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Law, Language and Lenity

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LAW, LANGUAGE, AND LENITY

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INTRODUCTION

The traditional rule for construing criminal statutes is the rule of lenity, a name given to a common law principle that "penal statutes should be strictly construed against the government or parties seeking to enforce statutory penalties and in favor of the persons on whom penalties are sought to be imposed."[1] The motivating purpose of the rule is to provide adequate notice to defendants (due process), and to reinforce the notion that only the legislature has the power to define what conduct is criminal and what conduct is not (separation of powers).[2]

Although widely accepted, the rule is by no means adhered to universally. The legislatures of many states, frustrated by what seemed to be unnaturally narrow judicial readings of criminal statutes, have eliminated the rule of lenity. New York and California did so more than a century ago.[3] Recent academic litera-

1. NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 59.03 (5th ed. 1992).

2. *See* Babbitt v. Sweet Home Chapter of Communities for a Great Or., 515 U.S. 687, 704 n.18 (1995) (mentioning the rationales).

3. *See* CAL. PENAL CODE § 4 (West 1988) ("The rule of the common law, that penal statutes are to be strictly construed, has no application to this Code. All its provisions are to be construed according to the fair import of their terms, with a view to effect its objects and to promote justice."); N.Y. PENAL LAW § 5 (McKinney 1998) ("The general rule that a penal statute is to be strictly construed does not apply to

ture has been critical as well. Professors Jeffries and Kahan criticize the principle on the grounds that its application does not further its stated rationales—legislative primacy and fair notice.[4] Other commentators object to lenity as inappropriate in particular situations, such as RICO,[5] civil bankruptcy,[6] government corruption cases,[7] and environmental crimes.[8] Moreover, not even lenity's strongest supporters can believe in it without qualification. Courts have good reason not to want every instance in which statutory language underdetermines meaning to require acquittal.

This Article takes issue with lenity's critics, new and old. Critics either assume lenity in a strong version not now used by the courts, or have too much confidence in how well we can construe statutes without some overriding principle to resolve ambiguities. The rule of lenity has been narrowed dramatically over time in response to changes in the ways that courts generally interpret statutes. In seventeenth century England, a very broad rule of lenity was developed to thwart the will of a legislature bent on seeing statutory violators hanged.[9] American courts, notably through Chief Justice Marshall and Justice Story, adopted the rule early on, but with qualifications that gave additional

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this chapter, but the provisions herein must be construed according to the fair import of their terms to promote justice and effect the objects of the law.").

4. *See* John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 198-200 (1985); Dan M. Kahan, *Lenity and Federal Law Crimes*, 1994 SUP. CT. REV. 345, 345-46; *see also* the benchmark article by Livingston Hall, *Strict or Liberal Construction of Penal Statutes*, 48 HARV. L. REV. 748 (1935) (discussing the factors that control judges' interpretation of penal statutes).

5. *See* Bryan T. Camp, *Dual Construction of RICO: The Road Not Taken in* Reves, 51 WASH. & LEE L. REV. 61, 61-62 (1994).

6. *See* Bruce A. Markell, *Bankruptcy, Lenity, and the Statutory Interpretation of Cognate Civil and Criminal Statutes*, 69 IND. L.J. 335, 336-37 (1994).

7. *See* Ross E. Davies, Comment, *A Public Trust Exception to the Rule of Lenity*, 63 U. CHI. L. REV. 1175, 1175 (1996).

8. *See* David E. Filippi, Note, *Unleashing the Rule of Lenity: Environmental Enforcers Beware!*, 26 ENVTL. L. 923, 924-27, 944-48 (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. 399 (1996).

9. *See infra* notes 123-28 and accompanying text.

deference to the intent of the legislature.[10] In the early part of the twentieth century, American courts began looking seriously at legislative history and at other extratextual materials as a routine aspect of the interpretation of statutes. Fueled largely by a series of opinions by Justice Frankfurter, the rule of lenity subsequently was narrowed further, relegating it to a tie breaker only after courts exhausted all other interpretive aids.[11]

Using advances from linguistics and cognitive psychology, this Article argues that the narrow, Frankfurter approach to lenity best approximates the way we use language and form concepts. Early attempts to impose a more mechanical rule of lenity gave inadequate recognition to the flexibility of our conceptual structure at the price of undermining legislative intent. The Frankfurter approach best serves the dual purposes of deference to legislative will and adequate notice to defendants.

Attempts to dispense with the rule altogether also come at great expense to widely held jurisprudential values. Language is sometimes vague and sometimes ambiguous. When we do not know how a legislature intended a statute to apply even after careful study, we have to look outside the statutory language for an answer. This Article argues that the narrow rule of lenity embodies important values with which we are unwilling to dispense. For this reason, courts in jurisdictions that have eliminated lenity legislatively continue to apply it anyway. For this same reason, we should not accept academic proposals to eliminate lenity, such as Professor Kahan's proposal to replace lenity with definitive interpretations by the Department of Justice.[12]

Section I of this Article explores the problem that the rule of lenity is intended to solve: What is it about the way we write criminal laws that leads to such uncertainty in our understanding of them? Coming to grips with this issue is a prerequisite for evaluating approaches to the interpretation of criminal statutes. The relevant literature on criminal statutes rarely addresses this problem, however, and the courts virtually never do, apart

10. *See infra* notes 135-78 and accompanying text.

11. *See infra* notes 179-228 and accompanying text.

12. *See* Dan M. Kahan, *Is* Chevron *Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 488-89 (1996).

from general remarks about the indeterminacies of language. This Article begins by describing the interpretive problems in cognitive and linguistic terms, an analysis that serves as a framework for the remainder of the Article.

Section II describes in more detail the three different approaches to lenity noted above: the broadest version, used centuries ago by courts in England; the traditional American rule, developed by John Marshall; and the narrow, Frankfurter version. This Article shows that the narrow version grew from a shift in interpretive style at the beginning of this century, in which legislative history and other extratextual material began to play increasingly important roles in statutory construction. By applying lenity only after taking this extratextual material into account, courts are likely to find less uncertainty in statutory meaning, and therefore apply lenity less frequently. This Article proposes that Frankfurter, not wanting to concede that his narrow version of lenity was a departure from tradition, literally fabricated history to make it appear consistent with earlier cases, including Marshall's opinions.

Section III examines how these issues show themselves in the Rehnquist Court's approach to interpreting criminal statutes. For the most part, the Court uses the narrow version of lenity. Justice Scalia's efforts to unseat the Frankfurter approach and return lenity to its nineteenth century form have been largely unsuccessful. This section also discusses the manner in which the current Court gives broad scope to certain statutory terms in light of the cognitive framework described in Section I.

Section IV discusses attempts to eliminate lenity legislatively, and evaluates suggestions by scholars that lenity should be eliminated in favor of other values, including Professor Kahan's recent proposal that the *Chevron* doctrine should replace lenity. This section shows that these efforts fail both because lenity reflects such deeply entrenched values that courts continue to apply it in certain circumstances even when the legislature has enacted laws against it, and because they do not account adequately for cognitive difficulties in statutory interpretation. Section IV is followed by a brief conclusion.

I. A LINGUISTIC APPROACH TO PROBLEMS IN STATUTORY INTERPRETATION

Two issues predominate in disputes over the scope of criminal statutes: (1) ambiguity;[13] and (2) problems of conceptualization resulting from poor fit between the words of a statute and the events in the world. Courts historically have treated these interpretive problems quite differently from one another.

A. Ambiguity

A criminal statute is ambiguous, in a narrow sense relevant here, when it refers to *P*, *P* can alternatively encompass either *a* or *b*, and it is beyond dispute that the defendant did *a*.[14] To illustrate with a classic example of ambiguity from the linguistic literature, the sentence "flying planes can be dangerous"[15] can mean either "it can be dangerous to fly planes" or "planes that are aloft can be dangerous." We recognize this ambiguity because we have tacit knowledge of the syntactic structures of the sentences we speak and hear. The sentence "flying planes can be dangerous" can be analyzed as having a syntactic structure associated with either reading. Our syntactic knowledge, however, takes us no further than this. We must infer from context which reading a speaker intended. If the context does not resolve the matter because it is insufficiently robust, we will simply suffer a partial failure in communication. When this happens in the interpretation of criminal statutes, it motivates application of the rule of lenity.

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13. *See, e.g.*, Crandon v. United States, 494 U.S. 152, 158 (1990) ("Moreover, 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.").

14. Professor Jeremy Waldron defines ambiguity as follows:

> An expression *X* is ambiguous if there are two predicates *P* and *Q* which look exactly like *X*, but which apply to different, though possibly overlapping, sets of objects, with the meaning of each predicate amounting to a different way of identifying objects as within or outside its extension.

Jeremy Waldron, *Vagueness in Law and Language: Some Philosophical Issues*, 82 CAL. L. REV. 509, 512 (1994). As an example, he contrasts the color blue and the emotion blue. *See id.*

15. NOAM CHOMSKY, ASPECTS OF THE THEORY OF SYNTAX 21 (1965).

The same holds true for word meaning. When we hear the word "bank," we know that this word in English refers to the earth along a river, or to a financial institution. For communication to be successful, we must determine from context and everyday experience which of these two uses of the word the speaker had in mind. The speaker's choice of the word "bank" instead of the word "cheese" reduces the universe of possible interpretations enormously. To resolve any residual uncertainty, we rely on context and our knowledge of how the word ordinarily is used. The choice of word itself takes us only so far.

Despite the fact that lenity often is stated in terms of ambiguity, most lenity cases involve conceptual difficulties[16] as opposed to ambiguity. Some do, however, concern ambiguity. Consider, for example, *Liparota v. United States*,[17] which involved the interpretation of an ambiguous mens rea requirement in a criminal statute. In that case, a jury had found the defendant guilty of food stamp fraud.[18] The applicable statute reads in part: "[W]hoever knowingly uses, transfers, acquires, alters, or possesses coupons, authorization cards, or access devices in any manner contrary to [the statute] or the regulations" is subject to a fine and imprisonment.[19] Liparota, who owned a lunch counter in Chicago, had been purchasing food stamps for less than their face value from an undercover government agent.[20] The regulations clearly prohibited this.[21] Liparota admitted buying the food stamps, and admitted that he bought them knowingly, but he argued that the statute was ambiguous with respect to the scope of "knowingly."[22] The government took the position that "knowingly" should be construed to modify "uses, transfers, acquires, alters, [or] possesses coupons or authorization cards," but not to modify, "in any manner contrary to [the statute] or

16. *See infra* text accompanying notes 28-121.
17. 471 U.S. 419 (1985).
18. *See id.* at 422-23.
19. 7 U.S.C. § 2024(b)(1) (1994).
20. *See Liparota*, 471 U.S. at 421.
21. *See id.* at 420-21.
22. *See id.* at 421-23.

the regulations."[23] On the other possible reading, for which Liparota argued, "knowingly" modifies both phrases.

The availability of these two readings, in fact, reflects a well-known property of adverbial scope in English.[24] Compare the language of the statute with the following example: "The pitcher intentionally tries to hit a batter in the head with a ball every Saturday." This sentence is similarly ambiguous. We know that the pitcher intentionally tries to hit a batter in the head with a ball, and we know that he tries to do this every Saturday, but we do not know whether he intentionally has chosen Saturdays to do this.

The availability of the reading of "knowingly" that requires a knowing violation of the statute, Liparota argued, should trigger the rule of lenity. The Court agreed. Justice Brennan, writing for the majority, examined the statute's language, its legislative history, and relevant canons of construction. Unable to glean from this investigation any clear notion of what Congress intended the state of mind to be for conviction under the statute, he applied the rule of lenity. Brennan explained: "Application of the rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal and strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability."[25]

Although Brennan invoked both of lenity's rationales, actual notice seems less central than does separation of powers.[26] From Brennan's perspective, it made perfectly good sense to exercise this level of conservativism in interpreting criminal statutes, and to require the legislature to expand the scope of any statute that the courts have misjudged.[27]

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23. *See id.* at 423.

24. *See, e.g.*, RAY S. JACKENDOFF, SEMANTIC INTERPRETATION IN GENERATIVE GRAMMAR 47-107 (1972). For a more detailed discussion of this phenomenon, see LAWRENCE M. SOLAN, THE LANGUAGE OF JUDGES 66-75 (1993).

25. *Liparota*, 471 U.S. at 427.

26. This Article argues that notice does play a role in the jurisprudence of statutory interpretation even when a defendant has not read the statute. *See infra* notes 359-89 and accompanying text.

27. Congress rarely will do so when a court has applied lenity. Congressional overrides occur with great frequency, however, when the Supreme Court decides a case based on the "plain language" of a statute whose language is not really plain.

B. Conceptual Problems

1. The Psychology of Conceptualization

We often have the experience of attempting to find the word that best fits the events that occur in the world around us. For example, we might have the following conversation: "Is it raining?" "No, it's just drizzling." In this dialogue, the second speak is telling the first that *raining* does not describe fairly the weather because there is another concept that better describes it. It also would have been possible for the second speaker to say, "Yes, but it's only drizzling." Thus, we have two truthful answers to the question "Is it raining?"—"Yes" and "No."

This kind of dilemma, which occurs frequently, creates a potential calamity for legal interpreters. It takes only the smallest elaboration to transform our hypothetical dialogue into a rule that makes it illegal to require construction crews to work outdoors when it is raining. If both "yes" and "no" were appropriate answers to the hypothetical inquiry posed above, then both "yes" and "no" are appropriate answers to the question, "has the employer violated the rights of workers by requiring them to work outdoors when there was only a drizzle or a fine mist?" If both "yes" and "no" are fair answers to this question, we do not know whether the employer has violated the rule.

This problem arises because of the way in which we form concepts. The classical view of concept formation says that to know a concept is to know the conditions under which it obtains. In this framework, the concept *rain*, for example, obtains just when (that is, if and only if) water falls in drops from the sky. *Sister* obtains when an individual is a female sibling, and so on. This classical view of word meaning claims that to know a word is to know its definition. The perfect definition will contain all of the conditions that are both necessary and sufficient for membership in the category that the word represents. The definition of *rain* will define all and only rain.[28] It will contain those conditions

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See William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 347, 450-55 app. (1991); Lawrence M. Solan, *Learning Our Limits: The Decline of Textualism in Statutory Cases*, 1997 WIS. L. REV. 235, 236-39.

28. Seen this way, it is possible for a definition to be too good, in the sense that

that are both necessary and sufficient for us to know when the expression "It is raining" is true, and when it is false.

In the 1970s, work in cognitive psychology produced a radical shift in our understanding of how words represent concepts. In particular, the pioneering work of Eleanor Rosch demonstrated that at least part of our knowledge of concepts is better characterized in terms of prototypes for categories.[29] Thus, when we use the word *rain*, we have some idealized sense of what it means for it to be raining. If it is a sunny, dry day, we will have no problem saying that it is not raining. If it is raining in more or less our idealized fashion for a long enough period of time, we will have no trouble saying that it is raining. For the in-between experiences, the drizzles, brief showers, cold rains bordering on hail, and so on, however, we become uncertain about whether the word *rain*, or another concept, is more appropriate. As we stray farther from prototypical instances of a concept, new concepts begin to invade their territory. Significantly, because prototypes are formed, reinforced, and at times changed as the result of cumulative experience, experts often refer to prototype theory as a probabilistic model of conceptualization.[30]

Prototype theory explains a great deal that classical theory could not. First, it explains our intuitions that some members are better examples of a category than others. Rosch's experiments showed, for example, that people typically regard chairs as prototypical examples of furniture, and lamps as marginal ones.[31] A second, related advantage of prototype analysis is that it is not troubled by what Wittgenstein called "family resemblance" categories.[32] Wittgenstein pointed out that the concept

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the definition is more precise than the word being defined. Philosophers of language refer to these as "precisifying definitions." *See* Roy Sorensen, *Vagueness and the Desiderata for Definition*, *in* DEFINITIONS AND DEFINABILITY: PHILOSOPHICAL PERSPECTIVES 71, 71-72 (James H. Fetzer et al. eds., 1991).

29. *See, e.g.*, Eleanor Rosch, *Cognitive Representations of Semantic Categories*, 104 J. EXPERIMENTAL PSYCHOL. 192 (1975).

30. *See, e.g.*, MARY B. HOWES, THE PSYCHOLOGY OF HUMAN COGNITION 206-08 (1990).

31. *See* Rosch, *supra* note 29, at 229. I discuss this phenomenon in Solan, *supra* note 27, at 270-75.

32. LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 31-32 (G.E.M. Anscombe trans., 3d ed. 1958).

game appears to extend to a family of activities that share features, but that no particular set of features is both necessary and sufficient to define a category that contains all and only games.[33] Third, prototype theory correctly predicts that concepts will become fuzzy at the margins. As the precipitation falls progressively harder, we reach a point at which we simply do not know whether we can still characterize it as a drizzle. Subsequently, if it continues to intensify, we become more and more certain that we have left the world of drizzle for the world of rain, or even downpour.[34]

These facts are legally significant. For example, Steven Winter uses prototype analysis to explain a great many legal phenomena in which the issue is a decision about conceptualization, ranging from standing doctrine to the constitutionality of the one-house veto of attorney general decisions.[35] Studies also have shown prototype construction to explain juror conduct.[36] In the realm of statutory interpretation, judges often evoke the canon that they are to give words in a statute their "ordinary" meaning.[37] Prototype analysis tells us that the notion of ordi-

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33. *See id.*

34. This fact is inconsistent with Aristotelian notions of logic in which all propositions are assigned truth values (that is, they are either true or false depending on whether they meet the criteria for inclusion in a set). *See* Jack F. Williams, *The Fallacies of Contemporary Fraudulent Transfer Models as Applied to Intercorporate Guarantees: Fraudulent Transfer Law as a Fuzzy System*, 15 CARDOZO L. REV. 1403, 1450 (1994). Logics that take the possibility of vagueness into account, however, can describe prototypes. This observation is important, because it suggests that a definitional approach to word meaning is indeed possible, as long as the definitions themselves include fuzzy conditions. This Article explores the possibility that something like this is the best approach. For an extremely interesting article that argues that one such logic (supervaluation theory) is superior to another (fuzzy logic), see Hans Kamp & Barbara Partee, *Prototype Theory and Compositionality*, 57 COGNITION 129 (1995).

35. *See* Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1385-86 (1988). Winter's forthcoming book, *A Clearing in the Forest* (University of Chicago Press) reformulates much of this work. Winter and I take slightly different positions with respect to some of the psychological literature, but the differences are not significant with respect to issues raised in this Article. Other legal scholars have used similar insights to explain legal reasoning. *See, e.g.*, Gerald P. López, *Lay Lawyering*, 32 UCLA L. REV. 1 (1984) (using the notion of "stock stories").

36. *See* Vicki L. Smith, *Prototypes in the Courtroom: Lay Representations of Legal Concepts*, 61 J. PERSONALITY & SOC. PSYCHOL. 857, 868-70 (1991).

37. *See, e.g.*, Moskal v. United States, 498 U.S. 103, 107-08 (1990) (stating that

nary meaning has a cognitive basis. Moreover, statutes often are vague. That is, it is sometimes hard to tell whether what has happened in the world properly fits into the categories that a statute proscribes.[38] Prototype analysis predicts this as well. Finally, prototype analysis explains why it is that we might make category errors. If we focus on the prototype, we may wrongly use an overinclusive or underinclusive category, only to discover later the poor fit between disputed events and statutory categories. This is why Justice O'Connor can argue that trading a gun for cocaine is "using a firearm" for purposes of interpreting a sentence-enhancing statute, and Justice Scalia can reply in dissent that swapping does not come to mind when we utter the phrase "use a firearm."[39]

Despite all of these advances, questions remain concerning how we acquire and access concepts. For one thing, experimental research seems to indicate that given the choice between sorting novel things by family resemblance or by a single, defining feature, people prefer to use the single feature. In a series of studies, Douglas Medin and a group of psychologists presented subjects with drawings of novel cartoon characters that differed on a number of dimensions (e.g., number of legs, shape of face, stripes or spots on body, length of tail).[40] The psychologists asked the subjects to divide the drawings into two piles "in a

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"falsely made" includes causing a government agency to issue genuine documents based on false information).

38. Professor Waldron defines vagueness as follows:

> A predicate P is vague if there are objects or instances x_1, x_2, etc. within the domain of the normal application of terms of this kind such that users are characteristically undecided about the truth or falsity of "x_1 is P," "x_2 is P," and they understand that indecision to be a fact about the meaning of P rather than about the extent of their knowledge of x_1, x_2, etc.

Waldron, *supra* note 14, at 513. Waldron makes this distinction to exclude from vagueness cases in which one knows perfectly well what a category contains, and would be able to tell whether a particular example fit within the particular category if only one studied the examples in more detail. *See id.* For example, uncertainty about whether the fruits on a tree seen at a distance are apples or pears does not illustrate vagueness.

39. *See* Smith v. United States, 508 U.S. 223, 230 (1993); *id.* at 245 (Scalia, J., dissenting), discussed *infra* text accompanying notes 108-10.

40. *See* Douglas L. Medin et al., *Family Resemblance, Conceptual Cohesiveness, and Category Construction*, 19 COGNITIVE PSYCHOL. 242 (1987).

way that seem[ed] natural or sensible."[41] Subjects almost always chose one feature (e.g., number of legs) as the defining one, and sorted that way.[42] They did not group drawings with the most features in common to create family resemblance categories.[43]

This is not to say that Medin and his colleagues found no prototype effects. While virtually all subjects attempted to discover a defining feature rather than a sense of overall similarity, not all available defining features were equally salient.[44] About half the subjects selected shape of face as the single defining feature, indicating, consistent with prototype analysis, that this is cognitively a "better" defining feature.[45]

Only when the features were related conceptually did subjects begin sorting into family resemblance categories with more frequency.[46] In yet another experiment, the psychologists gave subjects a set of file cards, each containing a list of five symptoms, and asked them to put the cards into two equal groups that made sense.[47] The first symptom was loss of sleep, which was present on half the cards, and stiff muscles, present on the other half.[48] Of the remaining four, two were clearly related (e.g., dizziness and earache), and two were less obviously related (e.g., sore throat and high blood pressure).[49] Although it was possible to sort the cards based only on the first dimension, people preferred to sort by correlated attributes.[50] The results

41. *Id.* at 247.

42. *See id.* at 248-254.

43. *See id.*

44. *See id.* at 254.

45. *See id.* In some experiments there were four possible defining features; in others, six. *See id.* Interestingly, when the experiments introduced variability to make them more realistic (e.g., faces were either vertically or horizontally oriented, but otherwise did not look exactly the same as one another), the number of legs became the leading defining feature. *See id.* Variability in appearance could not overcome the ease with which we can count either four or six legs. This finding highlights the way in which we attempt to find unique properties to define our categories.

46. *See id.* at 264-67.

47. *See id.* at 266.

48. *See id.*

49. *See id.*

50. *See id.* at 265-67. A similar experiment was conducted with features of animals, rather than disease symptoms, with the same result. *See id.* at 266-67. Both experiments were designed with appropriate care. For example, the related symp-

suggest that family resemblance categories may reflect our theorizing more abstractly about clusters of factors that we regard as important. Some have suggested, for example, that we form categories purposively to meet goals.[51]

Similarly, language acquisition experiments appear to demonstrate both types of learning in children, with preference for one or the other type of information dependent upon the age of the child. When asked about the meanings of words, children at first rely principally on salient characteristics, as prototype theory would predict, but later form theories based on defining features.[52] Crucially, as children form theories, the theories themselves constrain the ways in which they further generalize their concepts as they gain new experience.[53]

Many psychologists now believe that concepts contain both probabilistic information and incomplete theories that we revise with experience.[54] The more difficult question is how we structure this information in our minds. A promising approach is that of the linguist, Anna Wierzbicka.[55] Wierzbicka defends the

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toms were second and fourth on half of the cards and third and fifth on the other half, with no statistical difference. *See id.*

51. For evidence that people are goal-oriented in their categorization decisions, see Lawrence W. Barsalou, *Deriving Categories to Achieve Goals*, 27 PSYCHOL. LEARNING & MOTIVATION 1 (1991).

52. *See* FRANK C. KEIL, CONCEPTS, KINDS, AND COGNITIVE DEVELOPMENT 59-82 (1992). For a sophisticated study that shows both the role of family resemblance and its limits in the acquisition of categories by children, see ELLEN M. MARKMAN, CATEGORIZATION AND NAMING IN CHILDREN (1989).

53. *See* KEIL, *supra* note 52, at 59-82.

54. *See, e.g.*, JEROME BRUNER, ACTUAL MINDS, POSSIBLE WORLDS 11-43 (1986). Of course, it would be a mistake to reach conclusions about how we access and use concepts from research on how we acquire concepts. These are separate issues. It may well be, for example, that we typically use models based on prototypes even if our conceptual knowledge also contains partial theories. *See* PHILIP N. JOHNSON-LAIRD, MENTAL MODELS 205-42 (1983); Douglas L. Medin, *Concepts and Conceptual Structure*, 44 AM. PSYCHOL. 1469 (1989); Gregory L. Murphy, *Theories and Concept Formation*, *in* CATEGORIES AND CONCEPTS: THEORETICAL VIEWS AND INDUCTIVE DATA ANALYSIS 173 (I. Van Mechelan et al. eds., 1993). In essence, this illustrates the distinction between competence and performance developed by Chomsky. *See* CHOMSKY, *supra* note 15, at 10-15.

55. For an overview of Wierzbicka's recent positions on these matters, see ANNA WIERZBICKA, SEMANTICS: PRIMES AND UNIVERSALS (1996), and the many references cited therein.

notion that words do, indeed, have definitions.[56] These definitions, though, include descriptions of mental states that account for prototype effects.[57]

To take an example that has been prominent in the literature, the word "bachelor" once was thought to illustrate how words can be broken down into their component meanings. "Bachelor" had the features unmarried, adult, and male.[58] As later theorists demonstrated, however, there are many examples of unmarried adult males whom we are uncomfortable calling bachelors, such as the Pope, Tarzan, and homosexual men.[59] Wierzbicka argues that we can remedy all of this if we include in our definition of "bachelor," "a man thought of as a man who can marry if he wants to."[60] This has the desired consequence of making "bachelor" subject to prototype effects, since our notion of who is likely to marry is socially contingent and itself fuzzy. It does not, however, improperly ignore our intuitions that all bachelors are unmarried men. In other words, being unmarried and being male are necessary, but not sufficient conditions for bachelorhood. Within this framework, we similarly can define rain as including not only "water falling from the sky," but also something like, "when we think of rain, we think of getting wet." This explains why we have trouble calling a light mist "rain," without losing the fact that only when water falls from the sky do we say that it is raining.[61]

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56. *See id.* at 237-57.

57. The expression "prototype effect" is that of George Lakoff. *See* GEORGE LAKOFF, WOMEN, FIRE AND DANGEROUS THINGS 58 (1987). "Prototype effect" accurately captures the notion that prototypes are a consequence of the ways in which concepts exist in our minds, but are not themselves sufficient to constitute a theory of conceptualization.

58. *See* Jerrold J. Katz & Jerry A. Fodor, *The Structure of a Semantic Theory*, 39 LANGUAGE 170, 185-86 (1963).

59. Charles Fillmore first observed these issues in *Towards a Descriptive Framework for Spatial Deixis*, *in* SPEECH, PLACE AND ACTION 31 (Robert J. Jarvella & Wolfgang Klein eds., 1982).

60. WIERZBICKA, *supra* note 55, at 150. Wierzbicka criticizes Lakoff's approach. *See id.* at 150-51. It appears, however, that the two approaches really are not incompatible, although Wierzbicka's analysis is more detailed. *See* Winter, *supra* note 35, at 1382-86 (discussing adoption of Lakoff's approach).

61. Of course, there are metaphorical extensions of "rain," such as, "it is raining money on Wall Street." The transitive use of "rain" flags this extension of the word. Weather reports do not say "it is raining water." For a discussion of metaphor as a

Philip Johnson-Laird's theory of mental models also acknowledges the complexity of human conceptualization. Johnson-Laird argues that reasoning in general involves the construction of mental models, which we then compare to one another and manipulate.[62] These models are subject to the prototype effects of the sort discussed above.[63] They also, however, contain conventional dictionary entry information, as Johnson-Laird argues from a set of ingenious recall experiments.[64]

It may be, then, that there really is no legitimate battle between classical theory and prototype theory. Rather, conceptualization should be handled within a definitional approach that includes reference to prototypical mental images, as well as to things and events occurring in the world. From this, prototype effects should reveal themselves naturally. If this approach is correct, the problem with classical theory is not its reliance on conditions, but rather its assumption that those conditions are all "out there" in the world. Some of them, according to Wierzbicka, are states of mind containing prototypical images.[65]

Sometimes, we can develop sophistication with our concepts by gaining expertise. The zoologist knows a great deal about elephants. She will have a much more elaborate theory of what it is that makes an elephant an elephant, including many of which the unschooled are not aware. She might make reference

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significant phenomenon in conceptualization, see JEAN AITCHESON, WORDS IN THE MIND 147-56 (2d ed. 1994); LAKOFF, *supra* note 57, at 7-8; Winter, *supra* note 35, at 1382-86.

62. *See generally* JOHNSON-LAIRD, *supra* note 54 (discussing mental models in conceptualization and reasoning).

63. *See id.* at 192.

64. *See id.* at 229. Johnson-Laird reports on earlier-published experiments in which subjects, given a category such as consumable solids, remembered items on a list depending on how many features they had in common with the target category. *See* Philip N. Johnson-Laird et al., *Meaning, Amount of Processing, and Memory for Words*, 6 MEMORY & COGNITION 372, 374-75 (1978). In addition, the subjects had an easier time recalling utensils relating to the target category depending on how many features the utensil had in common with the target. *See* JOHNSON-LAIRD, *supra* note 54, at 228. For example, if the target category was "consumable solids" and the list of words contained both "chicken" and "wine," subjects would be more likely to recall "chicken." *See id.* at 227. Subjects were also, however, more likely to recall "plate" than "cup." *See id.* at 228. It is difficult to explain this second result without recourse to the kinds of features contained in conventional definitions. *See id.* at 229.

65. *See* WIERZBICKA, *supra* note 55, at 148-69.

to, for example, differences between Asian and African elephants, features in the paws, skin, gestation period, body temperature, and so on—a few of which lay people might be relying on unconsciously in forming their models, but which they certainly have no ability to discuss without significant training.[66]

For most things that we encounter in the world, however, there is no relevant expertise apart from everyday experience. We form concepts from this experience and from the way we structure it. Some concepts, like *property*, seem to have some sufficient conditions (the right to exclude others),[67] but no necessary ones. In contrast, verbs expressing propositional attitude, like *doubt* and *believe*, have the necessary condition of describing mental states. Others, like *odd number*, appear to be definable in terms of both necessary and sufficient conditions.[68] Sometimes we have some necessary and sufficient conditions (elephant—large mammal with trunk), but recognize that this knowledge is woefully incomplete. Linguistic categories also vary in this way. Recent work suggests that we learn irregular past tense forms (e.g., shook, bought) individually and in family resemblance groups, but learn regular past tense forms (e.g., created, moved, hiked) in an all-or-nothing fashion.[69] Similarly,

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66. For the perspective that our knowledge of concepts includes the notion that our understanding is incomplete, but susceptible of further refinement based on what we can learn from experts, see JERRY A. FODOR, THE ELM TREE AND THE EXPERT (1994); Hilary Putnam, *The Meaning of "Meaning," in* LANGUAGE, MIND, AND KNOWLEDGE 131 (Keith Grunderson ed., 1975). For problems with reliance on expertise as the basis for determining word meaning, see RAY JACKENDOFF, SEMANTICS AND COGNITION 93 (1983).

67. *See* Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 373 (1954).

68. Interestingly, concepts like "odd number" still produce prototype effects. That is, subjects are able to rank odd numbers as to whether they appear to be better or worse examples. For example, three appears to be a better odd number than 23. *See* Sharon Lee Armstrong et al., *What Some Concepts Might Not Be*, 13 COGNITION 263, 289 (1983). Rosch herself found that people rank different species of birds as better or worse examples of the concept *bird*. Robins and Sparrows are prototypical but peacocks and turkeys are not. *See* Rosch, *supra* note 29, at 232. Yet, no one would argue seriously that peacocks and turkeys are not birds or that 23 is not an odd number in an all or nothing sense. All of this implies that we appear to make probability assessments even when we make category decisions based on defining features. For criticism of the approach taken by Armstrong and her colleagues, see LAKOFF, *supra* note 57, at 148-51.

69. *See* Steven Pinker & Alan Prince, *The Nature of Human Concepts: Evidence*

work on language processing reveals both all-or-nothing structurally driven strategies, and more pragmatically oriented construal.[70]

Crucially, our use of language is generally neutral with respect to how broadly within the universe of possible interpretations we intend others to construe our words.[71] The word "vehicle" does not make it clear whether we are talking about the prototypical vehicle in a given context, a crisply defined subset of possible vehicles, or about anything within the outer limits of our concept of *vehicle*. Language simply does not express all of the richness of our conceptual structure.[72] This linguistic neutrality facilitates thought. By assimilating new things and experiences to existing categories, we are able to use old knowledge to help us decide what to do in unfamiliar situations. We use prototypes to idealize our experience, and then put these idealizations to work in understanding the world.[73] At the same time, we search for properties of new things that we encounter in the world that are sufficiently clear to put them into one or another category with certainty. These are the defining features and partial theories that continue to appear in the experimental literature. In Wierzbicka's terms, they are the parts of definitions that relate to things in the world other than to our own states of mind.[74]

Most of these issues are still the subject of intense investigation, and not everyone would agree with the above assessment of where we stand now.[75] Nonetheless, the reading of the litera-

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from an Unusual Source, 29 COMM. & COGNITION 307, 312-30 (1996). For a discussion of how linguistic categories generally are subject to prototype effects, see JOHN R. TAYLOR, LINGUISTIC CATEGORIZATION: PROTOTYPES IN LINGUISTIC THEORY (2d ed. 1995).

70. *See* LYN FRAZIER & CHARLES CLIFTON, JR., CONSTRUAL 151-52 (1996).

71. *See* DENIS BOUCHARD, THE SEMANTICS OF SYNTAX 34 (1995).

72. For discussion, see RAY S. JACKENDOFF, THE ARCHITECTURE OF THE LANGUAGE FACULTY 183-86 (1997). Jackendoff presents a sophisticated picture of how conceptual structure and language interface.

73. Lakoff's terminology, "idealized cognitive models," describes this phenomenon well. *See* LAKOFF, *supra* note 57, at 68-76.

74. *See* WIERZBICKA, *supra* note 55, at 149-69.

75. *See, e.g.*, LAKOFF, *supra* note 57, at 68-76 (acknowledging the existence of some all-or-nothing categories but focusing heavily on those aspects of cognition that attempt to assimilate information to idealized cognitive models based almost exclu-

ture adopted here suggests that we conceptualize in more than one way.[76] If this perspective is right, it has important ramifications in the interpretation of statutes. It means that often we will be unable to uncover in crisp rules referring to definable conduct all of the "elements" of statutory categories, because some of those elements are really aspects of our own internal states of mind. That is how prototype effects arise. On the other hand, the fact that we attempt to categorize by seeking defining features, and sometimes manipulate idealized categories in everyday life as if they were all-or-nothing propositions, drives us toward looking for ways to solve problems of categorization on an all-or-nothing basis, even when it is not possible.

2. *What is a Security?: A Legal Example*

Before addressing recurring conceptual and linguistic problems that have led to the rule of lenity and other such substantive canons of construction, let us look at an example of how ordinary statutory interpretation works with respect to the cognitive processes described above.

The Securities Act of 1933 requires that securities be registered with the Securities and Exchange Commission before they can be offered for sale to the public.[77] The Securities Exchange Act of 1934 outlaws fraud in the purchase or sale of securities.[78] Under both statutes, it is necessary to determine in advance whether the instrument in dispute is a security, and is therefore subject to the provisions of one of the acts.[79] *Landreth*

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sively on family resemblance and prototypes). *But see* STEVEN PINKER, HOW THE MIND WORKS 312 (1997) (agreeing with Lakoff with respect to concept formation, but arguing that it is the very fact that we do form idealized models (i.e., prototypes) that enables us to treat concepts as all-or-nothing propositions in everyday life, even though we know better in some sense).

76. *See supra* notes 28-64 and accompanying text.

77. *See* 15 U.S.C. § 77e (1994).

78. *See id.* § 78j.

79. The Securities Act of 1933 defines "security" as follows:

> [A]ny note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other

Timber Co. v. Landreth[80] presented the Supreme Court with the issue of whether the sale of a family-owned lumber mill, consummated as a sale of all of the stock in the company, came within the securities statutes.[81] The mill had decreased in value as the result of a fire, but the owners did not inform the potential investors adequately, including the party who later became the actual buyer.[82]

The Supreme Court has held that noncontributory pension plans[83] and shares in a housing cooperative, although called "stock," are not securities,[84] but contracts to purchase assignments of oil leases are securities.[85] At the time the Court decided *Landreth*, most lower courts agreed that "the federal securities laws do not apply to the sale of 100% of the stock of a closely held corporation."[86] Moreover, the Supreme Court earlier had held that to determine whether an instrument should be deemed stock, one should look not at whether it is called stock, but rather at whether it has the core features of stock, such as the right to receive dividends, negotiability, ability to pledge them, voting rights in proportion to shares owned, and appre-

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mineral rights . . . or, in general, any interest or instrument commonly known as a "security," or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

15 U.S.C. § 77b(1) (1994).

80. 471 U.S. 681 (1985).

81. *See id.* at 682-85.

82. *See id.*

83. *See* International Bhd. of Teamsters v. Daniel, 439 U.S. 551, 553-57 (1979).

84. *See* United Hous. Found., Inc. v. Forman, 421 U.S. 837, 858 (1975).

85. *See* SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344, 349 (1943); *see also* Marine Bank v. Weaver, 455 U.S. 551, 559 (1982) (holding that certificates of deposit are not securities).

86. *Landreth*, 471 U.S. at 684. Lower courts had cited *United Housing Foundation, Inc. v. Forman* as authority for this widely held proposition. *See id.* at 686. *Forman*, however, said no such thing. *Forman* involved nontransferrable shares in a low-income cooperative apartment complex. *See Forman*, 421 U.S. at 840-43. Ownership of the shares included none of the usual benefits of stock ownership. *See id.* It merely allowed the owner the right to lease a low-rent apartment. *See id.* Upon leaving the apartment, the owner had to forfeit the shares, and would receive the $450 cost of the shares in return, more or less the way a tenant obtains a refund of a security deposit when moving out of an apartment. *See id.* at 840-43. Undoubtedly, the Court decided *Landreth* to correct a perceived misreading of *Forman* to extend to the sale of stock in closely held corporations.

ciability.[87] In essence, then, the Court had analyzed the concept of a *security* as a family resemblance category, requiring that the disputed item share at least some features with those contained in the prototypical share of stock. This test required that one look not at labels, but at the economic reality of the disputed transaction.

In *Landreth*, however, the Court drew a conceptual line in the sand. It distinguished all of the previously mentioned cases as involving "unusual devices" and "unusual instruments."[88] In contrast,

> the instrument involved [in *Landreth*] is traditional stock, plainly within the statutory definition. There is no need here, as there was in the prior cases, to look beyond the characteristics of the instrument to determine whether the Acts apply. Contrary to respondents' implication, the Court has never foreclosed the possibility that stock could be found to be a "security" simply because it is what it purports to be.[89]

Justice Powell wrote the opinion in *Landreth* for a unanimous Court. The structure of the argument comports well with the picture of conceptualization outlined above. Powell regarded the stock in the lumber company as the prototypical security. In another context, Powell might have written, "I may need to consult a zoologist to learn whether a fox is a member of the dog family, but I sure know that my pet collie is a dog." And like our earlier examples, the residual theory, used for cases outside the prototype, is incomplete. None of the factors considered in deciding whether "an unusual instrument" is a security is both necessary and sufficient. Rather, the Court is willing to call an instrument a security when features tend to cluster around those that characterize the prototype, such as corporate stock.

Not all cases fit so nicely into the description of concepts provided above. As we examine the differences between *Landreth* and cases that approach these problems differently, however, we

87. *See Forman*, 421 U.S. at 851.

88. *Landreth*, 471 U.S. at 688 ("unusual devices"), 689 ("unusual instrument"), 690 ("unusual instruments").

89. *Id.* at 690-91.

will see how we can reanalyze in cognitive and linguistic terms battles over the way courts should interpret statutes.

3. Conceptual Problems in Statutory Construction

Most interpretive problems in law result from problems of conceptualization. Some of the most prevalent issues facing the interpreter of statutes are as follows:

(1) Vagueness—a statute refers to *X*, but we cannot tell whether the disputed event is an *X*;

(2) Overinclusion—a statute refers to *Y*, we know that the disputed event can be considered a *Y*, but it seems wrong to do so here because whoever wrote the statute probably meant *Y* in a narrower sense;

(3) Underinclusion—a statute refers to *Z*, we know that the disputed event is not a *Z*, but we still feel that the statute should cover our situation because the disputed event is like *Z*, and is just as blameworthy as *Z*.

This taxonomy accounts for many of what we consider to be the hard cases of statutory interpretation.[90] Numbers (1) and (2) differ only by degree; (1) describes the problem of borderline cases with a vague statute, whereas (2) describes a situation in which the disputed event comes within the concept, but is remote from the prototype. We are uncomfortable applying the rule when this happens. Number (3) describes what happens when we treat what appear to be similar situations differently by outlawing only one of them. Moral values demanding equal

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90. Legal scholars routinely recognize that rules tend to be overinclusive or underinclusive. For a recent discussion, see CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 101-35 (1996). This description, however, is only partly helpful. For example, statutes sometimes are overinclusive because they contain a category that, if construed with unnatural breadth, would include the disputed conduct. On other occasions they appear to be overinclusive because they are ambiguous, and a possible, but unintended reading of the statute would bring the disputed conduct within the statute's scope. While the difference may seem subtle at first glance, it accounts for what seem to be inconsistent and mutually contradictory statements about the application of the rule of lenity over long expanses of time. For an interesting discussion of interpretive problems associated with overenforcement and underenforcement of statutes, see Earl M. Maltz, *Rhetoric and Reality in the Theory of Statutory Interpretation: Underenforcement, Overenforcement, and the Problem of Legislative Supremacy*, 71 B.U. L. REV. 767 (1991).

treatment for similar wrongs pressure us to expand the proscribed category to include the equally bad conduct that does not appear to be proscribed.

a. Vagueness and Overinclusion

Landreth illustrates how courts deal with vagueness. The statute at issue in *Landreth* defined "security."[91] Some instruments, like the share certificates in *Landreth* itself, clearly fit within the definition, but borderline cases remain. More difficult is the interpretive problem that occurs when a statute, read literally, appears to criminalize more conduct than the legislature in all likelihood intended. H.L.A. Hart confronted this problem in his hypothetical rule forbidding vehicles in a park.[92] Should this rule make it illegal to drive an ambulance into the park? A World War II tank that will be left there as a memorial? These cases are distinct from cases of vagueness. When vagueness occurs, as in the "rain" example, we cannot tell one way or the other whether the event or thing in question is a member of the category contained in the statute. Here, in contrast, we know perfectly well that ambulances, for example, are vehicles. The problem is that the legislature that wrote the law might have erred in using as broad a word as "vehicle" when it only intended to ban certain vehicles, i.e., those vehicles that typically irritate those who are trying to enjoy the park.

A number of the most famous statutory cases confront this problem. For example, in *Church of the Holy Trinity v. United States*,[93] a unanimous Supreme Court held that a statute making it a crime, "in any manner whatsoever, to prepay the transportation . . . of [an] alien . . . to perform labor or service of any kind in the United States," did not apply to a church's payment for the transportation of its new rector from the United Kingdom.[94] Justice Brewer first decided that "the act of the

91. *See Landreth*, 471 U.S. at 685-86.

92. *See* H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607 (1958).

93. 143 U.S. 457 (1892).

94. *Id.* at 458.

corporation is within the letter of this section."[95] Brewer determined, however, that this was not enough: "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."[96] Brewer concluded that the transportation of the rector was not within the contemplation of the legislature, notwithstanding the statute's broad language, in part because

> the thought expressed in this [i.e., the use of the word "labor" in the statute's title] reaches only to the work of the manual laborer, as distinguished from that of the professional man. No one reading such a title would suppose that Congress had in its mind any purpose of staying the coming into this country of ministers of the gospel, or, indeed, of any class whose toil is that of the brain.[97]

Put in cognitive terms, Brewer hypothesized that the Congress that enacted the statute had an evil in mind to thwart: the importation of foreign workers by American employers bent on obtaining cheap labor at the expense of both the American labor market and the laborers themselves who would enter the country more or less as indentured servants. With this prototype in mind, Congress enacted a statute, using a word, "labor," that best characterizes the prototypical case. The conditions sufficient for membership in the class of laborers extended beyond the prototypical case. Brewer argued, therefore, that we should ignore theoretical extensions of the concept that stray too far from the prototype in deciding how broadly to interpret the statute. Otherwise, the statute would be interpreted to outlaw conduct that the enacting legislature would have believed to be entirely proper.[98]

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95. *Id.*

96. *Id.* at 459.

97. *Id.* at 463.

98. To put the discussion in Wierzbicka's framework, a psychologically realistic definition of "laborer" would include the notion that "labor" makes us think of physical work. *See supra* notes 56-61 and accompanying text. *But see* C. Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 STAN. L. REV. 1833, 1857 (1998). Vermeule argues that a close reading of related statutory language and legislative history argue against the Supreme Court's unanimous result. *See id.*

McBoyle v. United States,[99] the 1931 Supreme Court case that inspired the "no vehicles in the park" debate between Hart and Fuller,[100] shared this linguistic problem. Justice Holmes, writing for a unanimous Court, refused to extend the National Motor Vehicle Theft Act to include theft of an airplane.[101] The Act defined "motor vehicle" to "include an automobile, automobile truck, automobile wagon, motorcycle, or any other self-propelled vehicle not designed for running on rails."[102] Holmes looked at legislative history (no mention of airplanes), looked at related statutes (different treatment of airplanes), and applied the principle of ejusdem generis (statutory list appears to include only land vehicles).[103] He concluded that airplanes should not be considered vehicles for purposes of the statute.[104]

Consistent with contemporary notions of word meaning, Holmes stated: "But in everyday speech 'vehicle' calls up the picture of a thing moving on land."[105] Holmes knew very well that the statute referred to the theft of vehicles and that airplanes are vehicles. Nonetheless, he rejected the definitional approach to word meaning[106] in favor of analyzing what Congress seemed to have regarded as the prototype.[107]

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99. 283 U.S. 25 (1931).

100. *See* Hart, *supra* note 92, at 606-15; Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958). For an extremely interesting analysis, see Steven L. Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105, 1172-98 (1989).

101. *See McBoyle*, 283 U.S. at 26-27.

102. National Motor Vehicle Theft Act, ch. 89, 41 Stat. 324 (1919) (codified as amended at 18 U.S.C. §§ 10, 2311-13 (1994)).

103. *See McBoyle*, 283 U.S. at 26-27.

104. *See id.*

105. *McBoyle*, 283 U.S. at 26.

106. "The definitional approach to word meaning" refers to the classic approach that assumes that one can define concepts by necessary and sufficient conditions in some objective, external sense. For an alternate view, see *supra* notes 55-61 and accompanying text (discussing Wierzbecka's definitional approach, which incorporates prototype effects into the definitions themselves).

107. For a discussion of this example in terms much like these, see Winter, *supra* note 100, at 1176. Interestingly, as Winter has noted, Holmes was not consistent in taking this position. In *Schenck v. United States*, 249 U.S. 47 (1919), Holmes rejected a narrow interpretation of a statute that prohibited obstruction of "the recruiting or enlistment service." *Id.* at 53. He noted that recruiting generally was accom-

Even within the framework that Holmes embraced, one can argue that he was wrong because he should have focused on the current prototype at the time the Court decided the case, rather than the prototype for the enacting legislature. That is, Holmes should have recognized that had the enacting Congress been sitting when he made his ruling, it would have had no trouble incorporating airplanes into its "picture" of a vehicle.[108] The purpose of this discussion is not to defend the result in *McBoyle*, but to point out the significance of its analytical structure.

Smith v. United States[109] is a more recent illustration of this phenomenon. In *Smith*, the Supreme Court debated whether the expression "use a gun" should be interpreted to include trading a gun for cocaine, as Justice O'Connor argued for the majority, or to include only using a gun as a weapon, as Justice Scalia proposed in dissent.[110] Stretched to its conceptual boundaries, the statute can mean just what the majority said it means. Like the rector and the airplane, however, the person who attempts to trade a machine gun for cocaine seems to be outside the scope of what the legislature intended the statute to address. Unlike Brewer and Holmes, O'Connor chose in *Smith* to place the theory of the concept above its prototype in making the decision.

Interestingly, in his recent book, Justice Scalia criticizes the majority decision in *Smith* for straying too far from ordinary meaning.[111] Scalia also, however, offers sharp criticism of *Holy*

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plished by getting volunteers, and that "the word is apt to call up that method only in our minds." *Id.* Nonetheless, he extended the concept of *recruiting* to incorporate the military draft. *See id.*

108. For a lengthy defense of this approach to statutory interpretation, see WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION (1994); Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993). For a more recent *McBoyle* problem, see *Moskal v. United States*, 498 U.S. 103 (1990). The statute at issue in *Moskal*, 18 U.S.C. § 2314 (1994), prohibited the interstate transportation of, among other things, "falsely made" securities, including washed automobile titles. *See Moskal*, 498 U.S. at 106. The defendant argued that "falsely made," when the legislature enacted the statute, meant "counterfeit." *See id.* at 106-07. The court determined that "falsely made" had, at the time the Court heard the case, a plain meaning sufficient to put any defendant on notice. *See id.* at 108-15. Justice Scalia's dissent, however, resembles Holmes's arguments in *McBoyle*. For a further discussion of *Moskal*, see *infra* notes 377-84 and accompanying text.

109. 508 U.S. 223 (1993).

110. *See id.* at 228-37. For a more detailed discussion of this case, see Solan, *supra* note 27, at 270-75.

111. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND

Trinity Church, largely because of its reliance on the spirit of the statute.[112] These criticisms are ironic. Scalia's dissent in Smith is very much like Brewer's majority opinion in *Holy Trinity Church*. Both opinions reject resort to the outer bounds of definitions, relying instead on the "ordinary meaning," i.e., prototypical meaning, of the statute.

b. Underinclusion and the Linguistic Wall

The third conceptual problem that courts regularly face is the problem of apparent underinclusion. A statute, read literally, sometimes proscribes certain behavior, but does not cover similar behavior that seems just as culpable. This can be the result of legislative compromise, difficulties in defining categories, or just plain sloppy drafting. When this happens, prosecutors frequently ask the courts to extend the scope of the statute to include the equally culpable conduct. In a sense, this position is very reasonable. Our intuitions about justice tell us that the law should treat similar conduct similarly.[113] If two people do more or less the same thing, why should one be convicted of a serious crime, while the other is exonerated completely?

Despite the force of this argument, the traditional rule, first espoused by Chief Justice Marshall in *United States v. Wiltberger*,[114] is that courts should not look beyond the language of a statute to expand its scope to all occurrences involving the same evil as the conduct that the statute proscribes.[115] This rule is in keeping with both the due process and separation of powers rationales that pervade discussion of the proper interpretation of criminal statutes.[116] If the legislature did not

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112. *See id.*

113. For example, the Guidelines Manual of the United States Sentencing Commission describes "reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders" as one of the three objectives that Congress sought to achieve in enacting the Sentencing Reform Act of 1984. U.S. SENTENCING GUIDELINES MANUAL § 2 (1995).

114. 18 U.S. (5 Wheat.) 76 (1820).

115. *See id.* at 96. See *infra* notes 146-58 and accompanying text for a discussion of *Wiltberger*.

116. *See, e.g.*, McBoyle v. United States, 283 U.S. 25, 27 (1931) (discussing due process); *Wiltberger*, 18 U.S. (5 Wheat.) at 95 (discussing separation of powers).

criminalize a defendant's conduct, then the defendant has not received notice that his conduct could lead to punishment.[117] It would be unfair to the accused, and disrespectful to the structure of our government, for the courts to criminalize conduct that the legislature has not proscribed.[118]

For the most part, courts adhere to this principle. For example, the provisions of the securities laws discussed above apply only to sales of securities. Frauds involving instruments that are not securities are just as bad for the victims as those involving instruments that are securities. The Court, though, has never attempted to extend the reach of the securities laws on that basis. This might induce a court to interpret the term "security" rather broadly, as courts seem to do. No court, however, has been willing to dispense with the analysis altogether. When something is plainly outside the scope of a statute's proscription, we do not read it into the statute simply because the evil is both similar to and just as bad as the evil that the statute actually addresses. This Article refers to this phenomenon as "the linguistic wall."

The linguistic wall flies in the face of the competing value that the law should deal with similarly bad behavior similarly; it sometimes is tempting for a court to pretend that an evil is within the bounds of a statute when it really is not. This move nominally preserves the appearance of legislative primacy, and at the same time treats comparably those who commit similar bad acts. Some of the more aggressive constructions of the federal mail fraud statute by the Supreme Court fit well into this category.[119] Courts also typically interpret rather broadly other

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117. *See, e.g.*, *McBoyle*, 283 U.S. at 27.

118. *See, e.g.*, *Wiltberger*, 18 U.S. (5 Wheat.) at 96.

119. In *Schmuck v. United States*, 489 U.S. 705 (1989), the defendant was accused of setting back odometers in Wisconsin, and then selling the cars for inflated prices to car dealers. *See id.* at 707. The dealers, in turn, innocently resold the cars for more than they were worth to their own customers. *See id.* Schmuck obviously had committed a fraud. The issue was whether Schmuck used the mail "for the purpose of executing such scheme or artifice." 18 U.S.C. § 1341 (1994). The government's only proof on this issue was the dealers' subsequent mailings of the registration forms to the Wisconsin motor vehicle bureau. *See Schmuck*, 489 U.S. at 707-08. The state authorities had not prosecuted Schmuck. Therefore, failure to prove this jurisdictional fact would have resulted in his getting away with serious fraud. A divided

statutes that federalize crimes that would otherwise be criminal under state law.[120]

There are many reasons that a statute might outlaw one kind of evil, but leave a similar evil unregulated. The simplest answer is that Congress might have intended to do so. That is certainly the general wisdom behind interpreting the securities laws to include only fraud involving securities, and is at the heart of most theories of the legislative process, especially public choice theory.[121] At times, however, like the rest of us, congressional drafters miss something. The words they use understate the concepts they attempt to denote. By focusing too heavily on the prototypical instances, Congress chooses words the theoretical extensions of which are still too narrow to express its thoughts. Of course, we cannot ordinarily tell with certainty when this has happened. That is why we invoke the linguistic wall. We do, however, share the intuition that it does happen. After all, it happens to all of us. It is this interpretive context that has put the most pressure on lenity and related principles of interpretation.

Significantly, linguistic wall cases are about neither ambiguity nor vagueness. Precisely because the legislature has spoken clearly, courts give the statutory words deference in these cases. Still, linguistic wall cases are about conceptualization. The words of the statutes may be clear on their face, but we have the

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Supreme Court held that the bureau's mailings were sufficient, because "[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." *Id.* at 711-12. As Justice Scalia pointed out in dissent, however, the fraud was already over by the time the mailing occurred. *See id.* at 723 (Scalia, J., dissenting). This decision is very difficult to justify within the bounds of the linguistic wall.

120. *See* Moskal v. United States, 498 U.S. 103, 105 (1990). Kahan argues that such facts constitute evidence that the rule of lenity is obsolete. *See* Kahan, *supra* note 4, at 388-89. Section IV of this Article discusses my reasons for disagreeing with Kahan's argument.

121. *See* West Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 98 (1991) ("As we have observed before, however, the purpose of a statute includes not only what it sets out to change, but also what it resolves to leave alone."). For a discussion of various approaches, see DANIEL A. FARBER AND PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE (1991).

intuition that the clarity is in part the result of the legislature having chosen, perhaps by error, concepts that do not include all of the events that they should. We would like to correct this problem but the linguistic wall says that we should not do so.

C. Summary

This Article has distinguished between linguistic ambiguity and problems of conceptualization.[122] Some problems of statutory construction do involve ambiguity, but most do not. Rather, they involve conceptual difficulties. Some categories are overinclusive, and others are underinclusive. Because these problems follow directly from the way that we form concepts, virtually all legal categories will suffer from them. Consequently, we must decide what to do when they arise.

II. THREE APPROACHES TO INTERPRETING CRIMINAL STATUTES: A COGNITIVELY DRIVEN HISTORY

This section describes the process by which the rules governing the interpretation of criminal statutes have changed over the years. The rule of lenity has by and large remained in force, but it has shrunk. This shrinking is the natural consequence of American courts' acceptance of extratextual information, such as legislative history, into the interpretive process in the early decades of this century. Using the framework developed above, this section argues that the narrow version is sufficient to meet the concerns that motivate the rule.

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122. In keeping with the discussion thus far, the line between ambiguity and vagueness is not always crisp when it comes to disputes over word meanings. That is, "bank" presents a prototypical case of lexical ambiguity. When the possible meanings of a word are more closely related, however, it becomes more difficult to decide whether we are dealing with distinct meanings altogether, i.e., ambiguity, or the fit between events and a set of closely related concepts, i.e., vagueness. Different senses of the word "light" (to ignite a cigarette or something used to illuminate) illustrate the point. A "light" in the first sense actually creates "light" in the second. This does not pose a problem for the structure of the proposed analysis. It merely means that there will be cases that are inherently difficult to analyze—which should not be surprising.

A. Naked Lenity

The rule that criminal statutes should be strictly construed developed in England in response to a legal regime that punished just about every crime by hanging.[123] Government not having invested in prisons, punishment in seventeenth century England varied between transportation to the colonies and capital punishment, with the latter inflicted liberally.[124] A common law defense to many such crimes, "benefit of the clergy," granted immunity to prosecution to those who could read portions of the Bible.[125] With the rise in literacy, more defendants who were not members of the clergy qualified for this defense.[126] In response, the legislature exempted more and more crimes from the benefit of the clergy defense, leading to a "march to the gallows."[127] The courts, doing what they could to frustrate the legislative will, developed the principle that penal statutes were to be construed strictly, a principle that was firmly in place by the time of the founding of the United States.[128]

Blackstone's illustrations show the extent of this phenomenon. About one case, he wrote:

> Thus the statute 1 Edw. VI. having enacted that those who are convicted of stealing *horses* should not have the benefit of clergy, the judges conceived that this did not extend to him that should steal but one *horse*, and therefore procured a new act for that purpose in the following year.[129]

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123. For a seminal piece that discusses this history, see Hall, *supra* note 4, at 749-50. *See also* Davies, *supra* note 7, at 1177-78 (discussing history of interpretation of criminal statutes in England); Note, *The Mercy of Scalia: Statutory Construction and the Rule of Lenity*, 29 HARV. C.R.-C.L. L. REV. 197, 199-200 (1994) (discussing the history of interpretation of criminal statutes in England).

124. *See* Gray Cavendar & Michael C. Musheno, *The Adoption and Implementation of Determinate Based Sanctioning Policies: A Critical Perspective*, 17 GA. L. REV. 425, 431 (1983).

125. Some interesting aspects of this defense are described in J. H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 586-89 (3d ed. 1990).

126. *See* Hall, *supra* note 4, at 749.

127. Note, *supra* note 123, at 200.

128. *See id.*

129. 1 WILLIAM BLACKSTONE, COMMENTARIES *88.

Blackstone's other illustration concerned a statute that criminalized "stealing sheep *or other cattle*."[130] The court determined that the general words "or other cattle" were "much too loose to create a capital offence, and the act was held to extend to nothing but mere sheep."[131]

Linguistically, these cases illustrate what happens when a court refuses to use context to resolve ambiguity and vagueness. Blackstone's first illustration involves an ambiguous statute. The expression "*those who steal horses* shall be punished" is ambiguous with respect to how many horses an individual must steal to be punished. It can mean the following: *for all x, if x steals n horse(s), n ≥ 1, then x shall be punished.* It also can mean *for all x, if x steals horses, then x shall be punished.* In the first reading, *horse* appears in the plural only to agree in number with *those*. In the second, its number carries semantic information. The legislature that enacted this statute almost certainly intended the first reading, but the second remains possible.

The second illustration involves vagueness. Once we establish sheep as prototypical cattle, as the statute does, what else should count as cattle for purposes of interpreting the statute? If a court were to look out of context at the outer boundaries of the concept *cattle*, i.e., if the court were to use a theory of what constitutes cattle, the answer at the least would include cows. If the court were to look at animals that resemble sheep, the answer is not clear. The legislature no doubt intended to include sheep and any other animal that grazed on English farms at that time. The English court, however, took advantage of the legislature's identification of sheep as the prototype for purposes of the statute, limiting its interpretation to animals that closely resemble the prototypical example contained in the statute.

Our courts do not subscribe to naked lenity. Nonetheless, we should not forget that the strict construction of penal statutes came into play when a judiciary disapproved of legislative harsh-

130. *Id.*

131. *Id.* Blackstone continues by describing the next move in this chess game between legislature and court: "And therefore, in the next sessions, it was found necessary to make another statute, 15 Geo. II. c. 34. extending the former to bulls, cows, oxen, steers, bullocks, heifers, calves, and lambs, by name." *Id.*

ness it regarded as cruel.[132] Thus, it used lenity to thwart, not promote, the will of the legislature.[133] Whether the statute underdetermined meaning because it was vague or ambiguous made no difference. The notion that a defendant is entitled to clear notice is an ancient justification. The rule's separation of powers justification, however, is at odds with its common law roots.[134]

B. The American Tradition of Strict Construction

1. Chief Justice Marshall and Legislative Primacy

The question of lenity arose early in this country's history. In 1805, in *United States v. Fisher*,[135] Chief Justice Marshall articulated the rule that "where great inconvenience will result from a particular construction, that construction is to be avoided, unless the meaning of the legislature be plain; in which case it must be obeyed."[136] *Fisher* was a civil case. Section 5 of the Bankruptcy Act gave priority to the United States over other creditors, "where any revenue officer, or other person, hereafter becoming indebted to the United States, by bond or otherwise, shall become insolvent."[137] The issue in *Fisher* was whether the United States had priority when the insolvent was not a government official.[138] Although the phrase "or other person" need not be so construed, the creditor whose interest was at stake

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132. *See* Note, *supra* note 123, at 200.

133. *See id.*

134. In fact, there were common law crimes in seventeenth century England. For a discussion of the rejection of common law crimes in the United States, see R. KENT NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC 100-06 (1985). Professor Kahan takes the position that courts never really eliminated common law crimes. *See* Kahan, *supra* note 4, at 347. In modern times, Kahan argues, the shared lawmaking role of legislature and court takes its form in the legislature's delegation of the interpretation of complicated statutes in unforeseen situations. *See id.* I agree with Kahan on this issue, but disagree with his broader inference that shared lawmaking power undermines the rationales underlying lenity, making it unnecessary.

135. 6 U.S. (2 Cranch) 358 (1805).

136. *Id.* at 386.

137. *Id.* at 385.

138. *See id.* at 358.

argued that "or any person" should be read in light of "any revenue officer" to refer only to government officials.[139]

Marshall disagreed. Engaging in close textual analysis, he considered seriously, but ultimately rejected, a host of arguments based on surrounding statutory language and subsequently enacted statutes. Among them was the defendant's argument that "any person" should be read to include only government officials.[140] The bottom line to Marshall was that the language of the statute was plain enough. He reached this conclusion notwithstanding the potential inferences to the contrary, which at the very least gave him enough pause to devote pages of lengthy analysis. As for lenity, Marshall qualified his earlier statement that strict construction should be the rule where "great inconvenience will result," holding that it did not apply to regulatory statutes like the Bankruptcy Act—but only to statutes that infringed on more fundamental rights.[141]

Fisher is most famous for its oft-quoted statement: "Where the mind labours to discover the design of the legislature, it seizes everything from which aid can be derived."[142] Marshall most likely did not intend that this be construed as broadly as we now do. The opinion does not even mention legislative history, which was outside the legitimate consideration of the English courts, where it remained until very recently.[143] By "everything from which aid can be derived," Marshall no doubt intended the gloss, "among those things that our jurisprudence permits us to consider."[144] Marshall was, by and large, a textualist,[145] and

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139. This is the canon ejusdem generis. Marshall wrote: "Wherever general words have been used in these sections, they are restrained by the subject to which they relate, and by other words frequently in the same sentence, to particular objects, so as to make it apparent that they were employed by the legislature in a limited sense." *Id.* at 387.

140. *See id.* at 385-97.

141. *See id.* at 390.

142. *Id.* at 386.

143. *See* Miller v. Taylor, 4 Burr. 2303, 2332 (1769) (holding that the sense and meaning of an act of Parliament must be collected from what it says when passed into law, and not from the history of changes it underwent in the house where it took its rise; that history is not known to the other house or to the sovereign). For a recent case relaxing the English rule, see Pepper v. Hart, 3 W.L.R. 1032 (1993).

144. Of course, we understand the statement this way as well. What has changed with respect to our understanding of Marshall's statement, at least for most of the

his reluctance to step away from statutory language subsequently had serious ramifications for how he viewed lenity.

Fifteen years after *Fisher*, in *United States v. Wiltberger*,[146] Marshall did wrestle with the tension between legislative intent and lenity, this time in a criminal case. The issue in *Wiltberger* was whether the federal courts had jurisdiction over a prosecution for manslaughter, in which the homicide had occurred on an American merchant marine vessel located on the Tigris River in China.[147] Section 12 of the 1790 Act in dispute criminalized manslaughter "upon the high seas" for purposes of federal jurisdiction.[148] The question was whether this should be construed as including rivers in foreign countries.[149]

The government's principal argument was that section 8 of the Act gave the courts jurisdiction over prosecutions for robbery committed "upon the high seas, or in any river, haven, basin or bay."[150] It only made sense, the argument continued, to conclude that Congress used the expression "high seas" in section 12 as a shorthand for the collection of bodies of water described in section 8.[151]

Wiltberger, then, required the Court to determine whether it should expand the language of a criminal statute to include a class of defendants whom a reasonable legislature in all likelihood would have wished to include. Marshall answered this question negatively, thus establishing the linguistic wall.[152] He

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judiciary, is the identity of what it is permissible to consult. Thus, we still do not interpret Marshall's words to mean that court officials should break into the private offices of legislators and steal their files, an act that could provide insights into why the legislature drafted a statute as it did.

145. For a discussion of Marshall's position on issues concerning statutory interpretation, see John Choon Yoo, Note, *Marshall's Plan: The Early Supreme Court and Statutory Interpretation*, 101 YALE L.J. 1607, 1615-17 (1992). For a discussion of textualism as a method of statutory interpretation, see, e.g., Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597, 621-23 (1991) (Scalia, J., concurring); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990); Solan, *supra* note 27.

146. 18 U.S. (5 Wheat.) 76 (1820).

147. *See id.* at 77.

148. *See id.* at 80-81.

149. *See id.* at 94.

150. *Id.* at 79.

151. *See id.* at 94-95.

152. See *supra* notes 114-21 and accompanying text for a definition of the linguistic

did not limit himself solely to that issue, however. Rather, he used *Wiltberger* as a vehicle to discuss the entire array of interpretive problems described in the preceding section of this Article. First, Marshall stated with elegance the rule of lenity and its motivations:

> 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, not the Court, which is to define a crime, and ordain its punishment.[153]

But Marshall then continued:

> It is said, that notwithstanding this rule, the intention of the law maker must govern in the construction of penal, as well as other statutes. This is true. But this is not a new independent rule which subverts the old. It is a modification of the ancient maxim, and amounts to this, that though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. The maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases which those words, in their ordinary acceptation, or in that sense in which the legislature has obviously used them, would comprehend.[154]

Marshall's words on avoidance of narrow interpretation of a statute are dicta. *Wiltberger* had no issue that involved interpreting any expression with unnatural narrowness. Marshall's caveat nonetheless demonstrates a high level of sophistication. In it, he recognized that statutory terms become vague at the margins. Marshall wanted to make sure that his opinions would not lead once again to judicial findings that cows are not cattle.

To discern the intent of the legislature, we look at the words "in their ordinary acceptation, or in that sense in which the legislature has obviously used them."[155] That is, we draw the

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153. *Wiltberger*, 18 U.S. (5 Wheat.) at 95.

154. *Id.*

155. *Id.*

inference that the legislature has used statutory words in their prototypical sense. In *Wiltberger*, inquiry into such matters left Marshall with only a single choice. After all, rivers are not the high seas.[156] As far as Marshall was concerned, then, the statute really presented no interpretive problem. It was simply a narrowly-drafted law:

> To determine that a case is within the intention of a statute, its language must authorize us to say so. It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated.[157]

Marshall's concern was that courts not engage in creating a common law of crimes based on inferences that go beyond the language actually contained in the statute. At the end of the opinion he wrote:

> It appears that the argument chiefly relied on, to prove that the words of one section descriptive of the place ought to be incorporated into another, is the extreme improbability that Congress could have intended to make those differences with respect to place, which their words import. We admit that it is extremely improbable. But probability is not a guide which a court, in construing a penal statute, can safely take. 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.[158]

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156. *See id.* at 94.

157. *Id.* at 96.

158. *Id.* at 105. For another example of this principle, see United States v. Sheldon, 15 U.S. (2 Wheat.) 119 (1817). In *Sheldon*, the Court refused to extend a statute making it illegal to transport munitions or provisions from the United States to Canada "in any waggon, cart, sleigh, boat, or *otherwise*," to include living oxen driven over the Canadian border. *Id.* at 120 (emphasis added). The Court construed "otherwise" as limited to the kinds of vehicles enumerated in the statute. *See id.* at 121. The Court admitted that "the mischief is the same, whether the enemy be supplied with provisions in the one way or the other," but refused to interpret the statute as addressing this evil without clear language from Congress supporting such a move. *Id.*

Although not technically a lenity case because the language of the statute was sufficiently clear, *Wiltberger* served as a vehicle for Chief Justice Marshall to espouse a set of related principles for interpreting criminal statutes: (1) criminal statutes are to be strictly construed; (2) vagueness is not to be resolved by imposing the narrowest reading; rather, the ordinary meaning of the word is to be gleaned from its context in the statute; and (3) if an activity is not within the plain meaning of the statute, it is not a crime. These rules correspond to the linguistic and conceptual problems outlined in the preceding section of this Article, but only the third of these problems actually arose in *Wiltberger*. To see early examples of the others, we turn to opinions of Justice Story.

2. *Justice Story and the Meaning of Words*

Neither Marshall opinion discussed above dealt with the kinds of conceptual problems discussed earlier, but two opinions written by Justice Story, sitting as Circuit Justice, did. In *United States v. Shackford*,[159] decided in 1830, the question concerned the meaning of the word "arrival." The Coasting Act of 1793 provided for the issuance of temporary registry to a ship by the collector of a district other than that of the ship's home port.[160] Section 3 of the Act imposed a fine for failing to deliver the temporary registry within ten days of the ship's "arrival" in the home port.[161] At issue in *Shackford* was whether a ship that briefly entered its home port in the course of a journey had "arrived" in its home port, and therefore was obliged to deliver the temporary registries.[162] In this respect, the statute was vague.

Story began his analysis by candidly admitting that the language of the statute underdetermined its meaning.[163] He invoked the rule of lenity, not as a rule of decision, but rather as a guide to a judge attempting to ascertain how broadly the legislature intended the word to be construed:

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159. 27 F. Cas. 1038 (C.C.D. Me. 1830) (No. 16,262).
160. *See id.* at 1038.
161. *See id.*
162. *See id.*
163. *See id.*

> But if one construction be exceedingly inconvenient, and the other safe and convenient, a fortiori ought the latter to be deemed the true exposition of the legislative intention; for it can never be presumed that the government means to impose irksome regulations, unless for some known object, or from some express declaration.[164]

Looking to the language of both the statute in question and related provisions, Story concluded that imposing a fine on a vessel that makes only a brief visit to its home port would not serve the purpose of the statute.[165] Differing slightly from Marshall in his formulation of the rule, Story looked not to the ordinary meaning of "arrival" in some generic sense, but rather to the meaning that the legislature more likely intended in light of what the text said about the purpose of the statute.

In *United States v. Winn*,[166] an 1838 case that involved a statute making it unlawful for "any master or other officer" of an American ship to unjustifiably beat, wound, or imprison "any one or more of the crew of such ship,"[167] Story used Marshall's exact approach in refusing to apply the rule of lenity. The defendant, master of a ship, had been convicted of unjustifiably imprisoning the ship's chief officer.[168] The issue was whether the chief officer should be considered among the "crew" of the ship.[169] Story acknowledged the rule of lenity, but added:

> I agree to that rule in its true and sober sense; and that is, that penal statutes are not to be enlarged by implication, or extended to cases not obviously within their words and purport. But where the words are general, and include various classes of persons, I know of no authority, which would justify the court in restricting them to one class, or in giving them the narrowest interpretation, where the mischief to be redressed by the statute is equally applicable to all of them.[170]

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164. *Id.* at 1039.
165. *See id.* at 1039-40.
166. 28 F. Cas. 733 (C.C.D. Mass. 1838) (No. 16,740).
167. *Id.* at 733.
168. *See id.*
169. *See id.* at 734.
170. *Id.*

He then proceeded to determine that the word "crew," in its "general and popular sense," meant the ship's company.[171] To reach this conclusion, Story referred to various dictionaries and to other provisions in the United States Code that used the word "crew," much the way the Supreme Court has determined the appropriate meanings of words in recent years.[172] Story found that statutes generally used the word "crew" to refer to the entire company on a ship.[173] Statutes that used the word more narrowly usually drew a distinction by referring separately to the officers and the crew.[174]

Turning to the purpose of the statute, Story then asked rhetorically: "Why should we resort to the narrowest possible sense of the words, instead of the general sense, if there is the same mischief in each case to be suppressed, and the same public policy in the protection of the commercial interests of the country?"[175] Combining analyses of the ordinary meaning of the word in dispute, its use in the United States Code, and the purpose of the statute, Story concluded that the rule of lenity should not apply, and let the conviction stand.[176]

This method of interpreting criminal statutes remained in place as the principal mode of analysis through the nineteenth century.[177] Courts interpreted criminal statutes narrowly (without using the word "lenity"), but to the extent that the dispute was over the meaning of a statutory word, limited investigation occurred into the legislature's intended meaning of that word.[178] Such investigation into legislative intent often did not include analysis of legislative history, but came to do so only over time.

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171. *Id.*
172. *See* Smith v. United States, 508 U.S. 223, 228-29, 231-32 (1993), discussed *supra* text accompanying notes 109-12.
173. *See Winn*, 28 F. Cas. at 735.
174. *See id.* at 734-35.
175. *Id.* at 735.
176. *See id.* at 734-37.
177. *See* Note, *supra* note 123, at 201-02.
178. *See id.* at 201-05.

C. *Narrowing the Rule of Lenity*

1. *A Shift in the Interpretive Culture*

Church of the Holy Trinity v. United States,[179] the 1892 decision holding that a rector is not a laborer, also is noteworthy for its use of legislative history as justification for a narrow interpretation of the statute. Repeating Marshall's famous pronouncement in *United States v. Fisher*,[180] Justice Brewer did not limit himself to the statutory text as Marshall had done before him, but wrote extensively about the report of the Senate Committee on Education and Labor. The report made it clear that the Committee was aware of the possibility that one might interpret the statute broadly to prohibit assisting clergy to immigrate, but that the intent of the statute was for the courts not to do this.[181]

Brewer's reliance on legislative history was by no means revolutionary. The Court had used it occasionally in statutory cases during the nineteenth century, but such cases were not common.[182] Thus, *Church of the Holy Trinity* presaged a gradual change in the Supreme Court's methodology. In 1897, for example, the Supreme Court referred to legislative history in interpreting the newly enacted Sherman Antitrust Act, a statute that contained so few words of such broad generality that it would be almost impossible to interpret it meaningfully without resource to contextual material outside the language of the act itself.[183]

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179. 143 U.S. 457 (1892), discussed *supra* text accompanying notes 93-98.

180. 6 U.S. (2 Cranch) 358, 386 (1805) ("Where the mind labours to discover the design of the . . . legislature, it seizes everything from which aid can be derive.").

181. *See Church of the Holy Trinity*, 143 U.S. at 464-65. In his engaging article on *Church of the Holy Trinity*, Vermeule argues that the legislative history was not as clear as Brewer made it seem. *See* Vermeule, *supra* note 98, at 1839-57. Vermeule blames the lawyers in part for bringing a distorted picture of the legislative history to the Court's attention. *See id.* at 1858.

182. *See, e.g.*, Jennison v. Kirk, 98 U.S. 453, 459-60 (1878); Blake v. National Banks, 90 U.S. (23 Wall.) 307, 317 (1874); Dubuque and Pacific R.R. v. Litchfield, 64 U.S. (23 How.) 66, 87 (1859); Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. (13 How.) 518, 565 (1851). For a discussion of the use of legislative history in early cases, see James J. Brudney, *Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response?*, 93 MICH. L. REV. 1, 44-45 (1994); Mark R. Killenbeck, *A Matter of Mere Approval? The Role of the President in the Creation of Legislative History*, 48 ARK. L. REV. 239, 257-58 (1995).

183. *See* United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 321 (1897).

The cause of this shift in focus is a matter of some speculation. Eskridge, for example, places considerable weight on the reaction to *Church of the Holy Trinity*.[184] He points out that just prior to the decision, the first edition of Sutherland's treatise on the interpretation of statutes gave no role to the use of legislative history in statutory interpretation.[185] In contrast, the second edition of Sutherland, published in 1904, contained extensive discussion of the propriety of using extrinsic evidence of legislative intent gleaned from congressional proceedings.[186] Moreover, Eskridge and other commentators attribute this change in interpretive culture to a shift in the nature of the kind of legislation that Congress began enacting at the turn of the century: "New regulatory statutes even sought to move policy beyond or against common law doctrines. Without the common law to guide interpretation in such statutes, legislative history emerged as another useful context for interpretation."[187]

While these views help to explain the historical record, they do not tell the entire story. For example, the Interstate Commerce Act[188] was enacted in 1887. As set forth in Table 1, the Supreme Court decided eleven cases interpreting the Act in the 1890's. It refrained from resorting to legislative history in all of these decisions.[189]

This is not to imply that the legislative history of the Sherman Act teaches us much about how to interpret it. For a discussion of that history, see Spencer Weber Waller, *Market Talk*, 22 L. & SOC. INQUIRY 435 (1997) (book review).

184. *See* ESKRIDGE, *supra* note 108, at 209.

185. *See id.* at 208; J.G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION 380 (1891).

186. *See* J.G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION 879-83 (2d ed. 1904).

187. ESKRIDGE, *supra* note 108, at 209; *see* Brudney, *supra* note 182, at 45 n.178.

188. Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887) (codified as amended in scattered sections of 49 U.S.C.).

189. In one of these cases, *Texas & Pacific Railway v. ICC*, 162 U.S. 197 (1896), the Court did state that "courts must take notice of the history of legislation," among other things, in deciding which construction of a statute to accept. *Id.* at 218. It does not appear, however, that the Court actually looked at the legislative process in deciding that particular case. In none of the other 10 cases did the Court mention the issue at all.

TABLE 1

SUPREME COURT CASES
INTERPRETING INTERSTATE COMMERCE ACT

DECADE	CASES INTERPRETING INTERSTATE COMMERCE ACT	CASES INTERPRETING INTERSTATE COMMERCE ACT THAT RELY ON LEGISLATIVE HISTORY
1890s	11	0
1930s	57	21

This should not be terribly surprising. The textualist culture had been part of the Court since before John Marshall's time; regulatory statutes requiring more attention to legislative goals were just beginning to proliferate; and *Church of the Holy Trinity*, however notorious, was just one case. In contrast, during the 1930s, the Court decided fifty-seven cases interpreting the same act, indicating that the Court indeed was devoting more of its energy to the interpretation of regulatory statutes. In that decade, the Court resorted to legislative history twenty-one times, or thirty-seven percent of the time. Although Congress amended the Act during the interim, it seems fair to attribute the use of this new rhetoric to a change in interpretive culture.[190]

A more general study of cases that mention various aspects of the legislative process shows the same phenomenon during the period spanning 1890 through 1939, when Felix Frankfurter was appointed to the Court. Although treatise writers changed their positions on this issue at the turn of the century, and counsel arguing before the Court quickly followed suit, the Court itself only gradually became comfortable referring to legislative history in its opinions. Table 2 sets forth a decade by decade tally of instances in which the Court used legislative history in its opinions, as well as instances in which counsel referred to it, but the Court did not.[191]

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190. For an interesting argument that the *Erie* doctrine became increasingly likely as the result of cultural change, rather than as a sterile reevaluation of old doctrine, see Lawrence Lessig, *Erie-Effects of Volume 110: An Essay on Context in Interpretive Theory*, 110 HARV. L. REV. 1785 (1997).

191. The data contained in the chart reflect the results of a LEXIS search for the

TABLE 2

THE SUPREME COURT'S USE OF LEGISLATIVE HISTORY
1890 - 1939

DECADE	CASES CONTAINING REFERENCE TO LEGISLATIVE HISTORY BY THE COURT	CASES CONTAINING REFERENCE TO LEGISLATIVE HISTORY BY COUNSEL ONLY
1890-1899	3	15
1900-1909	8	14
1910-1919	46	34
1920-1929	60	32
1930-1939	154	23

As Table 2 demonstrates, the Court was slow to embrace the examination of legislative history as part of its routine methodology, and only came to do so during the New Deal. Prior to the New Deal, reference to legislative history became more common, with some significant cases resorting to it,[192] but it was still not the norm.

The early decades of the twentieth century were a time of transition in the realm of statutory interpretation, just as they were a time of transition in so many substantive areas of

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time period in question with the following words: "legislative history or conference report or senate committee or senate report or house committee or house report or committee report or conference report or floor debate." Undoubtedly, this search missed a few cases, but it is unlikely that the search missed enough cases to distort its value seriously. Cases returned by the search were reviewed to determine whether they really made reference to the legislative process, or simply mentioned some committee report, the sequence of enactments on a particular subject matter, or other such items. No distinction was made among majority, dissenting, and concurring opinions. Cases in which the Court sought legislative history but could not find any also were included because they reflected a methodology that included such information in the interpretive process.

192. *See, e.g.*, Boston Sand & Gravel Co. v. United States, 278 U.S. 41, 48 (1928) (Holmes, J.) ("It is said that when the meaning of language is plain we are not to resort to evidence in order to raise doubts. That is rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists."). For a discussion of broader changes in statutory interpretation associated with the New Deal, see Karen M. Gebbia-Pinetti, *Statutory Interpretation, Democratic Legitimacy and Legal-System Values*, 21 SETON HALL LEGIS. J. 233, 262-64 (1997).

law.[193] Ultimately, the recognition that the language of a statute cannot resolve all disputes over its applicability to unforeseen cases became inescapable. As Eskridge points out, once the Court had interpreted complicated regulatory statutes long enough, it had to deal not only with language that it previously found difficult, but also with the indeterminacies of its own precedents.[194] Regardless of what one now thinks about the wisdom of looking to such contextual information, most everyone confronted with the task of deciding cases admitted its necessity.[195]

This shift was not inevitable in an analytical sense, but it should have been expected from the constant reminders of the need to use context to resolve difficult interpretive problems. If our concepts include prototypical images along the lines described in Section I of this Article, it should not be surprising to

193. *See* Stephen A. Siegel, *Let Us Now Praise Infamous Men*, 73 TEX. L. REV. 661, 701-03 (1995) (book review). Siegel argues that the Fuller Court, during the last decade of the nineteenth century and first decade of the twentieth century, was a transitional Court in many respects. *See id.* at 695. Most crucial here was its willingness to embrace a dynamic constitutionalism, conceding openly that as society engages in new activities, the Court must reinterpret the Constitution to deal with a changing world. *See* Holden v. Hardy, 169 U.S. 366, 387 (1898) ("[T]he law [may] be forced to adapt itself to new conditions of society, and, particularly, to the new relations between employers and employés, as they arise."). None of the Fuller Court's statutory decisions that looked to legislative history discussed the Court's decision to do so. Thus, any discussion of the mindset of particular justices with respect to the decision to turn to this information can be only speculative. It does seem reasonable to hypothesize, however, that the transition from stasis to dynamism in constitutional analysis may correspond rather closely to the transition from textualism to context-sensitive analysis in the realm of statutory construction. That is, members of the Fuller Court generally were more open than were their predecessors to solving problems in light of extratextual historical events. For a similar point that correlates the increased use of legislative history in statutory cases with the growth of a subjective view of substantive legal issues, see William N. Eskridge, Jr., *Legislative History Values*, 66 CHI.-KENT L. REV. 365, 370-71 (1990). For an interesting discussion of the ambivalence that pervaded the literature on statutory interpretation during this period, see William S. Blatt, *The History of Statutory Interpretation: A Study in Form and Substance*, 6 CARDOZO L. REV. 799 (1985).

194. *See* ESKRIDGE, *supra* note 108, at 213.

195. For a contemporaneous discussion of the need for the Court to resort to extratextual material, and the less than systematic way in which the Court actually turned to such information, see Harry Willmer Jones, *The Plain Meaning Rule and Extrinsic Aids in the Interpretation of Federal Statutes*, 25 WASH. U. L.Q. 2 (1939). See *infra* notes 230-67 and accompanying text for a discussion of Justice Scalia's counter-attack against the use of contextual information.

learn that things happen in the world for which legal theories give no definitive answer. Unless we look outside the language of the statute itself, we will not discover a basis for making a decision. Adding to the pressure to interpret statutes in this manner was the increasing influence of the legal realist movement, with its unyielding attack on a concept of law in which the results of disputes were deducible from application of a comprehensible body of law to an ascertainable set of facts.[196]

2. *Justice Frankfurter and the Narrow Rule of Lenity*

This was the state of affairs when Felix Frankfurter was appointed to the Supreme Court in 1939. In the 1938-39 term, the Supreme Court had made reference to the legislative history of a statute (or to the absence of any history for it to rely on as an interpretive aid) on twenty-five occasions.[197] This environment was radically different from the one in which Marshall and Story had established longstanding interpretive doctrine, and Frankfurter was very much part of this new culture. He wrote in a 1947 article:

> In the end, language and external aids, each accorded the authority deserved in the circumstances, must be weighed in the balance of judicial judgment. Only if its premises are

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196. Professor Horwitz characterizes this aspect of legal realism in terms of a rejection of categories with hard and fast boundaries. *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960, at 199-206 (1992).

197. This tally differs from a widely-cited study that claims 19 citations to legislative history in 1938 and 35 in 1939. *See* Jorge L. Carro & Andrew R. Brann, *The U.S. Supreme Court and the Use of Legislative Histories: A Statistical Analysis*, 22 JURIMETRICS J. 294, 303 (1982). The difference appears to be in the methodology. As noted above, the survey used in this Article counted references to "legislative history" generally, even when the Court stated that it could not find any such relevant history, because such references reflect an actual effort to seek out legislative history as part of the analysis of the statute. Carro and Brann, moreover, appear to have counted citations to legislative history rather than cases containing citations to legislative history. Although the text of their article is not entirely clear on this matter, the number of citations in many years exceeds the number of cases that the Court decided. In fact, their study shows the number of annual citations increasing to about 100 in 1941, passing 200 for the first time in 1957, and doubling again to more than 400 by 1973. *See id.* at 303. The last year of their study is 1979, in which there were 405 citations. *See id.* For an empirical study of the use of legislative history in recent cases, see Thomas W. Merrill, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U. L.Q. 351, 355 (1994).

> emptied of their human variables can the process of statutory construction have the precision of a syllogism. We cannot avoid what Mr. Justice Cardozo deemed inherent in the problem of construction, making "a choice between uncertainties. We must be content to choose the lesser." But to the careful and disinterested eye, the scales will hardly escape appearing to tip slightly on the side of a more probable meaning.[198]

In that same article, Frankfurter showed himself to be well aware of the early history of statutory interpretation, attributing the growth in reference to legislative history to the widening of the area of regulation, which "compelled consideration of [] all that convincingly illumines an enactment, instead of merely that which is called, with delusive simplicity, 'the end result.'"[199]

All of this had a profound influence on how Frankfurter viewed the interpretation of criminal statutes. In the five opinions in which Frankfurter confronted the issue, he argued for lenity in four,[200] twice in dissent.[201] In one of these, Frankfurter used the word "lenity" to refer to the narrow construction of criminal statutes for the first time in the Court's history.[202] Frankfurter may not have invented the rule, but he apparently did name it.[203]

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198. Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 544 (1947) (footnote omitted).

199. *Id.* at 542 (referring specifically to John Marshall's approach).

200. *See* United States v. Turley, 352 U.S. 407, 417 (1957) (Frankfurter, J., dissenting); Bell v. United States, 349 U.S. 81 (1955); United States v. Universal C.I.T. Credit Corp., 344 U.S. 218 (1952); Singer v. United States, 323 U.S. 338, 346 (1945) (Frankfurter, J., dissenting).

201. *See Turley*, 352 U.S. at 417 (Frankfurter, J., dissenting); *Singer*, 323 U.S. at 346 (Frankfurter, J., dissenting).

202. *See Bell*, 349 U.S. at 83. Frankfurter wrote:

> When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity. And this not out of any sentimental consideration, or for want of sympathy with the purpose of Congress in proscribing evil or antisocial conduct. It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment.

Id.

203. Courts had used the word "lenity" from time to time as a synonym for leniency in various contexts, especially when referring to the conduct of juries, but it appears that no Supreme Court case prior to *Bell* used that word to state the rule

In *Callanan v. United States*,[204] the last of his lenity opinions, Frankfurter made the following statement, frequently quoted by the Rehnquist Court in recent years:

> But that "rule" [i.e., 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." The rule comes into operation at the end of the process of construing 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.[205]

Frankfurter cited recent opinions construing criminal statutes as authority for this statement, distinguishing those in which the Court had called for lenity. Only his own opinion in *Bell*,[206] however, even arguably relied on this approach to the interpretation of criminal statutes.[207]

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governing the interpretation of ambiguous criminal statutes. One lower court opinion used it in 1851. *See Ex parte* Davis, 7 F. Cas. 45, 49 (N.D.N.Y. 1851) (No. 3,613) ("'It was,' says Professor Christian, 'one of the laws of the twelve tables of Rome, that whenever there was a question between liberty and slavery, the presumption should be on the side of liberty. This excellent principle our law has adopted, in the construction of penal statutes; for whenever any ambiguity arises in a statute, introducing a new penalty or punishment, the decision shall be on the side of lenity and mercy . . . .'").

204. 364 U.S. 587 (1961).

205. *Id.* at 596 (footnote and citation omitted). As for the Rehnquist Court's reliance on this passage, see *infra* note 230 and accompanying text.

206. In *Bell*, after calling for application of the rule of lenity, Frankfurter noted:

> This in no wise implies that language used in criminal statutes should not be read with the saving grace of common sense with which other enactments, not cast in technical language, are to be read. Nor does it assume that offenders against the law carefully read the penal code before they embark on crime. It merely means that if Congress does not fix the punishment for a federal offense clearly and without ambiguity, doubt will be resolved against turning a single transaction into multiple offenses, when we have no more to go on than the present case furnishes.

Bell, 349 U.S. at 83-84. For a discussion of Frankfurter's philosophy concerning the interpretation of criminal statutes in the context of his opinion in *Bell*, see HENRY J. FRIENDLY, BENCHMARKS 208-09 (1967).

207. Other than *Bell*, which is rather cryptic in its description of how courts should apply the rule, Frankfurter cited four lenity cases in *Callanan*, none of which utilized the approach he advocated. *See* Heflin v. United States, 358 U.S. 415, 419 (1959) (stating that the Court resolves an ambiguity in favor of lenity when required

Contrary to Frankfurter's assertion in *Callanan*, Marshall had used lenity in *Wiltberger*[208] "as an overriding consideration of being lenient to wrongdoers."[209] Marshall's position in *Wiltberger* that "probability is not a guide which a court, in construing a penal statute, can safely take,"[210] was reprehensible to Frankfurter, who had no interest in using lenity to thwart clear legislative intent.[211] Frankfurter had in earlier opinions expressed his disapproval of this traditional approach to the interpretation of criminal statutes, but until *Callanan* he at least acknowledged its existence. In *Singer v. United States*,[212] decided seventeen years before *Callanan*, Frankfurter remarked in his dissent:

> In the past, to soften the undue rigors of the criminal law, courts frequently employed canons of artificial construction to restrict the transparent scope of criminal statutes. I am no friend of such artificially restrictive interpretations. Criminal statutes should be given the meaning that their language most obviously invites unless authoritative legislative history or absurd consequences preclude such natural meaning.[213]

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to determine intent of Congress in punishing multiple aspects of same criminal act); Ladner v. United States, 358 U.S. 169, 178 (1958) (stating that the policy of lenity means that the Court will not interpret a criminal statute so as to increase the penalty that it places on an individual "when such an interpretation can be based on no more than a guess as to what Congress intended"); Prince v. United States, 352 U.S. 322, 329 (1957) (stating that its holding is consistent with "our policy of not attributing to Congress, in the enactment of criminal statutes, an intention to punish more severely than the language of its laws clearly imports in the light of pertinent legislative history"); United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221-22 (1952). Frankfurter declared:

> [W]hen choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite. We should not derive criminal outlawry from some ambiguous implication.

Id.

208. 18 U.S. (5 Wheat.) 76 (1820), discussed *supra* notes 146-58 and accompanying text.

209. *Callanan*, 364 U.S. at 596.

210. *Wiltberger*, 18 U.S. (5 Wheat.) at 105.

211. *See* United States v. Hood, 343 U.S. 148, 150-51 (1952) (stating that a statute prohibiting the sale of influence in obtaining political office applies even when office does not exist but is merely authorized).

212. 323 U.S. 338 (1945).

213. *Id.* at 346 (Frankfurter, J., dissenting).

The statement has a distinctively disrespectful tone, especially when we recall that it was Marshall who first adopted this principle in the United States.[214] In the context of the opinion, however, Frankfurter was making the rhetorical point that even the narrowest rule of lenity demanded reversal because the statute was read most naturally to exclude culpability in that case. *Singer* involved a conspiracy prosecution under the Selective Training and Service Act of 1940 for conspiring to avoid the draft.[215] The defendant had committed no overt act in furtherance of the scheme.[216] The federal conspiracy statute then in effect required an overt act,[217] but the Selective Training Act did not.[218]

The statute at issue in *Singer* proscribed a list of wrongs, among them the knowing dereliction of duty by those in the selective service system.[219] The last item on the list was the most serious: "or any person or persons who shall knowingly hinder or interfere in any way by force or violence with the administration of this Act or the rules or regulations made pursuant thereto, *or conspire to do so*."[220] The question was whether "or conspire to do so" refers to only the last item on the list—involving violence—or to all of the statute's proscriptions. The majority opinion, written by Justice Douglas, argued that conspiracy to violate any of the provisions on the list was a crime,[221] while Frankfurter took the position that the Act only criminalized conspiracy to commit violence.[222] As a linguistic matter, Frankfurter was right: the Act was ambiguous, and the most natural reading was the narrower one.[223]

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214. In his extrajudicial writings, Frankfurter wrote respectfully of Marshall, but warned: "Marshall's intrinsic achievements are too solid and his personal qualities too homespun to tolerate mythical treatment. It is important not to make untouchable dogmas of the fallible reasoning of even our greatest judge, and not to attribute godlike qualities to the builders of our nation." Felix Frankfurter, *John Marshall and the Judicial Function*, 69 HARV. L. REV. 217, 219 (1955).

215. *See Singer*, 323 U.S. at 338.

216. *See id.*

217. *See* 18 U.S.C. § 88 (1944).

218. *See Singer*, 323 U.S. at 339.

219. *See id.*

220. 50 U.S.C. app. § 311 (1944) (emphasis added).

221. *See Singer*, 323 U.S. at 341-42.

222. *See id.* at 346 (Frankfurter, J., dissenting).

223. This is a classic case of the last antecedent rule, a canon of construction that

Frankfurter's departure from the traditional statement of lenity correlated with the changed role that legislative history played in statutory analysis. For both Marshall and Story, as for the English judges before them, inquiry into the meaning of a statute was limited to the statute's words as further resolved by certain grammatically oriented canons of construction. It was not an accident that Livingston Hall wrote his influential 1935 article that advocated for the elimination of lenity[224] in favor of reading statutes to reflect their fair meaning after the interpretive shift had caught hold, but before Frankfurter narrowed the rule of lenity in accordance with this shift.

Perhaps it would be more accurate to describe Frankfurter's innovation as applying the traditional rule of lenity in the new interpretive culture, and not as a reformulation of the rule itself. In the traditional mode of interpretation, courts looked first to the language of the statute, then to canons of construction. If these were not dispositive, lenity would apply. The new interpretive culture added legislative history and other extratextual materials to the types of information that courts were willing to examine. In both instances, lenity comes at the end of the process. The difference between Frankfurter's view and Marshall's, however, should not be trivialized. Frankfurter wanted to make sure courts did not act to frustrate legislatures that attempted in good faith to criminalize certain ranges of conduct. To Frankfurter, lenity was not as much about language as it was about residual uncertainty after careful study. In this sense, his vision of lenity differed sharply from the traditional one. This Article therefore refers to Frankfurter's version of lenity as a new, more narrow one.

Somewhat ironically, Frankfurter criticized what he saw as the aggressive use of legislative history by the courts to obscure the meaning of statutory language that he found plain on its surface.[225] Nonetheless, Frankfurter did not himself hesitate to use extratextual material in statutory cases. In *Callanan*, he

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calls for linking modifying phrases to the last antecedent, unless context requires otherwise. The problem is that when the modifying phrase comes at the end of a list, the notion "last antecedent" itself is ambiguous between the list itself and its last entry. For a discussion of this tension, see SOLAN, *supra* note 24, at 29-38.

224. *See* Hall, *supra* note 4, at 762-63.

225. *See* Frankfurter, *supra* note 198, at 543-44.

looked at the legislative history of the Hobbs Act in deciding that substantive violations of the Act and conspiracies under the Act could be punished as separate offenses notwithstanding the rule of lenity.[226] In *Singer*, he cited a speech by the Chairman of the Committee on Military Affairs to support his position that lenity should apply.[227] The Court used legislative history in almost all of the other lenity cases in which Frankfurter wrote an opinion.[228]

The relationship between the scope of lenity and approaches to statutory interpretation generally has implications for current statutory doctrine. A full hundred years separated Frankfurter from Marshall when Frankfurter initiated his attack on the traditional application of lenity. With the appointment of Justice Scalia to the bench in 1986, however, a new voice of textualism is present. The predictable result has been a resurrection of the debate that Frankfurter seemed to have won against Marshall.

III. LENITY IN THE REHNQUIST COURT

This section of the Article discusses some current trends in the interpretation of criminal statutes that follow from both the interpretive framework described in Section I and the history set forth in Section II.[229] First, this section discusses Justice Scalia's attempt to return to a broader version of lenity as part

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226. *See* Callanan v. United States, 364 U.S. 587, 591 (1961) (citing extensively the details of the record of the House Judiciary Committee).

227. *See Singer*, 323 U.S. at 348.

228. *See* United States v. Turley, 352 U.S. 407, 414 (1957) (Burton, J.) (invoking the legislative history of the National Motor Vehicle Theft Act); United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 222-23 (1952) (Frankfurter, J.) (invoking the legislative history of the Fair Labor Standards Act to argue for applying lenity).

229. This section of the Article does not purport to be an encyclopedic review of all issues presently confronting the courts with respect to the interpretation of criminal statutes. For example, the Supreme Court has been creating a confused jurisprudence concerning the interpretation of criminal statutes with civil counterparts. *Compare* United States v. Thompson/Center Arms Co., 504 U.S. 505, 517-18 (1992) (applying lenity to obtain a narrow interpretation of civil tax statute with criminal counterpart) *with* United States v. O'Hagan, 117 S. Ct. 2199, 2203-04 (1997) (interpreting criminal securities fraud statute broadly in light of earlier broad interpretations of civil counterpart). Both of these cases are discussed below in a somewhat different context. I leave for future work the issue of how to reconcile the different considerations that go into interpreting statutes with both civil and criminal enforcement mechanisms.

of his textualist program, and argues that he has not succeeded, as the Rehnquist Court routinely applies the narrow, Frankfurter version of lenity. Second, this section criticizes the Rehnquist Court's narrowing lenity even further by rejecting it in virtually every case in which the issue is the breadth of meaning of disputed words.

A. Lenity and the Debate Over Textualism

In recent years, the Supreme Court has adopted Frankfurter's narrow formulation of the rule of lenity with progressive frequency.[230] Chief Justice Rehnquist has taken the lead in this regard,[231] with the effect of limiting the occasions on which the Court finds a statute ambiguous. Frankfurter's *Callanan* opinion, quoted above, frequently is cited by various justices as the Court's pronouncement of the rule.[232]

Justice Scalia, in contrast, has had far less influence than the Chief Justice on the Court's position on lenity, if influence is measured by the publication of majority decisions. Nonetheless, he has provoked vigorous and exciting debate on the principle both among his colleagues on the Supreme Court[233] and in the academic literature.[234] In essence, Scalia has attempted to become to Frankfurter what Frankfurter had been to Marshall.

A detailed critique of Scalia's textualism is beyond the scope of this Article.[235] The focus here is on the relationship between

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230. *See, e.g.*, Bates v. United States, 118 S. Ct. 285, 291 (1997); United States v. Wells, 117 S. Ct. 921, 931 (1997).

231. *See* United States v. Aguilar, 515 U.S. 593, 602-06 (1995); Reno v. Koray, 515 U.S. 50, 64-65 (1995); United States v. Granderson, 511 U.S. 39, 69 (1994) (Rehnquist, C.J., dissenting); NOW v. Scheidler, 510 U.S. 249, 261 (1994); Chapman v. United States, 500 U.S. 453, 463-64 (1991); Albernaz v. United States, 450 U.S. 333, 342 (1981).

232. *See, e.g.*, *Granderson*, 511 U.S. at 77 (Rehnquist, C.J. dissenting); *NOW*, 510 U.S. at 262; United States v. R.L.C., 503 U.S. 291, 311 (1992) (Thomas, J., concurring); *Chapman*, 500 U.S. at 463; Gozlon-Peretz v. United States, 498 U.S. 395, 410 (1991). It is interesting to note that citations to *Callanan*, which were only occasional during the Warren and Burger Courts, have increased substantially in the Rehnquist Court, in keeping with the current Court's active engagement in debate over interpretive issues.

233. *See, e.g.*, Moskal v. United States, 498 U.S. 103, 107-08 (1990); *R.L.C.*, 503 U.S. at 305-06; Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597, 610 (1991).

234. *See, e.g.*, Kahan, *supra* note 4; Note, *supra* note 123, at 197.

235. See Solan, *supra* note 27, at 235-36 and references cited therein for a discus-

the use of context in statutory interpretation and the nature of lenity. One would expect, if the positions taken in this Article are right, that Scalia's textualist orientation would lead him back in the direction of Marshall's version of lenity. For if one continues to respect the values that underlie lenity, then an interpretive method that tolerates reduced investigation into the purpose and context of a statute will require a broader and somewhat more mechanical application of that principle.

That is exactly what has happened.[236] In a series of opinions, mostly concurrences and dissents, Scalia has staked out a position very reminiscent of John Marshall's, especially those aspects of it that Frankfurter apparently had put to rest. The most notable of these is his concurring opinion in *United States v. R.L.C.*[237] In *R.L.C.*, the Court was faced with the interpretation of the federal Juvenile Delinquency Act, a provision of which limits the term for which detention may be ordered for certain juveniles to "the maximum term of imprisonment that would be authorized if the juvenile had been tried and convicted as an adult."[238] A teenager subject to the Act had killed a two-year old while driving drunk.[239] He was convicted of manslaughter following a bench trial.[240] The issue was whether the Court could impose the maximum statutory penalty for manslaughter (three years), or whether it was limited to the maximum sentence that the Federal Sentencing Guidelines would permit under the circumstances (twenty-one months).[241]

The statute is silent on the issue of whether the term of imprisonment is limited solely by the term authorized in the underlying statute, or the term authorized under the statute read in light of the Sentencing Guidelines.[242] This creates an ambiguity.[243] The statute uses "authorized" as a passive verb with-

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sion of textualism.

236. This point is hinted at in Note, *supra* note 123, at 205.

237. 503 U.S. 291 (1992). For an extensive discussion of *R.L.C.*, see Kahan, *supra* note 4, at 391-96; Note, *supra* note 123, at 216-19.

238. 18 U.S.C. § 5037(c)(1)(B) (1994).

239. *See R.L.C.*, 503 U.S. at 294.

240. *See id.*

241. *See id.* at 295.

242. *See id.*

243. For a discussion of the rather narrow sense in which I use the term "ambiguity," see *supra* note 14 and accompanying text.

out an overt agent. The statute does not say "by whom" or "by what" the sentence must be authorized, just as "the ball was thrown through the window" does not say who threw the ball. In this context, there are two potential implied agents: the statute and the Sentencing Guidelines. If the implied agent is inferred to be the statute, then a three-year sentence will be imposed. If it is inferred to be the guidelines, then a twenty-one month sentence will be imposed. The issue was not the fit between concepts and events. Rather, it was which of two plausible but distinct meanings the Court should adopt.

Writing for a plurality with respect to some issues, and a majority with respect to others, Justice Souter analyzed the statute by using the narrow, Frankfurter version of the rule of lenity. He concluded that lenity was not necessary in this case, because the Court has "always reserved lenity for those situations in which a reasonable doubt persists about a statute's intended scope even *after* resort to 'the language and structure, legislative history, and motivating policies' of the statute."[244] Based on the Court's investigation into these matters, Souter concluded that the Congress did not intend the statute to be interpreted broadly, as the Government would have it.[245] Thus, Souter did not even reach the issue of lenity, which would have led to the same result in any event.

In a concurring opinion, Scalia took strong issue with Souter's approach. His principal concern was that if a court in applying lenity first takes into account legislative history and "motivating policies" behind a statute, a defendant is in jeopardy of being held accountable not only for those acts that violate the plain language of statutes, but also for those acts that violate a court's speculations about what a group of hundreds of people had in

244. *R.L.C.*, 503 U.S. at 305-06 (quoting Moskal v. United States, 498 U.S. 103, 108 (1990)). Souter's characterization of lenity as "always" reserved for situations in which a doubt exists after the history and motivating policies of a statute are investigated is no more accurate than Frankfurter's statements to that effect more than thirty years earlier. Souter, like Frankfurter before him, obscured the fact that this methodology is quite recent.

245. *See id.* at 297.

mind when they voted for the statute.[246] This, Scalia argued, cannot possibly further the underlying values that motivate lenity.[247] As for notice, Scalia wrote:

> It may well be true that in most cases the proposition that the words of the United States Code or the Statutes at Large give adequate notice to the citizen is something of a fiction, albeit one required in any system of law; but necessary fiction descends to needless farce when the public is charged even with knowledge of Committee Reports.[248]

Furthermore, Scalia expressed grave concern about cases in which examination of these extratextual materials leads a court not to the more lenient reading of the statute, as happened in *R.L.C.*, but to the harsher one, as happened in *Dixson v. United States*.[249] This, he argued, would subvert separation of powers, the other rationale for lenity.[250] Were it to become the norm, we would not rely on the legislature to enact statutes, but rather on the courts to divine from all kinds of extrinsic materials what it was that motivated the legislators to vote for the statute's enactment.

Scalia won only Justice Thomas's vote. The problem is that, as most justices recognize, we really do not understand, without turning to context, what people have in mind when they speak.[251] If that context is sometimes unreliable, it means only that our linguistic capacity is less robust than we would wish it to be in an ideal world. Without the context, however, we would have virtually no comprehension at all, especially when it comes to complicated statements such as the ones contained in the

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246. *Id.* at 308-09 (Scalia, J., concurring) (quoting *Moskal*, 498 U.S. at 108).

247. *See id.* at 308 (Scalia, J., concurring).

248. *Id.* at 309 (Scalia, J., concurring) (citing McBoyle v. United States, 283 U.S. 25, 27 (1931)).

249. *See id.* at 310 (Scalia, J., concurring) (citing Dixson v. United States, 465 U.S. 482 (1984)).

250. *See id.* (Scalia, J., concurring).

251. See Solan, *supra* note 27, at 251-62 for a discussion of how context contributes to our understanding of language. For a discussion of how crucial a role context plays in determining which alternative meaning of a word is intended, see George A. Miller, *Contextuality*, *in* MENTAL MODELS IN COGNITIVE SCIENCE: ESSAYS IN HONOR OF PHIL JOHNSON-LAIRD 1 (Jane Oakhill & Alan Garnham eds., 1996).

United States Code. Souter stated as much in his response to Scalia:

> It is true that the need for fair warning will make it "rare that legislative history or statutory policies will support a construction of a statute broader than that clearly warranted by the text," and that "general declarations of policy," whether in the text or the legislative history, will not support construction of an ambiguous criminal statute against the defendant. But lenity does not always require the "narrowest" construction, and our cases have recognized that a broader construction may be permissible on the basis of nontextual factors that make clear the legislative intent where it is within the fair meaning of the statutory language.[252]

Souter was right. In a system that denies judges the opportunity to look at extratextual material, a broader rule of lenity is needed. When judges can consult such things as purpose and legislative history freely, though, courts also should take this information into account in deciding whether to apply the rule of lenity. If looking to context means less lenity, cherished values are not compromised so long as the accepted interpretation is both within the "fair meaning of the statutory language" and within the intent of the legislature as gleaned by independent investigation. Only when issues of actual notice arise, i.e., when a defendant claims in good faith to have misunderstood a criminal statute, will we have to question this approach.

Two years after deciding *R.L.C.*, the Supreme Court confronted a similar problem, this time in connection with a statute dealing with the prison term that a person must serve if he possesses illegal drugs during probation. In *United States v. Granderson*,[253] the defendant, a letter carrier, had been fined and placed on five years probation after pleading guilty to one count of destruction of mail.[254] Had he been sentenced to prison, the Sentencing Guidelines would have called for a term of zero to six months.[255] While on probation, Granderson tested

252. *R.L.C.*, 503 U.S. at 305 n.6 (citations omitted).
253. 511 U.S. 39 (1994).
254. *See id.* at 43.
255. *See id.*

positive for cocaine, an infraction for which "the court shall revoke the sentence of probation and sentence the defendant to not less than one-third of the original sentence."[256] The issue in *Granderson* was what "one-third of the original sentence" meant in this situation.[257] The phrase could have meant one third of the five-year probation, which would have the effect of actually shortening the defendant's sentence; it could have meant one-third of the six-month maximum sentence to which he could have been sentenced originally, which would have required him to serve two months in prison; or, as the government successfully argued to the district court, it could have meant that Granderson had to serve twenty months in prison, which is one-third of the sixty month term that had earlier been probation time.[258]

Affirming the court of appeals, which had reversed the district court, the Supreme Court took the middle position: the statute required a two-month prison sentence.[259] Justice Ginsburg, who wrote the majority opinion, concluded, in essence, that Congress simply drafted the statute poorly. Looking at the legislative history, she conjectured that Congress probably had in mind an older sentencing regime in which those receiving probation first received a prison sentence, which was suspended in favor of the probationary period.[260] In this light, both the statutory scheme and the result of the case make sense. Finding that "text, structure, and history fail to establish that the Government's position is unambiguously correct,"[261] Ginsburg applied the rule of lenity.[262]

Scalia and Kennedy each concurred in the judgment. Scalia would have read the statute literally to require twenty months

256. 18 U.S.C. § 3565(a) (1988) (provision repealed 1994).
257. *See Granderson*, 511 U.S. at 45.
258. *See id.*
259. *See id.* at 55.
260. *See id.* at 42, 52.
261. *Id.* at 54.
262. *See id.* Chief Justice Rehnquist dissented. He had no trouble with the Court's use of legislative history, but found it unpersuasive in this particular case. *See id.* at 74 (Rehnquist, C.J., dissenting). Rehnquist would have reinstated the district court's harsher sentence. *See id.* at 78 (Rehnquist, C.J., dissenting).

probation, plus one-third the fine.[263] Kennedy by and large agreed with Scalia, except for the fine.[264] Neither would have rescued Congress from the consequences of its "wretchedly drafted statute."[265] The only reason for concurrences instead of dissents was that Granderson already had served eleven months in prison waiting for the completion of his appeal.[266] Moreover, Kennedy argued, if the Court were serious about lenity, it would have chosen the most lenient of the three options.[267] Thus, both would have supported a broader rule of lenity on textualist grounds.

Lenity is thus a real, but not an overriding aspect of the interpretation of criminal statutes for most of the current Supreme Court. It informs the interpretive process and breaks ties. It does not take the place of serious investigation into statutory language, the overall purpose of the statute, and the statute's legislative history.

B. Vagueness and Ambiguity in the Rehnquist Court

Recall Chief Justice Marshall's discomfort in *Wiltberger* with the relationship between the rule of lenity and the problem of vagueness.[268] Marshall knew that lenity could convert statutory interpretation into a language game every time the scope of a word is placed in issue. He was unwilling to infer meaning broader than the words that Congress used, even at the cost of accepting an undesirably narrow interpretation of a statute. When Congress has spoken in words that arguably, but not necessarily, encompass the conduct before a court, however, the

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263. *See id.* at 59 (Scalia, J., concurring).
264. *See id.* at 60-69 (Kennedy, J., concurring).
265. *Id.* at 60 (Scalia, J., concurring).
266. *See id.* at 58 (Scalia, J., concurring); *id.* at 60 (Kennedy, J., concurring).
267. *See id.* at 60-69 (Kennedy, J., concurring).
268. As Marshall stated:

> [T]hough penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. The maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases which those words, in their ordinary acceptation, or in that sense in which the legislature has obviously used them, would comprehend.

United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820); *see supra* notes 153-58.

court must decide how broadly to interpret the statute. Simply choosing the narrowest interpretation will not do.

Marshall's words were dicta, but as soon as a court begins to confront the problem of vagueness seriously, it becomes clear that statutes give us less rule of law than initially meets the eye. As discussed in Section I, prototype effects cause virtually all concepts to become fuzzy at the margins. Legislators, being human, have no choice but to write statutes that incorporate concepts into rules, forcing courts to decide what to do when cases arise that are remote from the prototype, but nevertheless within the periphery of the concept.

Ambiguity, in contrast, is far less of a threat to the rule of law. For one thing, problems of ambiguity arise less frequently. While concepts generally become vague at the margins, unresolvable ambiguity occurs only from time to time. Moreover, if a statute can mean either *a* or *b*, and investigation into the legislative process does not disclose which of *a* or *b* was intended, courts can apply the rule of lenity and allow the legislature to override the ruling if it is important. The situation is correctable. Problems of vagueness are by and large not correctable. New situations that challenge a statutory interpreter to make decisions about the appropriate breadth of a statute arise constantly.

Judges do not write about lenity in quite this way. Remarks about the nature of word meaning, however, such as Marshall's comments in *Wiltberger*, demonstrate an intuitive understanding of the problem. Contemporary cases repeat this sentiment, frequently reminding us that in applying the rule of lenity, courts are not obliged to give statutory words their narrowest meaning when a broader interpretation would better serve the independently discovered goals of the legislature.[269]

It is difficult to find recent cases in which the Supreme Court has applied the rule of lenity when the linguistic issue is vague-

269. *See, e.g.*, United States v. R.L.C., 503 U.S. 291, 306 n.6 (1992) ("But lenity does not always require the 'narrowest' construction, and our cases have recognized that a broader construction may be permissible on the basis of nontextual factors that make clear the legislative intent where it is within the fair meaning of the statutory language.").

ness. For example, in *United States v. O'Hagan*,[270] the Supreme Court interpreted section 10 of the Securities Exchange Act as creating insider trading liability against an attorney whose firm represented the bidder in a tender offer, but who traded securities in the target.[271] The attorney never had "inside information" in the usual sense, since he never had any relationship with the company whose stock he was trading.[272] The Court held, though, that the use of such information constituted a fraud under the Act.[273]

Section 10(b) outlaws the use of a "deceptive device" "in connection with the purchase or sale of any security."[274] The majority opinion in *O'Hagan* held "deceptive device" to extend to the use of information misappropriated from any source (in this case the defendant's law firm's client) to whom the defendant owed a fiduciary duty.[275] The statute requires deception in connection with a securities transaction; it does not say against whom the deception must be practiced.[276]

This is a classic case of statutory vagueness. The issue here, as it was in *Church of the Holy Trinity* and *McBoyle*, was the fit between statutory words and unusual events. In *O'Hagan*, the Court held the fit was good enough.[277] *O'Hagan* illustrates the Court's reluctance to apply lenity to resolve conceptual vagueness. Thus, the Court has interpreted the expression "use a firearm" broadly to include trading a firearm for cocaine;[278] the

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270. 117 S. Ct. 2199 (1997).
271. *See id.* at 2204-05.
272. *See id.* at 2205.
273. *See id.*
274. *Id.* at 2206-08.
275. *See id.*
276. *See id.* at 2206-07. Justice Scalia, dissenting, would have applied the rule of lenity. *See id.* at 2220 (Scalia, J., concurring in part and dissenting in part). Justice Thomas, joined by Chief Justice Rehnquist, also dissented. *See id.* at 2221-26 (Thomas, J., dissenting). Thomas would have interpreted section 10(b) more narrowly without resort to lenity. Thomas argued that the misappropriation of information was complete prior to its use to profit in securities trading, and that therefore the "in connection with" component of section 10(b) was not met. *See id.* at 2221.
277. In *Chiarella v. United States*, 445 U.S. 222 (1980), the Court held that the fit was not good enough when the person trading on inside information was an employee of a financial printer who owed no duty to any of the parties. *See id.* at 231-35.
278. *See* Smith v. United States, 508 U.S. 223, 234-35 (1993).

expression "official detention" against the interest of a defendant to exclude a locked drug rehabilitation center;[279] the concept "enterprise" broadly to include anti-abortion groups for purposes of interpreting RICO;[280] the federal conspiracy statute not to require proof of an overt act in furtherance of the conspiracy;[281] and "extortion under color of official right" broadly so as not to require demand for the funds extorted.[282]

Only in a few cases has the Court in the past several years ruled in favor of a defendant when the linguistic issue was vagueness. In *United States v. Aguilar*,[283] the Court, in an opinion by Chief Justice Rehnquist, interpreted the obstruction of justice statute narrowly to hold that a judge making false statements to FBI agents in the course of a criminal investigation was not "endeavor[ing] to influence, obstruct, or impede . . . the due administration of justice" required for conviction under the statute.[284] The Court held that the false statements must have a nexus with judicial proceedings, such as a grand jury.[285] Virtually all of the statute's other provisions made reference to such proceedings. The majority held that absent proof that the judge knew that his false statements would influence grand jury investigations and the like, he had not obstructed justice.[286] Interestingly, Rehnquist never mentioned the rule of lenity, but he did mention its rationales of "deference to the prerogatives of Congress," and "fair warning . . . to the world in language that the common world will understand."[287] It was Justice Scalia, in dissent, who argued correctly that the majority really was applying lenity through the back door. To Scalia, the statute was so clear that his broader rule of lenity did not apply.[288]

279. *See* Reno v. Koray, 515 U.S. 50, 65 (1995).
280. *See* NOW v. Scheidler, 510 U.S. 249, 258-62 (1994).
281. *See* United States v. Shabani, 513 U.S. 10, 15 (1994).
282. *See* Evans v. United States, 504 U.S. 255, 268-69 (1992).
283. 515 U.S. 593 (1995).
284. *Id.* at 598.
285. *See id.* at 599-600.
286. *See id.* at 601.
287. *Id.* at 600 (quoting McBoyle v. United States, 283 U.S. 25, 27 (1931)).
288. *See id.* at 612 (Scalia, J., concurring in part and dissenting in part).

Similarly, in *United States v. Thompson/Center Arms Co.*,[289] the Court narrowly construed a provision of the National Firearms Act that imposed a $200 tax per unit on anyone "making" "a firearm."[290] The statutory definition of "firearm" included short-barreled rifles, but did not include regular, long-barreled rifles, or handguns.[291] Thompson/Center Arms was selling kits for converting handguns into rifles, but if the purchaser of the kit used only some of its parts, she could convert the handgun into a short-barreled rifle.[292] The Supreme Court said Thompson/Center Arms should not be taxed on the kits. Focusing its attention on whether Thompson/Center Arms did enough to have "made" a statutorily-defined firearm, the Court observed 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."[293] The Court continued: "Making a firearm without approval may be subject to criminal sanction, as is possession of an unregistered firearm and failure to pay the tax on one. It is proper, therefore, to apply the rule of lenity and resolve the ambiguity in Thompson/Center Arms' favor."[294] Justice Stevens dissented, arguing that a civil tax statute should not be subject to the rule of lenity, and that the majority was unduly limiting congressional authority to regulate firearms.[295]

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289. 504 U.S. 505 (1992).

290. *See* 26 U.S.C. § 5821 (1994).

291. *See id.* § 5845(a)(3).

292. *See Thompson/Center Arms Co.*, 504 U.S. at 508.

293. *Id.* at 517.

294. *Id.* at 518 (citation omitted). The majority opinion, written by Justice Souter, focused on the fact that the kit allowed the completion of either short- or long-barreled rifles. *See id.* at 509-19. Justice Scalia, in a concurring opinion, agreed that the rule of lenity applied, but believed that the ambiguity arose only from the fact that the "firearm" had not been completely assembled, and therefore was arguably not "made" as required by the statute. *See id.* at 519-23 (Scalia, J., concurring). As between these two positions, Scalia had the better one.

295. *See id.* at 525 (Stevens, J., dissenting). Recently, Justice Stevens did succeed in obtaining a majority of Justices to construe a firearm regulation statute broadly. In *Bryan v. United States*, 118 S. Ct. 1939 (1998), the Court refused to apply the rule of lenity to the Firearm Owners' Protection Act, which makes it illegal to deal in firearms without a license. *See* 18 U.S.C. § 922(a)(1)(A) (1998). Section 924(a)(1)(D) imposes criminal penalties against those who "willfully violate[] . . . this chapter." *Id.* § 922(a)(1)(D). Bryan argued unsuccessfully that "willfully" should be

In contrast to its being generally unsympathetic to arguments of statutory vagueness, the Court has been more generous in applying lenity to cases in which the statute is ambiguous. Thus, in *Granderson*,[296] the Court interpreted the ambiguous term "original sentence" narrowly in connection with a statute governing the revocation of probation.[297] The mens rea requirement for "willful violation" of a statute, making it illegal to circumvent the cash transaction reporting requirements, was construed narrowly to require knowledge of the illegality of the activity.[298] Similarly, the mens rea requirement for "knowingly" violating the food stamp statutes was construed as requiring knowledge of the law.[299]

Professor Jeffries has suggested that the rule of lenity be replaced by a principle that courts should interpret statutes to maximize the rule of law.[300] As both Marshall and Story recognized almost two hundred years ago, however, rule of law problems will recur whether or not we maintain the rule of lenity. The very way we conceptualize makes it inevitable that we always will have to cope with borderline cases. Marshall's solution was for courts to give words their "ordinary meaning," which, in psychological terms, instructs courts not to stray too far from the prototype in holding criminal defendants liable for violations of law. The Supreme Court has a long history of looking at con-

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construed to mean that the defendant knew that he needed a federal license. *See Bryan*, 118 S. Ct. at 1946. The Court, in an opinion by Justice Stevens, disagreed, requiring only that the defendant knew his conduct was illegal. *See id.* at 1947. Justice Scalia, joined by Justices Rehnquist and Ginsburg, dissented, arguing that the rule of lenity should apply. *See id.* at 1949-52 (Scalia, J., dissenting). Scalia, citing *Ratzlaf v. United States*, 510 U.S. 135, 141 (1994), took the position that statutes with the same syntax as this one have been construed to require more than a general knowledge of illegality. *See Bryan*, 118 S. Ct. at 1951 (Scalia, J., dissenting). Scalia endorsed an intermediate position in which the government would not have to prove that the defendant knew of a federal license requirement, but would have to prove that the defendant knew generally that one needs to be licensed to deal in firearms. *See id.* at 1951-52 (Scalia, J., dissenting).

296. United States v. Granderson, 511 U.S. 39 (1994); *see supra* notes 253-67 and accompanying text.

297. *See Granderson*, 511 U.S. at 45.

298. *See* Ratzlaf v. United States, 510 U.S. 135, 148-49 (1994).

299. *See* Liparota v. United States, 471 U.S. 419 (1985), discussed *supra* text accompanying notes 17-27.

300. *See* Jeffries, *supra* note 4, at 219-23.

cepts in this light, and still does so, although not consistently.[301] In this regard, Justice Scalia's advocacy of the "ordinary language" canon has been very constructive in furthering a psychologically realistic approach to the thorny problem of the scope of vague statutory concepts.[302]

For the same reasons, one should not infer from these interpretive difficulties that the rule of lenity is useless or dead.[303] If our courts today purported to apply the naked lenity of common law times,[304] such an argument would have considerably more force. Undoubtedly, courts do not choose the narrowest interpretation of statutory concepts. In the contemporary world of interpretation, however, courts apply lenity only after serious investigation into legislative intent, prior court decisions, the structure of the statute as a whole, its legislative history, and other contextual information. It is entirely possible to use lenity as a guide, but to conclude that Congress did not intend the narrowest interpretation of each statutory word. Marshall understood this point, which has even more relevance in today's interpretive culture than it did when he wrote.

Some level of discretion is a necessary part of statutory interpretation. Typically, conservative courts will exercise their discretion to construe concepts in criminal statutes broadly, while more liberal courts will be more generous to defendants. As human beings, we make rules that include vague concepts and ambiguous syntax. We need judges to decide what to do when this

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301. *See supra* text accompanying notes 91-112 (discussing *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892), *McBoyle v. United States*, 283 U.S. 25 (1931), and *Smith v. United States*, 508 U.S. 223 (1993)). The Court recently applied this method in *Bailey v. United States*, 516 U.S. 137 (1995), the Supreme Court's sequel to *Smith*. In *Bailey*, the Court placed limits on the breadth of what it means to use a firearm in a drug trafficking crime. *See id.* at 150-51.

302. *See, e.g.*, Green v. Bock Laundry Mach. Co., 490 U.S. 504, 527 (1989) (Scalia, J., concurring); Smith v. United States, 508 U.S. 223, 241 (1993) (Scalia, J., dissenting); *see also* SCALIA, *supra* note 111, at 23-25 (discussing his dissent in *Smith* by stating that "when you ask someone, 'Do you use a cane?' you are not inquiring whether he has hung his grandfather's antique cane as a decoration in the hallway").

303. The uneven application of the rule of lenity in cases involving the scope of legally significant concepts is a point made by its critics. *See* Jeffries, *supra* note 4, at 198-201; Kahan, *supra* note 4, at 346.

304. See *supra* notes 123-34 and accompanying text for a discussion of the strong rule of lenity applied in seventeenth century England.

happens. There is nothing that we can do to change that fact, which is a consequence of our own biology.

IV. MUST CRIMINAL STATUTES BE INTERPRETED NARROWLY?

Because the narrow approach to lenity limits its role in the interpretation of statutes, we might ask whether it should be eliminated altogether. This section argues that lenity plays an important role in the way we interpret criminal statutes and it therefore should not be eliminated.

Fortunately for those who wish to study the matter, there is a sizable body of data as to what happens when a jurisdiction eliminates lenity in favor of a principle of fair statutory construction. Largely in the late nineteenth century and prior to the interpretive shift discussed earlier in this Article,[305] the legislatures of many states replaced the rule of strict construction with the principle that courts should follow the legislative will.[306] We now have had approximately a century of experience with these rules. A look at their application over time in two large states—New York and California—shows that even states that have rejected lenity use it anyway when the court has no other basis for deciding what to do. This follows from the combination of the deeply embedded values that lenity embodies and the frailties in our cognitive competence discussed earlier in this Article. Sometimes, we should admit, we really cannot tell with any confidence what to do. When this happens, courts resort to lenity even in jurisdictions that eliminated the doctrine legislatively more than one hundred years ago.

Moreover, it should not go unnoticed that the Supreme Court, despite its conservative bent—first under Chief Justice Burger and more recently under Chief Justice Rehnquist—continues to adhere to lenity. No justice, even in such a conservative court, has advocated its elimination. We should ask why. In particular, we should ask what it is that is so deeply rooted in the judicial

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305. *See supra* notes 179-96 and accompanying text.

306. *See, e.g.*, ARIZ. REV. STAT. ANN. § 1.211 (West 1997); CAL. PENAL CODE § 4 (West 1988); KY. REV. STAT. ANN. § 446.080 (Michie 1997); N.Y. PENAL LAW § 5.00 (McKinney 1998).

culture that for two hundred years even the most conservative judges have found a place for lenity in criminal cases.

This section first addresses the experience of states that have eliminated lenity by statute. It then discusses a recent proposal by Professor Kahan that the Department of Justice issue authoritative rulings on the interpretation of statutes in advance of prosecution, reserving lenity only as a "stick" to punish the Department when it has not done its interpretive job in time.[307] It concludes with a review of the status of lenity's underlying rationales: due process and separation of powers.

A. Failed Efforts to Eliminate Lenity

Beginning in the late nineteenth century, a number of states eliminated lenity by statute.[308] In New York, for example, the Penal Code contains the following provision, which has been part of New York law since 1881:

> The general rule that a penal statute is to be strictly construed does not apply to this chapter, but the provisions herein must be construed according to the fair import of their terms to promote justice and effect the objects of the law.[309]

If the arguments presented thus far are correct, this change to the code is not likely to make much difference. That is, if (1) the values of fair notice and legislative primacy are deeply embedded in our system; (2) language is by its nature vague and ambiguous at times; (3) context is sometimes, but only sometimes, able to remediate vagueness and ambiguity; and (4) lenity is applied only in cases in which the legislative purpose with respect to a series of events is not clear after investigation; we should expect that (5) lenity is a virtual necessity.

A review of the experience in New York suggests that this is so. In case after case, the courts continue to construe criminal statutes narrowly when context does not make it clear that the legislature intended disputed conduct to fit within the scope of

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307. *See* Kahan, *supra* note 12, at 488-89, 507-11.

308. *See, e.g.*, CAL. PENAL CODE § 4 (West 1989); N.Y. PENAL LAW § 5.00 (McKinney 1998).

309. N.Y. PENAL LAW § 5.00 (McKinney 1998). The statute was first enacted as section 11 of the Penal Code of 1881, and was first proposed in 1864 as part of the Field Code. For a discussion, see Hall, *supra* note 4, at 753 n.25.

the statute. This was the case when Professor Hall observed it disapprovingly some sixty years ago,[310] and it is still true today. For example, in *People v. Phyfe*,[311] an 1893 case decided shortly after the legislature enacted the interpretive rule, the New York Court of Appeals made it clear that defendants were still entitled to fair notice.[312] "The citizen is entitled to an unequivocal warning before conduct on his part, which is not *malum in se*, can be made the occasion of a deprivation of his liberty or property."[313] Seventy-seven years later, the courts were still saying the same thing. In *People v. Sansanese*,[314] the New York Court of Appeals held that a false driver's license should not be deemed an "instrument" for purpose of a statute prohibiting the filing or recording of forged instruments.[315] The Court reasoned: "While on the one hand we must not be overly technical in interpreting penal provisions, on the other hand 'Penal responsibility . . . cannot be extended beyond the fair scope of the statutory mandate.'"[316]

Moreover, New York courts read the statute to require them to look outside the words of the statute, to "the policy considerations underlying the statute and the ultimate results sought by the Legislature."[317] Using this approach, the courts have found, notwithstanding section 5.00 of the Penal Law, that "it is impossible to obtain a conviction under an ambiguous statute unless the defendant is clearly guilty under all reasonable interpretations of that statute."[318]

When Courts apply the statute, they often use it to reject unnaturally narrow readings of statutes whose applicability is rela-

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310. *See* Hall, *supra* note 4, at 755 n.39.
311. 32 N.E. 978 (N.Y. 1893).
312. *See id.* at 979.
313. *Id.*
314. 217 N.E.2d 660 (N.Y. 1966).
315. *See id.* at 662.
316. *Id.* (citing People v. Wood, 167 N.E.2d 736, 738 (N.Y. 1960)).
317. People v. Santiago, 506 N.Y.S.2d 136, 138 (N.Y. Sup. Ct. 1986).
318. People v. Familo, 516 N.Y.S.2d 416, 419 (Oswego City Ct. 1987); *see also* People v. Scott, 258 N.E.2d 206, 210 (N.Y. 1970) (ignoring Penal Law § 5.00 in favor of the principle that "[a] penal enactment must not only be strictly construed, especially where, as here, the act is a *malum prohibitum* and not a *malum in se*, but it must be reasonable and pellucid as well" (citation omitted)).

tively transparent in the case under dispute. Thus, despite a long history with a Penal Code that rejects lenity, New York courts continue to impose lenity when they have nothing better to say about how a statute should be interpreted. This may not occur often, but it does occur periodically, as it has for decades.

California, which abolished strict construction of its criminal code in 1871,[319] has seen a similar response from the courts. While Professor Hall listed California as among the enlightened states whose courts abided by its liberal construction statute,[320] the actual record is mixed. Thus, in 1890, the Supreme Court of California noted in the course of ruling against the state on a criminal appeal:

> While it is true the rule of the common law that penal statutes are to be strictly construed has been abrogated by the Code . . . it is also true that the defendant is entitled to the benefit of every reasonable doubt, whether it arises out of a question of fact, or as to the true interpretation of words, or the construction of language used in a statute . . . .[321]

Decades later, in 1932, a California appellate court held that a court-appointed receiver's embezzlement of an estate was not a violation of a statute prohibiting the embezzlement of public monies, notwithstanding the receiver's status as an officer of the court.[322] The court explained:

> Where the language employed is ambiguous or doubtful in its intent, a construction of the statute should always be favorable, rather than unfavorable, to any person accused of a vio-

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319. *See* CAL. PENAL CODE § 4 (West 1988). The statute reads:

> § 4. Construction
>
> CONSTRUCTION OF THE PENAL CODE. The rule of the common law, that penal statutes are to be strictly construed, has no application to this Code. All its provisions are to be construed according to the fair import of their terms, with a view to effect its objects and to promote justice.

Id. For a discussion of the contemporaneous enactment of the Civil Code, and the jurisprudential ramifications of the codification of interpretation, see Blatt, *supra* note 193, at 819.

320. *See* Hall, *supra* note 4, at 756 n.41.

321. *In re* Rosenheim, 23 P. 372, 373 (Cal. 1890).

322. *See* People v. Showalter, 14 P.2d 1034 (Cal. Dist. Ct. App. 1932).

> lation of the law. In other words, although the common-law rule that penal statutes be strictly construed has no application to the provisions contained in the Penal Code, nevertheless a criminal statute should be construed according to the fair import of its terms.[323]

This language is double-talk. The court was trying, unsuccessfully, to reconcile its common law handling of this case with the dictates of a statute that demanded the contrary.

Probably the most famous case in which the California courts have refused to construe a criminal statute liberally is *Keeler v. Superior Court*,[324] in which the Supreme Court of California decided a fetus is not a "human being" for purposes of construing California's homicide statute.[325] Keeler, who had discovered that his estranged wife was pregnant, kicked her in the abdomen during a confrontation, cracking the fetus's skull.[326] Justice Mosk, who wrote the majority opinion, resorted to lenity. He noted that throughout California history, "human being" has meant a human being born alive for purposes of the statute:

> It is the policy of this state to construe a penal statute as favorably to the defendant as its language and the circumstances of its application may reasonably permit; just as in the case of a question of fact, the defendant is entitled to the benefit of every reasonable doubt as to the true interpretation of words or the construction of language used in a statute.[327]

After quoting Marshall's warning in *Wiltberger* that courts should not expand criminal statutes to criminalize all instances of the evil with which the legislature had concerned itself, Mosk concluded:

> Whether to thus extend liability for murder in California is a determination solely within the province of the Legislature.

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323. *Id.* at 1035.
324. 470 P.2d 617 (Cal. 1970).
325. *See id.* at 623.
326. *See id.*
327. *Id.* at 624.

> For a court to simply declare, by judicial fiat, that the time has now come to prosecute under section 187 one who kills an unborn but viable fetus would indeed be to rewrite the statute under the guise of construing it.[328]

Thus, Mosk not only presented the rule of lenity as a basis for the court's decision, but he resorted to its underlying separation of powers rationale, Marshall and all. Professor Jeffries agrees with the holding in *Keeler*, but would reach the result by a different route. He argues that the holding in *Keeler* is attractive not because it promotes strict construction, but because it furthers the rule of law as a value.[329] The two may not be separable, however. Notice and legislative primacy are important values to us precisely because they promote the rule of law. For this reason, Professor Jeffries's suggestion that lenity can be replaced by canons that call for decisions consistent with rule of law values may not fully solve these interpretive issues. The bottom line is that courts sometimes do not know what to do when asked to interpret a statute. Lenity best promotes deeply held values when that situation arises.

This is not to say that California courts *never* give criminal cases the liberal construction that the Penal Code requires. In recent years, California's Supreme Court has been a conservative one. It has not been afraid to interpret criminal statutes liberally, and has even challenged the boundaries of the linguistic wall.[330] A broader survey of the California judiciary, however, shows that in other cases courts analyze the facts in terms of the narrow rule of lenity. In some of these cases, the court rejects the narrowest possible interpretation after engaging in the

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328. *Id.* at 625-26.

329. *See* Jeffries, *supra* note 4, at 226-33.

330. *See, e.g.*, People v. Cruz, 919 P.2d 731 (Cal. 1996). The court interpreted "inhabited dwelling house" to include boats for purposes of a sentence enhancement statute in order to further legislative intent. *Id.* at 733. The burglary statute in effect at that time listed boats, but the statute in question did not. *See id.* at 734-35. The case resembles *Wiltberger* in many respects, but with the opposite result.

analysis.[331] In other cases, courts apply lenity to resolve the case in favor of the defendant.[332]

In neither New York nor California have the courts been willing to give up lenity, especially when it is applied narrowly. The courts continue to feel that a tie-breaker is needed despite legislative action seemingly to the contrary. As discussed below, our concept of the rule of law combines with limits in our linguistic competence to make the rationales that underlie lenity robust to the point of being virtually indestructible.

B. Should the Chevron *Doctrine Trump Lenity?*

The rule of lenity traditionally has been given priority over the principle that courts are to defer to administrative agencies in construing statutes.[333] If it were otherwise, it would be up to the jailer—not the judge—to determine how long the prisoner was to remain incarcerated, a proposition that the courts have been unwilling to accept. For example, in *United States v. McGoff*,[334] Judge Starr wrote for the court of appeals that criminal defendants are "far outside *Chevron* territory," and refused to defer to the interpretation by the Justice Department of the Foreign Agents Registration Act of 1938.[335]

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331. *See* People v. Phelps, 48 Cal. Rptr. 2d 855, 858 (Cal. Ct. App. 1996) (acknowledging narrow version of lenity as California policy, but holding it inapplicable because restitution statute in issue was clear); People v. Ramon A., 47 Cal. Rptr. 2d 59, 62 (Cal. Ct. App. 1995) (analyzing case under narrow rule of lenity, then holding that statute was clear enough; rejecting argument of youth who stole a car and allowed a passenger carrying a gun to ride with him that he was not guilty of permitting firearm into car because he did not know whether gun was loaded).

332. *See, e.g.*, People v. Rosalio S., 41 Cal. Rptr. 2d 534, 537-38 (Cal. Ct. App. 1995) (holding that statute that made reference to the length of a knife's blade should be construed to require measurement of only the sharpened portion of the instrument); People v. Bartlett, 276 Cal. Rptr. 460, 465 (Cal. Ct. App. 1990) (holding that defendant convicted of "selling or transporting cocaine" should not have probation revoked, where revocation statute applies to those convicted of "selling" controlled substance). This is a prototypical case of lenity applied to an ambiguous statute.

333. *See, e.g.*, United States v. Mersky, 361 U.S. 431, 440 (1960).

334. 831 F.2d 1071 (D.C. Cir. 1987).

335. *Id.* at 1077; *see also* Note, *Increased Judicial Scrutiny for the Administrative Crime*, 77 CORNELL L. REV. 612, 645-46 (1992) (arguing that deference to *Chevron* is not appropriate when recognition of congressional trust in agency expertise is inapplicable).

In a provocative article, Professor Kahan suggests that the rule of law would be well-served if the Department of Justice were to promulgate authoritative interpretations of the criminal code to which courts had to defer.[336] Although this proposal inevitably would lead to the sacrifice of very important values, much of what Kahan says is compelling. Most importantly, it raises the issue of institutional choice.[337]

Kahan's principal argument is that many criminal statutes are so broad and vague that they necessarily require that their interpreter give them meaning.[338] When Congress legislates, it implicitly delegates lawmaking authority. Kahan suggests that important values would be better served if the Department of Justice were the delegatee of this power, rather than the courts.[339] First, he argues that the Justice Department has more experience than the courts with issues of crime and punishment.[340] Second, the Justice Department is more unified than the courts, and therefore more able to create a coherent jurisprudence of criminal law.[341] Finally, under the current system, aggressive U.S. Attorneys, who often have their own agendas, pull the courts in all directions.[342] Interpretations promulgated by the Department of Justice are likely to be more tempered and judicious.[343]

How is all of this to work? Courts will have to defer to Justice Department interpretations of statutes that are promulgated in advance of prosecution.[344] Lenity would be reserved as "a stick" to punish the Department of Justice with a narrow interpretation of a statute if it has not been quick enough at the draw to promulgate a broad one before a prosecution.[345] Presumably, as

336. *See* Kahan, *supra* note 12, at 469.
337. For an interesting essay arguing that we routinely should evaluate our choice of institutions in allocating responsibility, see Neil K. Komesar, *Exploring the Darkness: Law, Economics, and Institutional Choice*, 1997 WIS. L. REV. 465.
338. *See* Kahan, *supra* note 12, at 469-70.
339. *See id.* at 469.
340. *See id.* at 495.
341. *See id.* at 495-96.
342. *See id.* at 496-98.
343. *See id.*
344. *See id.* 496-500.
345. *See id.* at 507-11.

such lapses are corrected, courts will construe criminal statutes with more and more breadth.[346]

Kahan bases his proposal on some questionable factual assumptions. For example, contrary to Kahan's assertions, there is little reason to believe that the Justice Department is that much more expert at interpreting criminal statutes than are the courts. As Kahan points out, federal courts handle some 45,000 criminal cases annually.[347] That should be enough experience for anyone. One of the principal arguments of *Chevron*, that agencies entrusted with carrying out policy are in the best position to interpret statutes that govern their activities,[348] is far less compelling here. Second, Kahan may be correct in asserting that rules emanating from the Department of Justice are likely to be more tempered than some of the hyperaggressive positions taken by U.S. Attorneys bent on increasing their own visibility in their communities.[349] U.S. Attorneys, however, do not have the final say in the outcomes of their cases. The courts do, and the United States Attorneys do not always win.[350]

Finally, Kahan is correct in pointing out that a single interpretation promulgated by the Department of Justice would create a more coherent jurisprudence than one in which the circuits are at war with each other. This is his most compelling argument, but it does come at some cost—the elimination of stare decisis in criminal law. Consider the turmoil that would have

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346. *See id.*

347. *See id.* at 486 (citing BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, 1994 SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 433 tbl. 5.6 (1995)). Since Kahan completed research for his article, the number has increased. During the period ending June 30, 1997, just under 50,000 cases were commenced in the district courts. *See* ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, STATISTICAL TABLES FOR THE FEDERAL JUDICIARY 42 tbl. D (1997).

348. *See* Chevron U.S.A. Inc. v. Natural Resources Def. Council, Inc., 467 U.S. 837, 844-45 (1984).

349. *See* Kahan, *supra* note 12, at 496-97.

350. To support his claim about U.S. Attorneys, Kahan relies heavily on the abuses of Rudolph Giuliani as U.S. Attorney for the Southern District of New York. *See id.* at 487. Giuliani, however, is not principally criticized for prompting the Second Circuit to interpret the federal criminal code broadly. Rather, Giuliani is criticized for prosecuting individuals without adequate proof after ruining their reputations in dramatic press conferences. *See* DANIEL FISCHEL, PAYBACK: THE CONSPIRACY TO DESTROY MICHAEL MILKEN AND HIS FINANCIAL REVOLUTION 60-68 (1995).

ensued if President Reagan's Attorney General, Edwin Meese, had been in charge of interpreting criminal statutes in the 1980s, to be followed by Janet Reno in the 1990s on behalf of the Clinton administration. Thus, Kahan's system trades increased coherence at any particular time for greater incoherence over time. It likewise places great value on uniformity, and no value on benefits that may accrue from being able to evaluate retrospectively the different positions taken by different federal courts in order to forge coherent policy over time.

While these criticisms suggest that we should proceed cautiously with Kahan's proposal, none of them argues strongly against it. There are, however, more fundamental problems with the suggestion that the criminal law be *Chevronized*. First, the Constitution's dictate that Article III judges be appointed for life[351] increases the likelihood they will be willing to make unpopular decisions. In contrast, the Department of Justice official who interprets a statute too narrowly to enhance the political prospects of the administration's party can be fired. Recent studies show that people blame the courts for being too soft on crime.[352] A president might not be as willing to see members of the administration similarly blamed. Most complex societies value an independent judiciary. When it comes to matters of crime and punishment, a society should think hard before it decides to relinquish its judicial function to the prosecutors.

Second, Kahan's proposal has a strange irony, which comes from assuming lenity to be a mechanical rule, like naked lenity, instead of a default rule that comes into play only after careful study does not yield a result to the contrary. Consider once

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351. *See* U.S. CONST. art. III, § 1.

352. *See* Laura B. Myers, *Bringing the Offender to Heel*, *in* AMERICANS VIEW CRIME AND JUSTICE 46, 46 (Timothy J. Flanagan & Dennis R. Longmire eds., 1996). A substantial majority (67%), for example, believes that it is a problem that courts do not reduce crime. *See also* JONATHAN P. CAULKINS ET AL., MANDATORY MINIMUM DRUG SENTENCES: THROWING AWAY THE KEY OR THE TAXPAYERS' MONEY? xxv (1997) (citing a RAND Drug Policy Research Center study suggesting that legislative reaction to polls favoring elongated sentences is not an efficient way to deal with drug crimes); ELLIOTT CURRIE, CRIME AND PUNISHMENT IN AMERICA 4-11 (1998) (stating public opinion, which maintains the justice system is too soft on criminals, is misguided, and that "harsher" treatment is not the solution).

again *United States v. Granderson*,[353] the case in which the Supreme Court held that a defendant who violated probation by testing positive for drugs should be sentenced to one-third the maximum prison sentence he could have received had he not been placed on probation (i.e., one-third of six months)—not one-third of the term he was to serve on probation (i.e, one third of sixty months).[354] The government argued that the latter interpretation of the relevant statute was appropriate.[355]

Let us assume that this case were to arise in the *Chevron* regime that Kahan envisions, and that the Justice Department had not promulgated any reading of the statute at the time of the case. The result presumably would be the same as the result in the real *Granderson* case: the Court would apply lenity and accept the defendant's interpretation of the statute. Significantly, the lenity that the Court applied in *Granderson* was the narrow rule of lenity. The Court applied the rule only after it was convinced that it could not ascertain congressional intent to the contrary.

Now let us assume that the Justice Department had promulgated its interpretation prior to Granderson's prosecution. The result would change. The courts would be obliged to defer to the prosecutor, regardless of what the legislature actually intended. The *Granderson* court applied lenity only after doing its best to ascertain congressional intent. Even Scalia's concurrence shared that goal, although Scalia disagreed with the majority about the nature of the evidence that the Court should feel free to consider.

Contrast this with a case in which lenity was rejected. *O'Hagan*[356] is a good example. In that case, the Supreme Court accepted the government's broad interpretation of insider trading, based on close analysis of both the statutory language and the history of interpretation of the securities laws.[357] Assume once again that the *Chevron* regime is in place, and that the

353. 511 U.S. 39 (1994), discussed *supra* notes 253-67 and accompanying text.
354. *See id.* at 55.
355. *See id.* at 45.
356. O'Hagan v. United States, 117 S. Ct. 2199 (1997), discussed *supra* notes 270-76 and accompanying text.
357. *See id.* at 2205-14.

Department of Justice has failed to speak on the issue. Presumably, lenity then should apply as a "stick" to punish the Department of Justice for not having promulgated a rule to cover that case in advance.

These results trivialize the decisionmaking process. As Section I showed, the beauty of broad categories is that they allow us to generalize a single decision to a multitude of situations. Their cost is that it is not always easy to determine whether a particular event falls within them. The solution to this endemic conceptual problem should not be reward and punishment of the bureaucracy for the speed with which it acts. A court's engagement in thoughtful analysis should not occur only when the Department of Justice fails to promulgate a broad rule that does not take congressional intent into account, and may, in fact, intentionally thwart it. Were the only currently available approaches to the interpretation of statutes the aggressive positions of the most vigilant U.S. Attorney on the one hand, or naked lenity on the other, Kahan's proposal would have some force. No argument exists, though, for abandoning thoughtful decisionmaking in favor of a regime in which the prosecutor wins whenever the executive branch beats the courts to the punch.

Finally, the same conceptual difficulties that plague statutes today will, as a matter of biological necessity, plague Justice Department interpretations of them. That is why we need lenity in the first place. Interpretive problems result not only from the occasional congressional drafting error, but far more frequently from the way that the human mind works. There always will be a next case, and someone will have to decide whether that next case falls within a Justice Department interpretation, or is a candidate for lenity.

While the current system is laden with problems, the combination of narrow, context-oriented lenity, the "ordinary meaning" canon, and the linguistic wall roughly approximate prototype analysis of statutory concepts. Together, they act as a brake on the impulse to interpret every statutory word to its outer boundary. However imperfectly this system works (and it works very imperfectly), it helps to maintain at least some nexus between the legislative process on the one hand and the outcomes of

criminal cases on the other. Requiring deference to the most aggressive interpretation that the words of a statute can tolerate decontextualizes interpretation. We should reject Kahan's proposal for the same reason that our courts rejected naked lenity two hundred years ago.[358]

C. Lenity's Values

1. Notice

Lenity's rationales are still very much in our consciousness, and account for our steadfast adherence to the principle despite the protests of state legislatures and legal scholars. Notice to defendants is, of course, largely fictional. Notwithstanding Marshall's concern, we can be quite sure that Wiltberger did not read the statute books to determine the absence of federal jurisdiction before committing manslaughter on a merchant marine ship docked in a river in China. The courts, however, continue to take seriously the notion that criminal statutes must give fair notice, even if nobody reads them. Holmes explained the reason for this in *McBoyle*:

> Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.[359]

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358. This is not to say that the *Chevron* doctrine should play no role in the interpretation of criminal statutes. Criminal statutes often make reference to knowing violations of regulations. When a defendant challenges the validity of those regulations, courts will measure their legality under the *Chevron* doctrine. In fact, this is just what happened in *O'Hagan*. One issue in that case was the legitimacy of the SEC's adoption of Rule 14e-3(a) pursuant to section 14(e) of the Securities Exchange Act. In rejecting the defendant's argument, the Court held:

> 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." In this case, we conclude, the Commission's assessment is none of these.

O'Hagan, 117 S. Ct. at 2217-18 (quoting Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984)).

359. McBoyle v. United States, 283 U.S. 25, 27 (1931).

As Justice Harlan elaborated some decades later:

> The policy thus expressed is based primarily on a notion of fair play: in a civilized state the least that can be expected of government is that it express its rules in language all can reasonably be expected to understand. Moreover, this requirement of clear expression is essential in a practical sense to confine the discretion of prosecuting authorities, particularly important under a statute . . . which imposes criminal penalties with a minimal, if any, *scienter* requirement.[360]

Harlan's restatement puts the notice rationale in perspective. The issue is not whether defendants read the statute books; for the most part, they do not.[361] The system of criminal justice, however, is not concerned only with notice to the defendant, but also with notice to all those empowered to punish people on behalf of the government, especially prosecutors and judges. The notion of limited government based on the rule of law crucially depends on there actually being law. The principle that criminal statutes should be comprehensible to those against whom the government inflicts violent punishment reaffirms the rule of law each time punishment is meted out.

In part because of the indeterminacies of language and in part because we are simply not able to predict all situations that we might wish to come within the scope of a rule, legislatures always will be only partly successful in drafting rules of general application. The notice rationale behind the rule of lenity tells us to accept in ourselves this frailty, and to let the defendant go

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360. United States v. Standard Oil Co., 384 U.S. 224, 236 (1966) (Harlan, J., dissenting). In *Standard Oil*, the majority held that the spillage of oil constituted the discharge of "refuse matter" under the Rivers and Harbors Act of 1899. *See id.* at 229-30. Justice Harlan dissented. Nonetheless, he agreed that notice was not a serious issue in that case: "[I]t is difficult to justify a narrow reading of § 13 on this basis [i.e., lack of notice]. The spilling of oil of any type into rivers is not something one would be likely to do whether or not it is legally proscribed by a federal statute." *Id.* at 235 (Harlan, J., dissenting).

361. Criminal violations of regulatory statutes are a separate matter. For example, we do hold corporate polluters responsible for knowing the Clean Water Act, and therefore will allow prosecution for knowing violations of that act based solely on a defendant's knowledge that it is emitting certain pollutants into the environment. *See* Filippi, *supra* note 8, at 924-28.

free when we are uncertain about the law's applicability for the sake of being more confident that we are doing the right thing when we do exercise the force of law. It is for this reason that our courts continue to adhere to the notice rationale, even knowing that the citizenry rarely receives whatever notice is actually given. What the notice says, and who says it, are more important than who is listening. Thus, while Kahan may be correct in asserting that the notice rationale *can* frequently (but perhaps not always) be collapsed into the separation of powers rationale in lenity cases,[362] it is not clear that it *should* be.

By the same token, these observations weaken Justice Scalia's argument that resort to legislative history in criminal cases is inconsistent with the notice rationale.[363] Scalia is willing to engage in the following fictions: defendants have read the criminal code; defendants have read all controlling court decisions interpreting the code; defendants have read all other provisions of the code that use the same words as the provision in dispute; defendants have read relevant regulations and dictionaries; and defendants have studied the canons of construction. It is hard to see, even on Scalia's own terms, why reading the Congressional Record would be any more of a burden on his idealized defendant.[364] This Article's perspective, in contrast, is that we need not engage in these fictions at all. What we really should care about is that enough process has occurred, consistent with the linguistic wall[365] and the context in which the statute was enacted, to justify a claim that a defendant is being held to a publicly articulated standard of conduct.

The Supreme Court recently reaffirmed its commitment to the notice rationale. In *United States v. Lanier*,[366] Justice Souter, writing for a unanimous Court, reinstated a conviction under

362. *See* Kahan, *supra* note 4, at 349-56.

363. *See* United States v. R.L.C., 503 U.S. 291, 307-11 (Scalia, J., concurring in the judgment); *see also supra* notes 244-52 and accompanying text.

364. Professor Jeffries makes a similar point. *See* Jeffries, *supra* note 4, at 205-12.

365. By "the linguistic wall," I mean the principle that criminal statutes should not be construed beyond the meanings of their words, even if it would make sense to do so because similar conduct to that proscribed is just as bad. *See supra* text accompanying notes 119-21.

366. 117 S. Ct. 1219 (1997).

section 242 of the criminal code, which makes it a crime for a person acting under color of law to "depriv[e]" another "of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States."[367] While serving as a state judge in Tennessee, Lanier had sexually assaulted five women in his chambers, including a woman whose daughter's custody remained subject to his jurisdiction.[368] The Sixth Circuit had reversed the conviction, holding that for section 242 to apply, fair warning required that the deprivation of rights that are the subject of the crime must have been recognized by the Supreme Court itself in a case with facts "fundamentally similar" to the one being prosecuted.[369]

Finding this standard too stringent, the Supreme Court reversed, holding that "criminal liability under § 242 . . . may be imposed for deprivation of a constitutional right if, but only if, 'in the light of pre-existing law the unlawfulness [under the Constitution is] apparent.'"[370] To meet this standard, the government may rely on decisions of the circuit courts as well as those of the Supreme Court.[371]

While the Court reasonably settled for a somewhat reduced set of criteria for there to be fair warning, it emphatically reaffirmed its commitment to the notion itself, associating the rule of lenity with the constitutionally mandated void for vagueness doctrine and the due process clause. The Court cited both *Wiltberger* and *McBoyle*, and noted the relationship between fair notice and legislative primacy.[372] The underlying reasoning of

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367. The statute reads in relevant part:

§ 242. Deprivation of rights under color of law

> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, . . . shall be fined under this title or imprisoned not more than one year, or both . . . .

18 U.S.C. § 242 (1994).

368. *See Lanier*, 117 S. Ct. at 1222-23.

369. *United States v. Lanier*, 73 F.3d 1380, 1393 (6th Cir. 1996).

370. *Lanier*, 117 S. Ct. at 1228 (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)).

371. *See id.* at 1224-28.

372. *See id.* at 1224-25.

this case seems sound, and comports with the vision of notice discussed above.

The more compelling cases for attacking the legitimacy of the notice rationale are those in which the defendant obviously knows his conduct to be illegal, but the statute is ambiguous. Statutes that confer federal jurisdiction over otherwise criminal activity, such as the mail fraud statute,[373] the statute proscribing interstate transportation of "falsely made securities,"[374] and RICO,[375] are among the obvious examples. Courts are likely to interpret these statutes broadly.[376]

For example, in *Moskal v. United States*,[377] the question was whether a defendant's commerce in genuinely issued automobile titles containing false information constituted transportation across state lines of "falsely made securities."[378] At the time the operative statute was enacted in 1939,[379] "falsely made" was a synonym for counterfeit. Indeed, the statute proscribes not only trafficking in falsely made securities, but also in counterfeit and forged ones, and in the tools for making them.[380] Anyone reading the statute for the first time today, however, unless that reader has special knowledge, would think that one meaning of "falsely made" is something like "made with false information." Thus, Moskal was on notice that the statute proscribed his conduct, but the notice was of something that the legislature in all likelihood never intended to be part of the crime.

This was good enough for the majority. Looking at the legislative history, the Court found this construction consistent with the statute's broad purpose in an opinion by Justice Thurgood Marshall: "Congress enacted the relevant clause of § 2314 in order to 'com[e] to the aid of the states in detecting and punish-

373. 18 U.S.C. § 1341 (1994).
374. *Id.* § 2314 (1994).
375. *See id.* § 1961-1968 (1994).
376. *See* Kahan, *supra* note 4, at 372-81; *see also* Schmuck v. United States, 489 U.S. 705 (1989) (interpreting mail fraud statute); Moskal v. United States, 498 U.S. 103 (1990) (interpreting statute proscribing transportation of falsely made securities); United States v. Turkette, 452 U.S. 576 (1981) (interpreting RICO).
377. 498 U.S. 103 (1990).
378. *See id.* at 105.
379. 18 U.S.C. § 2314 (1994).
380. *See Moskal*, 498 U.S. at 107 n.1.

ing criminals whose offenses are complete under state law, but who utilize the channels of interstate commerce to make a successful getaway and thus make the state's detecting and punitive processes impotent.'"[381]

Moskal is completely at odds with *McBoyle*. In both cases, the language of the statute at the time of interpretation was most easily read to support a conviction under the statute, providing more than adequate notice. In both cases, the purposes underlying the statute would best be served by so applying the statute. And in both cases, the enacting legislature had no inkling that the statute would be so applied. The difference between the two cases was that Holmes applied the broader rule of lenity of the earlier era in *McBoyle*, while Justice Thurgood Marshall applied the narrower, Frankfurter version in *Moskal*. As for Holmes's prototype analysis, a defender of *Moskal* simply could argue that Holmes analyzed the statute appropriately, but chose the wrong interpretive community. He should have been looking at the statute as of the time of the alleged violation.[382]

In contrast, Scalia's dissent in *Moskal* sounds much more like the John Marshall who wrote *Wiltberger* than the Thurgood Marshall who wrote the majority opinion in *Moskal*. Resorting to a host of dictionaries, early court decisions, and related statutory provisions, Scalia demonstrated convincingly that the enacting Congress almost certainly had in mind a statute that criminalized the transportation of forged documents. Scalia, therefore, would have applied the rule of lenity, but the rule of lenity that he would have applied was not the one that most members of the Court have adopted. As in his concurrence in *R.L.C.*, Scalia would have used the broader, textualist version of lenity.

Scalia probably had the better of the argument even on the majority's terms. Nonetheless, the majority decision in *Moskal* is

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381. *Id.* at 110 (footnote omitted) (quoting United States v. Sheridan, 329 U.S. 379 (1946).

382. In other words, Holmes did not interpret the statute dynamically. *See generally* ESKRIDGE, *supra* note 108 (discussing dynamic interpretation); Lessig, *supra* note 108 (same). For an insightful discussion of how the notion of interpretive community plays a role quite generally in statutory interpretation, see William S. Blatt, Interpretive Communities in Statutory Interpretation (1997) (unpublished manuscript, on file at the University of Miami).

defensible. The decision is consistent with the broad purposes of the statute, and does not violate the linguistic wall.[383] Thus, cases such as *Moskal* should not lead us to doubt the vitality of lenity in statutory interpretation. That conclusion would come only from misunderstanding lenity to be a rule far more rigid than it has been for many decades. Professor Jeffries's excellent article, despite its valuable insights, makes this error. He argues: "The notion that every statutory ambiguity should be resolved against the government, no matter what the merits of the case, seems to me simplistic and wrong."[384] Jeffries may be right, but he has not properly characterized the rule that the courts actually apply.

The Supreme Court's broad interpretations of RICO present another apparent challenge to the vitality of lenity. RICO is an unusual statute for two reasons. First, it has its own built-in directive that it should be interpreted liberally.[385] Second, RICO criminalizes, under certain circumstances, activities that are otherwise crimes in any event, including some violent crimes.[386] Thus, neither the notice nor legislative primacy rationales should lead to strict construction of RICO, except in cases in which broad interpretation would take a court too far from the underlying purposes of the Act. This may explain why the Court has construed one RICO term after another broadly,[387] while narrowly interpreting efforts by civil litigants to ex-

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383. In contrast, see *supra* note 119 for a discussion of *Schmuck v. United States*, 489 U.S. 705 (1989). The Court's reading of the mail fraud statute is so aggressive in *Schmuck* that it probably violated the linguistic wall by requiring defendants to obey provisions that the statute's language does not include whatsoever, under any reasonable reading. I agree with Justice Scalia's dissent:

> The purpose of the mail fraud statute is "to prevent the post office from being used to carry [fraudulent schemes] into effect." The law does not establish a general federal remedy against fraudulent conduct, with use of the mails as the jurisdictional hook, but reaches only "those limited instances in which the use of the mails is *a part of the execution of the fraud*, leaving all other cases to be dealt with by appropriate state law." In other words, it is mail fraud, not mail and fraud, that incurs liability.

Id. at 722-23 (Scalia, J., dissenting) (citations omitted).

384. Jeffries, *supra* note 4, at 219.

385. *See* 18 U.S.C. § 1961 (1994).

386. *See id.*

387. *See* H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 237 (1989) (construing "pattern of racketeering activity" broadly in a civil case); Sedima,

pand the class of RICO defendants to people only tangentially involved in businesses in which the racketeering activities have occurred.[388] However badly RICO was drafted, it provides adequate notice to anyone engaged in its predicate acts of fraud and violence that there is potential criminal liability. An accountant who omitted crucial information from a shortened version of a financial report presented at a shareholders meeting has far less notice.[389]

2. Legislative Primacy

The notion of legislative primacy is also deeply embedded in our entire jurisprudence of statutory interpretation.[390] No one on the Court advocates, as a general rule, the application of statutes in a manner at odds with the wishes of the enacting legislature. As we have seen, questions of legislative primacy most often arise when the issue in a case is the fit between a nonprototypical instance of a proscribed category and the category itself. The question becomes whether the legislature would have wanted courts to apply the statute in such unusual circumstances, even if the circumstances do fall within the outer boundaries of the statutory language.[391]

What about cases in which the legislature no doubt intended conduct to fall within a statute, but did not say so? *Wiltberger* is an example. If, in fact, research into legislative history and other matters revealed that Congress really intended to take jurisdiction over manslaughter cases on American vessels docked in

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S.P.R.L. v. Imrex Co., 473 U.S. 479, 481 (1985) (interpreting civil liability provisions of section 1964 broadly to favor plaintiffs in order to effectuate remedial purpose of the statute); Russello v. United States, 464 U.S. 16, 20-29 (1983) (construing "interest" broadly for purposes of RICO's criminal forfeiture provision); United States v. Turkette, 452 U.S. 576 (1981) (interpreting "enterprise" broadly to include non-legitimate businesses).

388. *See* Reves v. Ernst & Young, 507 U.S. 170, 183, 186 (1993) (holding that an accounting firm that had committed securities fraud was not liable under RICO provision that penalized those who participated in the conduct of an enterprise because it did not participate in the day-to-day affairs of the entity).

389. *See id.* at 174-75.

390. For a discussion and review of the literature, see Maltz, *supra* note 90.

391. *See, e.g.*, Church of the Holy Trinity v. United States, 143 U.S. 457 (1892); *supra* notes 93-98, 179-81, and accompanying text.

foreign rivers, the motivation to interpret the statute to include Wiltberger's conduct would be greater. Jurisdictional cases, like *Wiltberger* and *Moskal*, are weak candidates for application of the rule of lenity, especially a strong version of that rule, because the federal statute merely grants a forum in which otherwise culpable behavior can be tried. Defendants have more than adequate notice that the conduct in question is criminal. The only issue is whether Congress has decided that the federal courts shall be the place in which the case may occur. If Congress appears to have so decided based on the historical record, and has said so in the statute—although not in words that are unequivocable—it is difficult to argue that the sort of fair play that troubled Justice Harlan should be an issue.[392] This is not to say that *Wiltberger* should be overruled. The linguistic wall still stands; but it does mean that we are likely to be more tolerant of linguistic uncertainty when the defendant is independently on notice of the criminal nature of his activity and both the language of the statute and the legislative history support a broader reading.

Professor Kahan takes the position that fidelity to the rationale of legislative primacy requires that courts acknowledge at the outset that the legislature intended the two branches to work in harmony to promulgate a criminal law that is largely legislative, but interstitially judicial.[393] No doubt he is correct. Moreover, inquiry into what the legislature would have intended in a novel case routinely leads to different conclusions. Anyone who reads the majority and dissenting opinions in *Moskal* or *R.L.C.* cannot avoid this conclusion.

This means that contextually-laden inquiry into legislative purpose, combined with a narrow rule of lenity, does not fully determine the outcome of every case. We still need judges, and

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392. The record in *Moskal* does not make the decision so easy. On the one hand, the legislative history indicates that Congress was attempting to assert federal jurisdiction over crimes involving interstate commerce, which particular states may not wish to prosecute. *See* Moskal v. United States, 498 U.S. 103, 110-11 (1990). On the other hand, it is relatively clear, as Justice Scalia points out in dissent, that Congress really thought that it was dealing with counterfeit securities, and not with the sort of fraud that Moskal had committed. *See id.* at 123-26 (Scalia, J., dissenting).

393. *See* Kahan, *supra* note 12, at 470.

those judges will not always reach consensus. Constrained only in part, they will have to exercise their judgment and do the best they can to create a coherent and rational jurisprudence.

A moment of frustration occurs when a judge, having to decide whether to apply a linguistically unclear statute, must shrug her shoulders and recognize that even after careful study she cannot tell what the legislature would have done if it had addressed the matter, and that the rule of law will not be compromised regardless of the holding in the particular case. That is "lenity time." Given the ways in which our concepts fail to match crisply the events that occur in the world, the situation will arise periodically. It may not happen often, but it will occur. Even if one attempts to replace lenity with other principles, such as Professor Jeffries's well-motivated set of rules to the effect that statutes should be interpreted to enhance the rule of law,[394] the need for lenity will return. We cannot get rid of it, even when we try.

CONCLUSION

This Article began with a discussion of linguistic and conceptual issues that appear to drive problems of statutory interpretation. Chief Justice Marshall characterized these problems, which continue to arise today, by and large in the ways that he described. Our two hundred year history of grappling with the same interpretive issues should be seen in light of aspects of our biological endowment. Thus, there is no escaping them.

A combination of deeply held values and the frailties of the human condition ultimately motivate lenity. This explains both why state legislatures have not been able to get rid of it, and why efforts by academics to advocate its demise fall on deaf judicial ears. A great deal of this Article focused on showing how these problems led both to a change in interpretive culture in the beginning of this century, and to a change in the way that criminal statutes are analyzed. Knowledge of this history, along with sensitivity to the cognitive issues that necessitate our thinking seriously about interpretation of statutes in the first

394. *See* Jeffries, *supra* note 4, at 212-19, 222-23.

place, make it possible to evaluate the current state of interpretive doctrine more fully and subtly.

These issues, taken together, do not present coherent doctrine, but they do show how recurrent conceptual and linguistic issues shape legal argument. The interpretation of criminal statutes requires that we acknowledge both linguistic ambiguity and difficulties in conceptualization, and that we then apply complex analysis of context to try to resolve these difficulties. It is, therefore, unrealistic to expect to find a set of procedures that will lead to consistent interpretation. Who the judges are, and how they look at events in the world, will always matter. We can try to set a framework, however, to structure disputes so that disagreements focus on the issues upon which disagreement exists. In that way, even when we do not like the result of a particular case, we can at least say that the Court gave serious consideration to the significant issues. By and large, our long history of respecting the linguistic wall, and the narrow version of lenity routinely used today, combine to accomplish this limited goal.