HOW TO CONSTRUE A HYBRID STATUTE

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INTRODUCTION

MANY statutes create what appears to be a single substantive duty enforceable through both civil and criminal litigation. By way of example, such a "hybrid" statute might be structured as follows: imagine that Section One requires or prohibits certain conduct, Section Two creates a private cause of action for damages caused by violations of Section One, and Section Three makes willful or knowing violation of Section One a crime.

These "hybrid statutes," which include such well-known statutes as the Sherman Act[1] and the Racketeer Influenced and Corrupt Organizations Act ("RICO"),[2] are commonplace, but they raise some intractable interpretive questions. To the extent that Section One is ambiguous, the use of standard rules of construction may create problems for interpreters. If the ambiguity first comes to light in a criminal or other "penal" proceeding, the court might apply the rule of lenity and give Section One a narrow construction. But if the ambiguity first came to light in a "remedial" civil proceeding, the mere existence of ambiguity would not dictate a particular outcome, and a court might not narrowly construe the ambiguous Section One as it would in a penal proceeding. Instead, the court might invoke the canon of broad remedial construction to justify a broad construction, or might rely on some other canon or presumption to reach either outcome. The ambiguous Section One need not receive a narrow construction as it would in a penal pro-

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[1] 15 U.S.C. §§ 1–37a (2000). The Sherman Act creates standards of conduct and imposes criminal liability for their violation in §§ 1–3 and creates a civil cause of action for their violation in § 15.

[2] 18 U.S.C. §§ 1961–68 (2000). RICO creates substantive duties in § 1962, criminal liability in § 1963, and a civil cause of action in § 1964.

ceeding. This raises a problem of "path dependence": the same language in Section One could receive a different construction depending on whether the first case construing it was remedial or penal.

Path-dependence problems multiply when a subsequent court uses the first interpretation as precedent. Does a lenity-inspired narrow construction bind a subsequent court construing the statute remedially? If not, Section One could acquire separate criminal and civil meanings, despite the fact that the legislature, in creating criminal and civil liability by reference to a single standard of conduct, likely intended only one meaning. Conversely, if the narrow construction is binding precedent, its extension to the civil context might frustrate legislative intent about the scope of the statute's operation.

Similar problems arise if a court first interprets the statute in a civil case and adopts a broad construction to further the statute's remedial purposes. If this broad construction is not binding precedent for subsequent criminal cases, dual construction is again likely and, arguably, again problematic. Alternatively, if the broadening civil precedent binds later courts construing the statute criminally, the rule of lenity will not have its ordinary effect, and judicial construction will have created criminal liability. This criminalization-by-remedial-construction, which has elsewhere been denominated "statutory inflation,"[3] raises uncomfortable questions about the law's commitment to the principle of legality: the notion that criminal conduct should be legislatively defined with the greatest possible specificity.

Such problems regularly arise in the construction of both federal and state hybrid statutes. Specifically, path dependence arises

[3] Lawrence M. Solan, Statutory Inflation and Institutional Choice, 44 Wm. & Mary L. Rev. 2209, 2213 (2003). Professor Solan describes four ways in which a statute with civil and criminal applications could be construed. The "inflationary model" refers to broad civil and criminal constructions, often arising when the broad criminal constructions draw on the rationales of earlier civil cases. Id. at 2237–51. The "lenity model" refers to narrow civil and criminal construction. Id. at 2251–55. The "law enforcement model" means broad criminal and narrow civil construction, id. at 2255–60, and the "standard model" means, in theory, broad civil and narrow criminal construction, id. at 2218–37, though Professor Solan argues that the standard model in practice often becomes the inflationary model. Id. at 2238. This terminology is used at various points throughout.

when courts rely on the traditional canons of construction (including lenity) and follow the ordinary rules of stare decisis. The combination of two interpretive rules makes this possible: first, lenity traditionally applies only to penal applications of a statute, and second, authoritative civil or remedial constructions of a hybrid statute can preclude a finding of statutory ambiguity in a subsequent criminal case.[4] Thus, courts rendering broad civil constructions of hybrid statutes can be seen as engaging in crime definition: a civil construction of an ambiguous statute gives prosecutors a charging option that might have been precluded by lenity had the criminal construction been sought first. The interaction between these interpretive rules is a fundamental feature of the interpretation of hybrid statutes, and any normative discussion of how they should be interpreted must take account of it. If path dependence is to be avoided, the potential solutions require modifying the applicability of the relevant interpretive rules. Though some potential modifications are discussed below, this Note will contend that the best alternative is to interpret hybrid statutes using the same set of interpretive rules in criminal and civil cases and, when necessary, to discard the rule of lenity when interpreting some elements of some hybrid statutes, even in criminal cases. Before explaining why this is the best response to path dependence, though, it helps to explain the potential alternatives.

Since the path-dependence problem arises from the fact that lenity traditionally applies only in penal contexts, one possible response is to expand the rules governing lenity's applicability by applying it to a hybrid statute even in a civil context, an approach that the Supreme Court first authorized more than a decade ago[5] and recently endorsed again.[6] But this has the potential to cramp the

[4] See United States v. Nippon Paper Indus. Co., 109 F.3d 1, 8 (1st Cir. 1997) (citing Hartford Fire Ins. Co. v California, 509 U.S. 764, 796 (1993)) (concluding that since "the Supreme Court deems it 'well established' that Section One of the Sherman Act applies to wholly foreign conduct, [the First Circuit] effectively [was] foreclosed from trying to tease an ambiguity out of Section One relative to its extraterritorial application," and thus concluding that "the rule of lenity [played] no part in the instant case") (citations omitted).

[5] Crandon v. United States, 494 U.S. 152, 158 (1990); see also United States v. Thompson/Center Arms Co., 504 U.S. 505, 517–18, 518–19 n.10 (1992).

[6] Clark v. Martinez, 543 U.S. 371, 380–81 (2005); Leocal v. Aschcroft, 543 U.S. 1, 11–12 n.8 (2004).

broad regulatory schemes that many hybrid statutes create, thereby frustrating legislative intent regarding the scope of the statute. Moreover, since many hybrid statutes are predominantly enforced civilly,[7] there is a risk of the criminal "tail" wagging the civil "dog." Civil application of lenity would, however, solve the path-dependence problem: if the rules of construction do not differ between remedial and penal contexts, the statute's interpretation will not depend on the interpretive context in which an issue of first impression arises.

On the other side, abandoning or scaling back the rule of lenity in interpreting hybrid statutes is also potentially troublesome. While this would also prevent path dependence, it might help create flawed substantive criminal law insofar as lenity aids the transparency of, and legislative accountability for, crime policy. A further cost of this approach is that lenity may help mitigate the severity of overly broad and overly punitive substantive law, and abandoning it might eliminate a valuable check on those tendencies.[8]

Dual construction of the statutory language—giving the same provision one interpretation in civil cases and another in criminal cases—is another possible solution to path dependence, but this too is unsatisfactory. The use of identical language in related statutes gives rise to a presumption that the language should be construed consistently. References in multiple liability-creating sections of a single statute to one substantive standard of conduct only strengthens this presumption.[9] The putative advantages of dual

[7] See, for example, infra note 138 for a brief discussion of the predominantly civil application of hybrid provisions of the Bankruptcy Code; see also Solan, supra note 3, at 2227–30 (discussing the relative paucity of copyright infringement prosecutions in comparison to civil infringement litigation).

[8] See, e.g., Zachary Price, The Rule of Lenity as a Rule of Structure, 72 Fordham L. Rev. 885, 912–21 (2004) (stating that a strong rule of lenity enhances the transparency of criminal law and accountability of the legislature's crime policy); Stephen F. Smith, Proportionality and Federalization, 91 Va. L. Rev. 879, 891–93 (2005) (arguing that lenity is under-applied, contributing to a federal criminal law that imposes punishments disproportionate to moral blameworthiness).

[9] See, e.g., Ratzlaf v. United States, 510 U.S. 135, 143 (1994) (mandating a strong presumption for consistently construing a single formulation used in multiple statutory provisions); Sullivan v. Stroop, 496 U.S. 478, 484 (1990) (applying a rule of consistent usage, in which identical words within the same statute are presumptively construed consistently).

construction are not sufficient to overcome those presumptions. Indeed, this Note will argue that the mere difference in interpretive context should not be sufficient to overcome the presumption against dual construction.

With these general concepts in mind, a menu of unpalatable interpretive options emerges:

> (1) Apply lenity only to criminal/penal applications of hybrid statutes and thereby either create path dependence (if precedent rendered in one context applies in the other) or violate the consistent usage canons (if it does not);
>
> (2) Apply lenity to all applications of hybrid statutes, thereby resolving path dependence but possibly frustrating legitimate regulation; or
>
> (3) Abandon lenity altogether.

It is not obvious which option is the best, or that there is one generic best option for all statutes.

Academic commentary provides little guidance in choosing among these options and is divided on whether dual or path-dependent construction of hybrid statutes is tolerable or even normatively desirable. Some commentators have advocated intentional dual construction of particular statutes, usually premised on policies or rationales specific to one statute or area of law.[10] On one

[10] For instance, Professor Bryan Camp argues that courts should construe RICO narrowly in private-party civil actions but broadly in criminal and government-initiated civil actions. Bryan T. Camp, Dual Construction of RICO: The Road Not Taken in *Reves*, 51 Wash. & Lee L. Rev. 61, 62, 95–96 (1994). This is problematic insofar as it would make statutory meaning in civil RICO cases turn on the identity of the parties before the court, which violates fundamental rule of law values, namely the idea that the law should not be a "respecter of persons." A statute, of course, can explicitly provide different rules of decision for government and private party civil cases, and some do, see, e.g., 15 U.S.C. § 78u-4 (2000) (establishing heightened procedural and pleading requirements for private-party securities fraud suits), but courts should not infer such a distinction lightly, and the civil RICO statute's text contains no hint that the government should get the benefit of § 1964's ambiguities when others do not. Compare with Trevor W. Morrison, Private Attorneys General and the First Amendment, 103 Mich. L. Rev. 589, 646 (2005) ("I argue simply that the constitutionality of a statute's substance should not depend on the identity of the party enforcing it."). Similarly, Professor Bruce Markell argues that courts should construe terms of art common to both civil and criminal bankruptcy provisions more narrowly

side, Professor Lawrence Solan has argued that courts should not always resist statutory inflation, the quintessential form of path dependence,[11] a topic to which this Note will return. On the other side, Professor Margaret Sachs has argued that the civil and criminal portions of hybrid statutes should be interpreted consistently, focusing primarily on the area of securities law. She contends that unitary construction of federal securities law will produce better outcomes, will be more consistent with the enacting Congress's expectations, and will be more consistent with Supreme Court precedent than dual construction.[12]

Professor Sachs offers a sound result, but it is justified by different and more broadly applicable reasons, namely that this interpretive default rule better reflects "legislative intent"[13] than any of the

in the criminal context because the civil and criminal bankruptcy statutes are not sufficiently related to be in *pari materia*. Bruce A. Markell, Bankruptcy, Lenity, and the Statutory Interpretation of Cognate Civil and Criminal Statutes, 69 Ind. L.J. 335, 336–37 (1994). This is unpersuasive, insofar as criminal bankruptcy exists to protect the procedural integrity of civil bankruptcy.

[11] Solan, supra note 3, at 2260–63. Professor Solan views some forms of statutory inflation as the law's natural response to changing attitudes and enforcement priorities, appropriate when norms announced or validated in civil litigation are internalized by society. Prosecution for violating them is obviously contrary to the enacting legislature's intent, but better conforms with the social norms of the day. Id.

[12] Margaret V. Sachs, Harmonizing Civil and Criminal Enforcement of Federal Regulatory Statutes: The Case of the Securities Exchange Act of 1934, 2001 U. Ill. L. Rev. 1025, 1030 ("Hybrid statutes present the question whether the same statutory prohibition should be construed differently in different enforcement contexts. The Supreme Court has often insisted that the answer is no but has not said why."); see also id. at 1031-33.

[13] The scare quotes are intentional. Whether "legislative intent" is a vacuous concept is one of the most profound questions in statutory interpretation, and one from which this Note keeps a respectful distance. The analysis here proceeds on the assumption that—at least on occasion—legislators can meaningfully be said to have specific "intent" regarding the content of a legal rule beyond merely passing a statute containing particular language. The goal of a faithful interpreter, then, should be to discern the existence and content of that specific intent. Compare Caleb Nelson, What is Textualism?, 91 Va. L. Rev. 347, 416–18 (2005) (arguing that even judges who deny that subjective "legislative intent" is meaningful or an appropriate interpretive goal frequently behave as if it is both), with John F. Manning, Textualism and Legislative Intent, 91 Va. L. Rev. 419, 450 (2005) (arguing that legislative intent in the classical sense is not meaningful or an appropriate interpretive goal). See generally Larry Alexander & Saikrishna Prakash, "Is That English You're Speaking?" Why Intention Free Interpretation is an Impossibility, 41 San Diego L. Rev. 967, 968–72 (2004); Lawrence M. Solan, Private Language, Public Laws: The Central Role of Legislative Intent in Statutory Interpretation, 93 Geo. L.J. 427, 444–49 (2005). The conclusions

alternatives. But while courts should presumptively favor unitary construction of hybrid statutes, it is not necessary for them to take the same approach to the rule of lenity in each statutory context that they confront. To the contrary, this Note argues that the menu of options above is not exhaustive, and a more attractive option is available: courts can and should construe the portions of hybrid statutes common to civil and criminal applications consistently but not always as narrowly as lenity would require. At the same time, ambiguous language found only in the criminal portion of a hybrid statute should be construed as narrowly as it ordinarily would.

Part I of this Note will introduce terminology for classifying interpretive canons, including a discussion of lenity's proper classification.

Part II will examine case law from various substantive areas of the law in order to elaborate on the interpretive problems described. Specifically, it will demonstrate how the "standard" interpretive regime can result in path-dependent construction of hybrid statutes. This Part will also address the relative merits of Supreme Court precedent authorizing the use of lenity in civil applications of hybrid statutes and ultimately will conclude that this approach is problematic.

Part III will develop an interpretive theory for hybrid statutes that minimizes the risk of path dependence, while also avoiding the pitfalls of both dual construction and universal application of civil and criminal rules of construction. This Part will first develop the theoretical basis for a hierarchy among three conflicting interpretive canons that are applicable every time a hybrid statute must be construed. Specifically, other interpretive rules, including lenity and broad remedial construction, should give way to one overarching rule: consistent and evenhanded construction of the civil and criminal portions of hybrid statutes. Such a presumption can be justified both descriptively and normatively, as it facilitates legislative expression of "intent" and encourages coherence in the law. Part III will then address the role of mens rea in interpreting hybrid statutes and will conclude that courts should construe mens rea

drawn herein can be embraced even by those who believe that "legislative intent" is irrelevant, unknowable, or fictitious. Regardless, I will use the language of "legislative intent" as useful shorthand throughout.

terms and other elements unique to criminal portions of hybrid statutes as they would with ordinary criminal statutes: by applying the rule of lenity. This Part will then conclude by using hypotheticals to recommend that the Supreme Court abrogate the requirement that courts apply the rule of lenity to any ambiguity in a statute with criminal applications, provided that the ambiguity arises in a statute that will primarily be enforced civilly. By applying the theory advanced in this Note, the Court can maintain statutory coherence and avoid the problems inherent in dual construction.

I. DESCRIPTIVE VS. NORMATIVE CANONS OF STATUTORY CONSTRUCTION AND THE RULE OF LENITY

A point of terminology will clarify the later discussion of lenity and consistent usage. Interpretive canons of statutory construction can appropriately be categorized as descriptive or normative.[14] A descriptive canon is a rule-like generalization about legislative intent. Such canons provide useful guidance about legislative drafting and language conventions. A descriptive canon is defensible to the extent that it implements legislative preferences, not about the outcomes of individual cases, but about the content or meaning of the legal rule in question. In contrast, interpretive rules that do not implement "legislative intent" to some degree are termed normative canons of construction. They derive their legitimacy from serving some goal other than legislative intent, frequently one with constitutional overtones. Normative canons need not actively frustrate legislative intent, though they might. Many canons could have both descriptive and normative justifications.

From this classification, an important rule emerges: descriptive canons should be (and typically are) applied before normative ones, and they should confine the application of normative canons.[15] Only if descriptive canons do not persuasively resolve an interpretive question should an interpreter resort to normative canons, and even then he should use normative canons only to choose

[14] Stephen F. Ross, Where Have You Gone, Karl Llewellyn? Should Congress Turn Its Lonely Eyes To You?, 45 Vand. L. Rev. 561, 563 (1992).

[15] See Nelson, supra note 13, at 376 ("When confronting a statute, all mainstream interpreters start with the linguistic conventions (as to syntax, vocabulary, and other aspects of usage) that were prevalent at the time of enactment.").

an interpretation from among the range of options that cannot be ruled out by application of descriptive canons. In other words, descriptive canons supply a boundary of indeterminacy outside of which normative canons should not operate. The traditional goal of statutory interpretation, implementing legislative intent, requires as much.[16] This is because descriptive canons by definition are probative of legislative intent, and normative canons by definition are not. Therefore, an interpreter seeking to implement legislative intent must follow whatever guidance the former offers before paying heed to the latter.

Because this Note discusses lenity extensively, a few words about its function and legitimacy are in order. Stated simply, the rule of lenity requires that courts narrowly construe penal statutes by resolving ambiguities in favor of defendants. The rule's lengthy historical pedigree is well documented elsewhere.[17]

More controversial is whether the rule has any continuing vitality and which of its many justifications, if any, are persuasive. One traditional justification for the rule, that it serves to provide fair notice to citizenry of what conduct is criminal, is clearly flawed. Generally, citizens know what actions are criminal because they are socialized to know, not because they read statute books.[18] The one situation in which citizens may actually read statutes and case law is in seeking to avoid liability for regulatory crimes, many of which are created by hybrid statutes. Accordingly, some commen-

[16] Even interpreters who do not view their goal as divining legislative intent seem to follow suit in applying the most clearly descriptive canons first in the interpretive process. Regardless of whether legislative intent is a meaningful concept, and regardless of what the proper goals of statutory interpretation are, it is relatively uncontroversial that some canons are applied before others. For example, no interpreter, regardless of whether he viewed the appropriate goal of interpretation as discerning the legislature's intent or discerning the "objective" meaning of a statute, would rely on presumptions like those against preemption or altering the balance of federal-state relations when grammar rules persuasively resolve an issue. In other words, it is generally true that the more a canon is grounded in ordinary principles of grammar and English usage, the earlier it is applied in the interpretive process. Some canons simply have more probative force than others—regardless of whether an interpreter considers them "more probative" of the meaning of language an ordinary reader or listener would discern, or the meaning a speaker of language would ordinarily intend. See id.

[17] See, e.g., Price, supra note 8, at 896–99.

[18] See id. at 886 ("[C]riminals do not read statutes, and . . . even if they did it would not be clear that the legal system should reward their efforts to skirt the law's borders.").

tators have persuasively contended that the notice justification for lenity is even weaker in this context.[19]

A second traditional justification, that lenity is required by the principle of legislative supremacy in criminal law, is also flawed. Seminal lenity cases like *United States v. Wiltberger*[20] and *United States v. Bass*[21] invoke a principle of legality, that only the legislature can define crimes. Despite this principle's deep roots in Anglo-American law, it is evidently not a principle widely shared by legislators. Legislatures have overturned several high-profile lenity-based statutory interpretations,[22] and state legislatures almost universally have attempted to abrogate lenity by statutory rules of construction.[23] There is no particular reason to think that legislatures want courts to resolve criminal statute ambiguities in favor of defendants, nor is there any reason to think that legislatures do not intend to delegate criminal lawmaking power to the courts. If anything, lenity frustrates legislative intent more often than not. In sum, it is difficult to label lenity as a descriptive canon. The best justifications for lenity are frankly normative, and so lenity is better classified as a normative canon: first, it is a non-delegation doctrine of sorts, and second, it ensures a tolerable direction of interpretive error.

As to the first justification, lenity forces legislatures to specify the content of criminal law with some degree of specificity and prevents excessive delegation of criminal lawmaking power to the judiciary.[24] The principle of legality instructs that this is a good

[19] Id. at 906–09.

[20] 18 U.S. (5 Wheat.) 76, 95 (1820).

[21] 404 U.S. 336, 348 (1971).

[22] Two salient examples of this are Congress's overruling of *McNally v. United States*, which had rejected mail fraud by deprivation of honest services on a lenity theory, 483 U.S. 350, 359–60 (1987), and of *Ratzlaf v. United States*, which employed a lenity theory to require knowledge of a currency-structuring requirement for the crime predicated on its violation. 510 U.S. 135, 146–49 (1994). The congressional repeals of *McNally* and *Ratzlaf* are discussed in Price, supra note 8, at 916 n.197.

[23] State interpretive codes attempting to abrogate or modify lenity are collected in Price, supra note 8, at 902–03 & nn.111–18 and the associated text.

[24] See Price, supra note 8, at 911 ("The effect [of lenity] is to require legislatures to define crimes in specific rather than general terms. . . . [P]oliticians must lay bare the full extent of the conduct they intend to criminalize, exposing themselves to whatever resistance or ridicule their choices entail; they cannot use vague or general language to obscure the law's reach."); see also Dan M. Kahan, Lenity and Federal Common

thing, notwithstanding that some scholars have embraced a greater role for judicial lawmaking in the criminal law.[25] As noted above, legislatures on some occasions intend to delegate criminal lawmaking power to the judiciary, so the legality principle's justifications must be normative, not descriptive.

As to the second justification, lenity might actually increase the number of interpretive errors relative to a regime where an interpreter did not cease his inquiry upon finding a certain level of ambiguity, but instead continued the task of interpretation in an evenhanded fashion. This phenomenon is evidenced by congressional abrogation of cases like *McNally v. United States* and *Ratzlaf v. United States*, compared to a dearth of cases where a legislature narrowed a broadly construed criminal statute. But in contrast to such an evenhanded regime, lenity ensures that interpretive errors favor individual liberty. Skewing statutory construction toward under- rather than overcriminalization helps ensure that no defendant is convicted for behavior that the legislature did not intend to criminalize, even if some escape liability for behavior that was intended to be criminal. This may in turn reduce the overall cost of interpretive errors: they may be more frequent but less costly, since the law considers an erroneous overcriminalization more harmful than a mistaken undercriminalization.[26] In any event, so long as courts apply the lenity canon only in cases of genuine interpretive uncertainty, it has passable normative justifications.

However, these normative justifications only prove that lenity is an acceptable interpretive rule, not one required by the Constitution. It should be emphasized that lenity is a rule of statutory interpretation, not a means of smuggling constitutional law in through the back door to save an otherwise unambiguously unconstitu-

Law Crimes, 1994 Sup. Ct. Rev. 345, 347 (1995) ("[T]he rule of lenity . . . is best understood as a 'nondelegation doctrine' in criminal law.").

[25] E.g., Kahan, supra note 24, at 396–428 (arguing for the abolition of lenity and for the development of a theory of federal common law crimes).

[26] See William N. Eskridge, Jr. & John Ferejohn, Structuring Lawmaking to Reduce Cognitive Bias: A Critical View, 87 Cornell L. Rev. 616, 643 (2002) ("The rule of lenity, which requires a statutory clear statement before courts will apply criminal laws to an accused, can best be justified as reducing the risks of terrible error.") (emphasis omitted). See generally Alexander Volokh, *n* Guilty Men, 146 U. Pa. L. Rev. 173 (1997) (chronicling the tradeoff between dubious acquittals and dubious convictions, and the law's preference for the former).

tional statute or to avoid a difficult constitutional question. Lenity is not an interpretive rule explicitly required by the text of the Constitution; nowhere does that document provide that all ambiguities in penal statues shall be resolved in favor of the accused. Although it would offend the Constitution's guarantees of due process to construe ambiguities in penal statutes against the accused, evenhanded construction—that is, resolving ambiguities without recourse to a presumption in favor of either the accused or the government—would likely pass constitutional muster.[27] In short, while due process notice requires a certain degree of clarity in criminal statutes, it does not require the degree required to satisfy lenity.

Further, given that lenity only legitimately operates after descriptive canons delineate a range of meanings, an unambiguous penal statute that violates the Constitution should be declared unconstitutional as applied. To instead use a doctrine like lenity to confine the statute to constitutional applications would be disingenuous, even if done in the name of judicial restraint. Nor should lenity be a de facto avoidance canon used to duck hard questions about the constitutionality of particular prosecutions by pretending that the legislature intended a higher level of mens rea than it did,[28] or did not intend to delegate as much criminal lawmaking power to the judiciary as it did.[29] There is no indication that legislatures maintain a respectful distance from the boundaries of their powers, including the power to criminalize.

In short, lenity is a normative canon that properly operates only when descriptive canons fail to clearly resolve a statute's meaning. While concepts such as "nondelegation" and "direction of error" provide coherent justifications for the rule, "notice" and actual legislative intent do not. Finally, although lenity may be normatively

[27] See Nicholas Quinn Rosenkranz, Federal Rules of Statutory Interpretation, 115 Harv. L. Rev. 2085, 2097 (2002) (noting that the Due Process Clause likely allows "a range of options regarding lenity").

[28] See, e.g., United States v. U.S. Gypsum Co., 438 U.S. 422, 435–38 (1978) (invoking lenity as a justification for requiring mens rea for antitrust crimes despite the absence of such a requirement in the statute).

[29] But see William N. Eskridge, Jr. & Philip P. Frickey, Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking, 45 Vand. L. Rev. 593, 600 (1992) (noting that "lenient interpretation of a criminal statute obviates inquiries into underlying due process concerns").

attractive in some circumstances, it is not an interpretive rule required by the Constitution and therefore may be modified or scaled back. In particular, penal statutes may be construed even-handedly without running afoul of the Constitution.

II. MUDDY WATERS AND FUZZY BOUNDARIES: PATH DEPENDENCE UNDER THE CLEAN WATER AND SHERMAN ACTS AND ONE RESPONSE

The first Section of this Part uses two representative cases, each construing an ambiguity within a hybrid statute, to illustrate the phenomenon of path dependence. The second Section discusses Supreme Court precedent authorizing the use of lenity in civil constructions of hybrid statutes and discusses why this may be problematic notwithstanding its avoidance of path dependence.

A. Path-Dependent Construction of the Clean Water Act's "Point Source" Requirement and the Sherman Act's Extraterritorial Applicability

1. The Clean Water Act

Efforts to construe the Clean Water Act ("CWA")[30] provide a useful example of the problems so far discussed. Criminal liability under the CWA turns on whether the discharge of a pollutant was from a "point source" or a "non-point source."[31] The CWA defines

[30] 33 U.S.C. §§ 1251–1387 (2000).

[31] The CWA makes it unlawful to discharge pollutants without a permit. Id. § 1311(a). But it narrows that prohibition by mandating that only point sources of pollution are governed by the CWA. Id. § 1311(e). Non-point sources are governed by other law, including the Refuse Act of 1899, Id. § 407, and states may establish their own law in the area of water quality standards pursuant to the procedures outlined elsewhere in the CWA. Id. § 1313; see, e.g., Am. Wildlands v. Browner, 260 F.3d 1192, 1197–98 (10th Cir. 2001) ("Congress has chosen not to give the EPA the authority to regulate nonpoint source pollution [under the CWA].") (citation omitted). CWA crimes are created by reference to violations of § 1311. 33 U.S.C. § 1311. Specifically, § 1319(c)(1) creates a crime for negligent violations of various sections of the CWA, including § 1311. Id. § 1319(c)(1). Section 1319(c)(2) creates the basic crime: a person who "knowingly violates" enumerated CWA sections, including § 1311, faces significant financial penalties and up to three years in prison. Id. § 1319(c)(2). Section 1319(c)(3) increases the financial penalties and raises the maximum prison sentence to fifteen years for a person who "knowingly violates [enumerated sections, including Section 1311] and who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury." Id. § 1319(c)(3). Thus, for a dis-

"point source" as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged," excluding some agricultural discharges.[32] If a person discharges a pollutant from a point source without a permit or in violation of one, her mens rea determines the degree of punishment: negligent violations, knowing violations, and violations that knowingly create imminent bodily harm for another are punishable by up to one year, three years, and fifteen years imprisonment, respectively.[33] Thus, while the *degree* of criminal liability turns on traditional criminal law facts such as the defendant's mens rea, the *existence* of criminal liability turns on a question of statutory construction far afield from moral culpability: whether it is plausible to characterize a particular source of pollution as a point source.

A well-known and controversial application of the rule of lenity in a CWA case was the United States Court of Appeals for the Second Circuit's decision in *United States v. Plaza Health Laboratories*.[34] *Plaza Health* illustrates the potential for path-dependent construction of hybrid statutes because it is a case in which the court invoked lenity in construing a substantive provision of a hybrid statute and understood lenity as a criminal law doctrine only, suggesting that the result might have been different in a civil case where different interpretive rules applied. Ultimately, however, the court's reliance on lenity was unnecessary. The essential facts are as follows. The defendant Villegas, co-owner of a blood testing facility, took vials of blood from work, some of which were infected with Hepatitis B, and dumped them into the Hudson River. A group of schoolchildren later discovered some of the vials on a field trip. Villegas was convicted on several counts, including the "knowing discharge" and "knowing endangerment" provisions of the CWA,[35] over his objection that the discharge was not from a

charge to be criminal, it must be from a "point source," but the degree of culpability for such a discharge is determined by the applicable mens rea.

[32] 33 U.S.C. § 1362(14).

[33] Id. § 1319(c)(1), (c)(2), and (c)(3), respectively.

[34] 3 F.3d 643 (2d Cir. 1993).

[35] 33 U.S.C. § 1319(c)(2) and (c)(3).

point source. The district judge rejected the argument that a human being could not be a point source.[36]

The Second Circuit reversed, invoking lenity to rule that a human being cannot be a point source within the meaning of the CWA.[37] This holding departed from prior interpretations of "point source" that broadly construed the term and extended its meaning in close cases far beyond the paradigmatic pipe or drain.[38] The holding also conflicted with the dominant theory of the meaning of "point source": controllability. On this theory, any purposeful gathering of pollutants by humans, the path and discharge of which is subject to their control, could constitute a point source.[39]

Careful analysis of the statute suggests two conclusions. First, given its relatively ambiguous statutory definition, "point source" probably could bear either meaning.[40] Second, careful application

[36] United States v. Villegas, 784 F. Supp. 6, 10–11 (E.D.N.Y. 1991); see also *Plaza Health*, 3 F.3d at 644.

[37] Id. at 649.

[38] For example, "point source" had been construed to include bulldozers and similar earthmoving equipment, United States v. Lambert, 915 F. Supp. 797, 802 n.8 (S.D. W. Va. 1996); dump trucks, United States v. Banks, 873 F. Supp. 650, 657 (S.D. Fla. 1995); runoff that would otherwise be non-point source pollution where that runoff was "collected or channeled" by the defendant, Sierra Club v. Abston Constr. Co., 620 F.2d 41, 45 (5th Cir. 1980); and the broken-off hull of a barge, United States v. West Indies Transp., 127 F.3d 299, 308–09 (3d Cir. 1997). Conversely, courts have refused to label as point sources such things as cows, Or. Natural Desert Ass'n v. Dombeck, 172 F.3d 1092, 1099 (9th Cir. 1998), or a building from which trash had fallen into a river, Hudson Riverkeeper Fund v. Harbor at Hastings Assocs., 917 F. Supp. 251, 257 (S.D.N.Y. 1996). The court in *Plaza Health* also states in memorable dicta that casual litterers or urinating swimmers are not point sources. *Plaza Health*, 3 F.3d at 647.

[39] See 2 William H. Rodgers, Jr., Environmental Law: Air and Water § 4.10, at 150 (1986) (cited in *Plaza Health*, 3 F.3d at 653 (Oakes, J., dissenting)); see also Stephanie L. Hersperger, Comment, A Point Source of Pollution Under the Clean Water Act: A Human Being Should Be Included, 5 Dick. J. Envtl. L. & Pol'y 97, 112–17 (1996) and sources cited therein.

[40] Although this author believes that the better reading of the statute is that a human being is not a point source, commentary has tended to run the other way, making colorable arguments both on interpretive and policy grounds. See, e.g., Robin L. Greenwald, What's the "Point" of the Clean Water Act Following *United States v. Plaza Health Laboratories, Inc.*?: The Second Circuit Acts as a Legislator Rather Than as a Court, 60 Brook. L. Rev. 689, 704–24 (1994); Kasturi Bagchi, Comment, Application of the Rule of Lenity: The Specter of the Midnight Dumper Returns, 8 Tul. Envtl. L.J. 265, 285–92 (1994); David E. Filippi, Note, Unleashing the Rule of Lenity: Environmental Enforcers Beware!, 26 Envtl. L. 923, 944–49 (1996); Hersperger, supra note 39, at 108–18.

of descriptive canons suggests that a slightly better reading is that a human being is not a point source. The court therefore did not need to resort to lenity. For a human being to be a point source under the CWA, he must be a "discernible, confined and discrete *conveyance* . . . from which pollutants are or may be discharged."[41] Conveyance, in turn, can bear two relevant meanings: "[a] means of transport from place to place"[42] or "[t]he action or process of conveying."[43] The former meaning suggests a physical structure, the latter a process. The government and the *Plaza Health* dissent argued that "the entire stream of Mr. Villegas's activity" (taking the pollutants from work and dumping them in the river) was a "'discrete conveyance' or point source."[44] In other words, they read "conveyance" as referring to a process.

Reading "conveyance" to encompass only physical structures is the better reading. The listed examples in Section 1362(14) are all physical structures, and the canon *ejusdem generis* thus suggests reading this limitation into the earlier "any . . . conveyance" language. Moreover, the definition's conclusion, "from which pollutants are discharged," suggests that the source of the pollutants is a structure, not a process, because it is more natural to speak of discharge *from* a structure and discharge *by* a process.[45] Reading "conveyance" to encompass only physical structures employed as a means of transport means that a human being could not be a point source, since a human being is not a "means of transport" in the conventional or paradigmatic sense. This cuts in favor of reading the statute narrowly, as statutory terms presumptively carry their ordinary meaning, and there is no reason to discern a specialized meaning here, as "conveyance" is not a term of art, nor is it defined elsewhere in the statute. Thus, because these descriptive canons persuasively resolve the ambiguity, the court's invocation of lenity was unnecessary.

[41] 33 U.S.C. § 1362(14) (2000) (emphasis added).
[42] 3 The Oxford English Dictionary 876–77 (2d ed. 1989) (definition no. 13).
[43] Id. at 876 (definition no. 1).
[44] *Plaza Health*, 3 F.3d at 653 (Oakes, J., dissenting).
[45] Compare "sulfates were discharged from the incineration" with "sulfates were discharged by the incineration" and with "sulfates were discharged from the smokestack." The latter two are more natural than the first.

Moreover, *Plaza Health* is typical of the difficulties courts face when confronted with the criminal application of an ambiguous hybrid statute on first impression. The majority suggests that it might have found Villegas's conduct to constitute point source pollution were the case civil, rejecting as inapposite dicta from civil suits that encouraged the broadest possible reading of the CWA.[46] The trend of these numerous, mostly civil and expansionary precedents suggested reading "point source" to include human beings, although no case law was precisely on point.[47] In short, *Plaza Health* plausibly but unconvincingly invoked lenity to reject the implications of otherwise valid civil precedent that—while not precisely on point—could logically have been extended to support conviction, and indeed probably would have been had the case been civil. The court avoided path-dependent statutory inflation by invoking lenity, but that invocation was strained, and the statutory inflation could have been avoided on other grounds. *Plaza Health* illustrates that lenity can occasionally do some real work in resolving criminal cases, and that lenity's presence in criminal applications of hybrid statutes can lead to path dependence.

2. The Sherman Act

a. Nippon Paper*: Statutory Inflation in Action*

The opposite phenomenon—indeed, a paradigmatic example of statutory inflation—occurred in the First Circuit's decision in *United States v. Nippon Paper Industries Co.*[48] That case confronted the issue of whether the Sherman Act's[49] prohibition on conspiracies in restraint of trade[50] applied extraterritorially in a criminal case.[51] The Supreme Court had recently ratified, in a civil case, the notion that the Sherman Act could reach anticompetitive conduct perpetrated entirely abroad but having and intended to have substantial effects in the United States.[52] This holding was, in turn,

[46] *Plaza Health*, 3 F.3d at 648–49.
[47] See cases cited supra note 38.
[48] 109 F.3d 1 (1st Cir. 1997).
[49] 15 U.S.C. §§ 1–7 (2000).
[50] Id. § 1.
[51] *Nippon Paper*, 109 F.3d at 2.
[52] Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796 (1993).

based on the Court's reading of older, widely followed circuit precedent to the same effect.[53]

The First Circuit, relying both on this precedent as well as "common sense" and "accepted canons of statutory construction,"[54] held that prosecution for extraterritorial conduct was permitted under Section One of the Sherman Act.[55] The court thought the especially strong presumption of consistent usage that attaches when "the text under consideration is not merely a duplicate appearing somewhere else in the statute, but is the original phrase in the original setting,"[56] combined with the Supreme Court's authoritative civil construction of that phrase, mandated this outcome.[57] What makes *Nippon Paper* particularly germane to this discussion is the explicit recognition that an authoritative civil construction of a hybrid statute can preclude the finding of a statutory ambiguity to which lenity could otherwise attach. *Hartford Fire*, as well as *Alcoa*, established that the antitrust laws applied to extraterritorial conduct,[58] but they were both civil cases. However, even though these cases did not directly establish the proposition that extraterritorial conduct may be criminally punished, the fact that they established that such conduct was subject to civil liability was deemed sufficient in *Nippon Paper* to extend the Sherman Act's criminal prohibitions extraterritorially as well.

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[53] Id. (citing, among other cases, United States v. Aluminum Co. of Am., 148 F.2d 416, 444 (2d Cir. 1945)).

[54] *Nippon Paper*, 109 F.3d at 4.

[55] Id. at 8.

[56] Id. at 5. The Sherman Act is the prototypical hybrid statute. Section One contains both the substantive prohibition and the criminal liability-creating provision, providing that:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony . . . .

15 U.S.C. § 1 (2000).

Civil liability is created by 15 U.S.C. § 15(a), which provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

[57] *Nippon Paper*, 109 F.3d at 5.

[58] Hartford Fire Ins. Co. v California, 509 U.S. 764, 796 (1993); *Alcoa*, 148 F.2d at 444.

Importantly, absent *Hartford Fire* and *Alcoa*, it is possible or even likely that *Nippon Paper* would have come out the other way. That is to say, absent civil precedent authorizing extraterritoriality, the face of the Sherman Act might have been considered sufficiently ambiguous that lenity would preclude such a prosecution. The statute makes no clear statement as to extraterritoriality, although the fact that the Sherman Act has long been viewed as a grant to the federal courts of a common lawmaking power[59] renders this omission less relevant than it might be in a more exhaustive statute.

The text of the Sherman Act itself provides little guidance on the question of extraterritoriality. The only relevant text, stating that contracts, combination, and conspiracies "in restraint of trade or commerce among the several States, or with foreign nations" are forbidden,[60] does not mandate an outcome either way. Anticompetitive conduct affecting international trade is clearly in the purview of the statute, but it is silent as to whether such conduct must occur within the United States to be within the statute's reach, although conduct occurring in foreign nations can restrain trade between the United States and foreign nations just as much as domestic conduct can. Moreover, actions in restraint of interstate trade are quite likely to occur in the United States, though they need not necessarily do so. This fact might (though it need not) suggest that such a territorial limitation was intended with respect to actions in restraint of foreign trade. Conversely, the difference between interstate and foreign commerce is significant, and extraterritoriality could track it. Since restraint of interstate trade is likely to occur within the United States, Congress may have had only domestic enforcement in view. In contrast, conduct in restraint of foreign trade is more likely to occur abroad, and thus it is plausible that extraterritorial enforcement was likely intended by Congress, inasmuch as it would have been foreseeably necessary to effectuate the statute.

[59] See, e.g., Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 688 (1978) ("Congress, however, did not intend the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations. . . . [I]t expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition.").

[60] 15 U.S.C. § 1.

Although these considerations deserve more in-depth treatment than is possible here, the point of the counterfactual analysis above is simply that the statute itself provides little guidance in resolving the question of extraterritoriality, and plausible textual arguments can be made in either direction. Moreover, absent the civil precedent supporting extraterritoriality, lenity would likely have precluded prosecution for extraterritorial conduct. Therefore, in authorizing the prosecution in *Nippon Paper*, the First Circuit placed decisive weight on the existence of the authorizing precedent.[61] The precedent, in other words, precluded lenity by foreclosing an "ambiguity."

With just these two data points, the possibility of path-dependent interpretation of hybrid statutes begins to emerge. In *Plaza Health*, the expansionary civil precedent had not addressed the precise question facing the criminal court[62] as it had in *Nippon Paper*.[63] Only an argument that valid civil precedent was inapplicable in the criminal context could save the defendant. The most significant difference between *Plaza Health* and *Nippon Paper*, and the most likely explanation for their different outcomes, is that civil precedent squarely on point with the prosecution's theory of the case existed in the latter but not the former case.[64] Therefore, it appears that expansive civil precedent can preclude application of lenity in a subsequent criminal case if the precedent is precisely on point with that case. If this precedent is not clearly applicable to the case at bar, however, ambiguities that otherwise might have been resolved by lenity will not be so resolved.

[61] *Nippon Paper*, 109 F.3d at 3–6.

[62] United States v. Plaza Health Labs., 3 F.3d 643, 648–49 (1993).

[63] *Nippon Paper*, 109 F.3d at 3–6.

[64] Theoretically, the differences can be reconciled on a notice theory, since, unlike in *Nippon Paper*, no court had ever specifically held Villegas's conduct illegal. *Plaza Health*, 3 F.3d at 648–49. Yet this explanation is superficial and flimsy: both defendants knew or should have known their conduct was unlawful. Judge Oakes's dissent in *Plaza Health* explains that Villegas was aware of proper methods of waste disposal. Id. at 653 (Oakes, J., dissenting). Similarly, Nippon Paper may have had access to compliance attorneys; its only defense seemed to be that its officers thought the Sherman Act inapplicable since the conduct took place solely in Japan. *Nippon Paper*, 109 F.3d at 2. Moreover, as this Note has endeavored to show, both the Clean Water Act and Sherman Act could bear the opposite interpretation from that rendered by each respective court. The prior interpretations or lack thereof were decisive.

b. The Merits of Path Dependence

Having established that path dependence occurs, the analysis proceeds to consider whether it is problematic. The meaning of a hybrid statute should not depend on the fortuity of whether an issue of first impression arises in a civil or criminal case when it could plausibly arise in either, yet that is precisely what the conventional interpretive rules permit. If a prosecutor devises a novel interpretive gloss, he must overcome the rule of lenity. If a plaintiff devises such a gloss, he need not overcome lenity, and thus is much more likely to succeed in convincing the court to adopt this gloss. Subsequent prosecutors could then draw on the success of that plaintiff, even though they probably could not have advanced the same theory themselves in a criminal case.

If one thinks of the rule of lenity as primarily justified because it ensures that citizens have notice of the content of criminal law, however, path dependence seems less problematic. On this theory, a narrow construction of an ambiguous penal statute ensures that no citizen is convicted for behavior where he did not have fair warning of its criminality. A civil gloss on a hybrid statute, however, provides "notice" that certain conduct is unlawful and renders a later narrow construction unnecessary. Thus, it is not unfair for a subsequent court to treat that gloss as foreclosing whatever ambiguity may have been present on the face of the statute, since lenity's "notice" purpose is served by the prior construction. Yet the "notice" justification for lenity is weak, as noted in Part I. If resolution of ambiguities in penal statutes in one particular direction cannot be justified by the necessity of providing notice of the content of criminal law, neither can path dependence. Permitting certain theories of prosecution only if they have been adopted civilly, on a theory that the relevant civil glosses provide "notice" of criminality that was otherwise lacking, assumes that notice was lacking before the civil gloss was rendered and was present afterwards. This theory seems flimsy if notice is to have any relation to the actual knowledge or expectations of citizens. It is just as fictitious to assume that the public reads the Federal Reporter as it is to think that it reads statutes. If lenity is to be justified, it must be on grounds other than notice, and thus, so must path dependence.

A more sophisticated defense of path dependence has been made by Professor Solan. He argues that statutory inflation (an

important form of path dependence) is not always to be resisted, but instead constitutes a natural form of legal development; statutory inflation is just the eventual criminalization of behavior whose unlawfulness has long been established civilly.[65] This sort of reasoning frankly admits that some activity that was not criminal in a given year may become criminal some years later without any change in the relevant statutory language or other formal legal sources. The changes that transform behavior from non-criminal to criminal occur not in the law per se but in social norms. Whether one is comfortable with path dependence (and statutory inflation in particular) thus depends on how dynamically one wishes to interpret statutes—that is, the extent to which statutory meaning changes (or may be construed as changing) over time without any change in formal legal texts.[66]

These questions are difficult ones, and this Note will not pretend to resolve them. Though the reasons stated above may be sufficient grounds to demonstrate the undesirability of path dependence, the issue of path dependence is a manifestation of the larger debate about whether statutes should be interpreted dynamically or statically. As such, the desirability of path dependence will not be neatly or conclusively resolved here, and the remainder of this Note will address some options for ending path dependence, should courts desire to do so. One option is the application of the rule of lenity in civil cases arising under hybrid statutes. Another is abandonment of the rule of lenity in interpreting hybrid statutes, even when confronting issues of first impression in the criminal context. Finally, courts could engage in dual construction. The next set of cases guardedly embraces the first option, the use of lenity in civil cases, but this approach is unsatisfactory.

[65] Solan, supra note 3, at 2260–61, 2276.

[66] See id. at 2260–63; see also William N. Eskridge, Jr., Dynamic Statutory Interpretation, 135 U. Pa. L. Rev. 1479 (1987) ("Statutes, however, should—like the Constitution and the common law—be interpreted 'dynamically,' that is, in light of their present societal, political, and legal context.").

B. One Option for Eliminating Path Dependence: The Virtues and Vices of Applying Lenity in Civil Cases

1. Thompson/Center*: The Application of Lenity in the Civil Context*

In *United States v. Thompson/Center Arms Co.*,[67] the Supreme Court endorsed for the first time the idea that the lenity canon could apply to a civil statute if that statute had criminal applications.[68] In this case, the statute in question was the National Firearms Act ("NFA"),[69] which provided for a $200 tax on anyone "making" a "firearm."[70] The statute defined the term "make" to include "manufacturing (other than by one qualified to engage in such business under this chapter), putting together, altering, any combination of these, or otherwise producing a firearm."[71] "Firearm" excluded pistols and long-barreled rifles, but included short-barreled rifles.[72] In addition to the $200 tax per gun, a "maker" of "firearms" who failed to comply with any of the NFA's other requirements could be subjected to a $10,000 fine and/or ten years imprisonment.[73]

Defendant Thompson/Center sold pistols (not a statutory "firearm") along with a parts kit, including a shoulder stock and a

[67] 504 U.S. 505 (1992).

[68] Id. at 518. A prior case, *Crandon v. United States*, 494 U.S. 152 (1990), was apparently the first time the Court had authorized application of lenity outside the context of criminal litigation. In that case, the United States government brought a civil action to recover severance payments to several Boeing employees who left the company for service in the federal government. Id. at 154–56. The government sought to impose a common law constructive trust on the payments, id. at 156, but alleged the employees' fiduciary breach resulted from a violation of 18 U.S.C. § 209(a), which created criminal liability for executive branch employees who received salary payment from anyone other than the government, and created coextensive criminal liability for the payer. Id. at 158. Because there was no civil statute authorizing a cause of action, the interpretive situation was not exactly identical to the prototypical hybrid statute. The case's crucial insight, though, was that lenity could apply outside the criminal context, if standards of civil and criminal liability were based on a common statute. Id. at 158, 168. In this case, the civil cause of action was premised on common law fiduciary breach as measured by a criminal statute, rather than a civil statute authorizing a cause of action for breach of a criminal statute, or a civil statute using identical language to a criminal one.

[69] 26 U.S.C. §§ 5801–72 (2000).

[70] Id. § 5821.

[71] Id. § 5845(i).

[72] Id. § 5845(a).

[73] Id. § 5871.

longer barrel.[74] If both the stock and barrel were attached, the gun became a long-barreled rifle and thus remained outside the statutory "firearm" category, but if only the shoulder stock were attached the gun became a "firearm."[75] Thompson/Center contended that it did not "make" a firearm within the meaning of the NFA by selling the pistol and conversion kit.[76] The Court agreed, concluding that "[a]fter applying the 'ordinary' rules of statutory construction" (including textual canons such as the whole act rule), the statute was still ambiguous.[77] At this point, the Court might have applied civil canons of construction, such as broad remedial construction, or the presumption that "exemptions from taxation are not to be implied; they must be unambiguously proved,"[78] to construe Thompson/Center's activity as taxable, but it did not. Instead, the court regarded as dispositive the fact that NFA crimes did not have a mens rea requirement; thus, the effect of a broad tax construction in later criminal prosecutions would not be blunted in any way.[79] That is to say, a broad tax construction would directly expand criminality with no narrowing force.[80] The Court therefore chose to apply lenity instead.[81] As to the dissent's objection that this was not a criminal case, the Court noted that lenity "is a rule of statutory construction whose purpose is to help give authoritative meaning to statutory language. It is not a rule of administration

[74] *Thompson/Center*, 504 U.S. at 508.

[75] Id.

[76] Id. at 513 n.6.

[77] Id. at 517. More specifically, the Court found that "making" a "firearm" need not be confined to the final putting-together of the gun; otherwise much of the definition of "make" would be superfluous. Id. at 514–15. Making a kit composed of parts that could *only* be used to make a short-barreled rifle, or making a gun with a kit whose parts were useless except to convert the gun to a "firearm," the Court noted, would be "otherwise producing" (and thus "making") a firearm within the meaning of the NFA. Id. at 512. Thompson/Center's gun-and-converter-kit package, however, was different because it could be used to convert a pistol into a regulated "firearm" or into an unregulated long-barreled rifle. Id. at 512–13.

[78] United States v. Wells Fargo Bank, 485 U.S. 351, 354 (1988); see also United States v. Centennial Sav. Bank, 499 U.S. 573, 583 (1991) (construing tax exemptions and deferral provisions narrowly).

[79] *Thompson/Center*, 504 U.S. at 517–18.

[80] Notice that this premise—that an expansive tax construction would expand criminality—depends on consistent construction of civil and criminal provisions. For a defense of this practice, see infra Section III.A.

[81] *Thompson/Center*, 504 U.S. at 518.

calling for courts to refrain in criminal cases from applying statutory language that would have been held to apply if challenged in civil litigation."[82] This perplexing statement[83] apparently recognizes the possibility of creating a gloss that, because of the unstated presumption that the statutory language would receive only one construction, would create new criminal liability where such liability was at least uncertain before.

There are at a minimum two possible readings of *Thompson/Center*. A narrow reading suggests that lenity applies to hybrid statutes in civil cases only when the criminal prohibition contains no additional mens rea requirement. Lenity protects against statutory inflation or "criminalization-by-remedial-construction" only when nothing else does.[84] A broader reading might suggest that any hybrid statute should receive narrow construction in a civil case, regardless of the presence or absence of statutory mens rea requirements in the criminal version of the statute.

Because the idea of lenity-inspired narrow constructions of civil statutes is fairly novel, a few comments about its descriptive and normative justifications are in order. As a criminal law doctrine, lenity has a distinguished pedigree[85] and passable normative justifications. For instance, even though the traditional "notice" justification is arguably inadequate, lenity does ensure that interpretive errors are in the direction of individual liberty; moreover, forcing legislatures to undertake crime definition (to the greatest extent possible) serves important rule-of-law values.[86] Narrowly construing hybrid statutes when they are applied civilly has a much less distinguished pedigree, to say the least, since the notion of broad construction of "remedial statutes" (an ill-defined notion to be sure, but one that presumably encompasses most hybrid statutes as

[82] Id. at 518–19 n.10.

[83] One might infer that the "criminal" cases in the Court's view are hypothetical future ones that would have relied on the gloss the Court intentionally refused to hand down in the case at bar. Id.

[84] The majority itself seemed to be of the opinion that it was handing down only this more limited holding. See id. at 517 ("The key to resolving the ambiguity lies in recognizing that although it is a tax statute that we construe now in a civil setting, the NFA has criminal applications that carry no additional requirement of willfulness.").

[85] Early decisions, including Chief Justice Marshall's opinion in *United States. v. Wiltberger*, 18 U.S. (5 Wheat.) 76 (1820), are ably discussed in Price, supra note 8, at 896–99.

[86] See supra Part I.

applied civilly)[87] is as venerable as lenity.[88] Thus, applying lenity to civil hybrid statutes is a novel idea, such that widespread civil application of lenity might be accused of frustrating "legislative intent" if it upsets legislative expectations that remedial statutes will be construed broadly, or, at least, will not be construed pursuant to the rule of lenity. Assuming that some feedback effects exist between judicial use of particular interpretive canons and statutory drafting,[89] novel application of a canon risks frustrating legislative intent until it is internalized by the legislature, unless it reflects extant drafting conventions when the statute was passed.

Novelty aside, it is not obvious that narrow construction of civil statutes is a useful generalization about legislative intent or that it is normatively attractive. Indeed, the opposite conclusion seems more intuitive. The broad remedial construction canon implements the common sense notion that, if the legislature passed a statute creating a private remedy addressing certain wrongs or "mischief," it viewed that mischief as inadequately remedied under prior law,

[87] The court in *Thompson/Center* asserted that the mere presence of criminal applications of the NFA made it a penal statute. *Thompson/Center*, 504 U.S. at 518 n.10 ("[T]his tax statute has criminal applications, and we know of no other basis for determining when the essential nature of a statute is criminal.") (internal quotation marks omitted). This reasoning seems dubious, insofar as it would make all hybrid statutes essentially criminal, regardless of the fact that many are disproportionately enforced civilly, but it is consistent with the "lowest common denominator . . . must govern" principle articulated in *Clark v. Martinez*, 543 U.S. 371, 380 (2005). See infra Subsection II.B.2. I contend, however, that those statements cannot be taken at face value either. The more sensible view would be that a hybrid statute whose primary purpose or application is civil would be viewed as remedial. Most hybrid statutes would fall into this category—the hybrid provisions of the bankruptcy code, copyright laws, antitrust statutes, consumer protection laws, environmental statutes, and the tax statutes at issue in *Thompson/Center*, for example. See 11 U.S.C. § 727(a) (2000) and 18 U.S.C. § 152(7) (2000) (standards for bankruptcy discharge and bankruptcy fraud); 17 U.S.C. §§ 501, 506 (2000) (civil and criminal copyright infringement); 15 U.S.C. §§ 1, 15 (2000) (criminal and civil causes of action for violation of Sherman Act); 15 U.S.C. §§ 1604, 1611 (2000) (civil and criminal provisions of Truth in Lending Act); 33 U.S.C. §§ 1311, 1319 (2000) (civil and criminal Clean Water Act violations); 26 U.S.C. §§ 5821, 5871 (2000) (taxation of gunmakers and criminal penalty for failure to comply). Hybrid statutes where criminal enforcement is more frequent, such as RICO or the forfeiture laws, could properly be viewed as penal. 18 U.S.C. §§ 1961–68 (2000) (RICO); 18 U.S.C. §§ 981–82 (2000) (civil and criminal forfeiture).

[88] Broad construction of remedial statutes can be traced at least to Lord Blackstone's formulation of the Mischief Rule and was adopted in the United States by the early nineteenth century. See Solan, supra note 3, at 2219.

[89] See infra Section III.A.

and the statute should not be interpreted so stingily as to gut the intended new remedy. Likewise, statutes authorizing new forms of enforcement litigation by the government can arguably be seen as "remedial" and undeserving of judicial stinginess. Thus, it is not clear that applying lenity to civil statutes implements legislative intent. Moreover, the best normative justifications for lenity, the non-delegation and direction-of-interpretive-error ideas,[90] have little traction in interpreting civil statutes. Delegation to the judiciary (or agencies) of the power to make common law, or to develop statutory terms in common law fashion, is unquestionably acceptable in that context.[91] Likewise, the consequences of an "inflationary" interpretive error—that is, of reading the statute more broadly than was intended—are more dire in the criminal context, simply because criminal liability is typically more onerous than civil liability. Moreover, scholars have suggested that the political pressure to overcriminalize is such that activity once criminalized cannot be decriminalized,[92] while the same may not be true civilly—a further reason the consequences of an expansionary interpretive error are more dire in criminal cases. Civil application of lenity also can be seen as hostile both to regulation and to regulatory innovation: by definition, narrowing constructions take cases outside the statute, and thus leave them unregulated or regulated only by whatever legal regime preceded the statute, common law or otherwise. Applying lenity in civil cases can thus be seen as a profoundly "conservative" interpretive doctrine, in that it is likely to preserve the status quo.[93]

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[90] See supra Part I.

[91] Richard H. Fallon, Jr. et al., Hart and Wechsler's Federal Courts and the Federal System 685 (5th ed. 2003) ("There is no longer serious dispute that the body of federal law legitimately includes judge-made law . . . ."); see also Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 688 (1978) ("Congress, however, did not intend the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations. . . . [I]t expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition.").

[92] See, e.g., William J. Stuntz, The Pathological Politics of Criminal Law, 100 Mich. L. Rev. 505, 507, 509 (2001).

[93] Of course, civil application of lenity may be attractive for precisely that reason: descriptively, if one thinks that legislatures are hesitant to displace prior law (which is a doubtful proposition), or normatively, if one thinks that legislatures have incentives to hastily pass statutes in response to whatever problem is in the headlines, without regard to the adequacy of prior law.

These normative drawbacks must be weighed against the normative virtues of preventing both statutory inflation in particular, and path dependence more generally. Applying lenity to all cases arising under a hybrid statute solves the path-dependence problem noted above. It does not matter whether an issue of first impression is confronted in a civil or criminal case, because the statute's ambiguities will receive a narrowing construction either way. If civil application of lenity ends path dependence but renders many hybrid statutes ineffective, however, the medicine is probably worse than the disease.

2. Leocal v. Ashcroft *and* Clark v. Martinez*: The Court Sheds Light on* Thompson/Center

Regardless of the virtues or vices of the rule it purports to create, lower courts did not warm up to *Thompson/Center*. Courts citing *Thompson/Center* typically have done so to distinguish it on the facts, or to otherwise discuss why lenity is inapplicable in the civil case at bar.[94] Most courts have treated the case as standing for the narrower proposition noted above, that courts should apply lenity civilly only when no statutory mens rea terms would confine the criminal application of a broad civil construction. After a decade-long silence following *Thompson/Center*, the Supreme Court employed lenity in two civil cases in the October 2004 Term and shed light on the *Thompson/Center* rule. *Leocal v. Ashcroft* resolved the straightforward issue of whether a state driving-while-intoxicated ("DWI") conviction was a "crime of violence" within the meaning of the relevant statute, Title 18, Section 16 of the United States Code.[95] The context was civil—the petitioner was contesting his de-

[94] See, e.g., United States v. $734,578.82 in U.S. Currency, 286 F.3d 641, 657–58 (3d Cir. 2002) (holding that while the rule of lenity should be applied in the case of an extremely ambiguous statute, the statute in question in this case was not sufficiently ambiguous to require the application of lenity); United States v. Pitt-Des Moines, Inc., 168 F.3d 976, 984 (7th Cir. 1999) (finding, in a classic case of path dependence, *Crandon v. United States*, 494 U.S. 152 (1990), inapplicable in a prosecution because the terms creating liability in the instant case were unambiguous, relying in part on prior civil constructions adopting the proposed interpretive gloss). Predictably, there are exceptions. See, e.g., United States v. One 1973 Rolls Royce, 43 F.3d 794, 798, 819 (3d Cir. 1994) (applying lenity to a nominally civil forfeiture statute).

[95] 543 U.S. 1, 3–4 (2004).

portation—but Section 16 has criminal applications as well.[96] The Court held that lenity must apply to such hybrid statutes *because* they must be construed consistently.[97] This idea supports the broader reading of *Thompson/Center*: lenity applies to civil applications of hybrid statutes not just as a last resort to prevent a particularly troublesome brand of statutory inflation (those instances when broadening constructions would not be blunted by mens rea terms), but as an initial presumption that hybrid statutes are to be construed both consistently and narrowly.

The Supreme Court's second recent civil lenity case, *Clark v. Martinez*,[98] was more complicated. The relevant statute stated that "[a]n alien ordered removed who is inadmissible . . . removable . . . or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period."[99] An earlier case, *Zadvydas v. Davis*, construing the statute in the context of a removable alien, held that the statute did not authorize indefinite detention, and that an alien was entitled to release if he could demonstrate that he would not be deported in the foreseeable future, despite the absence of any language in the statute limiting the period of pre-deportation detention.[100] In *Martinez*, the Court took the logical next step of extending the *Zadvydas* holding to inadmissible aliens, since the statute's text does not differentiate between different classes of aliens.[101] In so doing, the Court endorsed, in dicta, the notion that "[i]t is not at all unusual to give a statute's ambiguous language a limiting construction called for by one of the statute's applications, even though other of the statute's applications, standing alone, would not support the same limitation. The lowest common denominator, as it were, must govern."[102]

Although a limiting construction in *Martinez* was ostensibly justified by the avoidance canon rather than by lenity,[103] the Court's vague language suggesting that the "lowest common denomina-

[96] Id. at 11 n.8.
[97] Id. at 11–12 n.8.
[98] 543 U.S. 371 (2005).
[99] 8 U.S.C. § 1231(a)(6) (2000).
[100] 533 U.S. 678, 682, 699–700 (2001).
[101] *Martinez*, 543 U.S. at 377–78.
[102] Id. at 380.
[103] See id. at 381–82.

tor . . . must govern"[104] has significant implications for how hybrid statutes should be interpreted. The language of the last sentence seems mandatory: the lowest common denominator "must" govern. The prior sentence, however, sounds permissive; its general sense seems to be that, when courts confront statutes with multiple applications (as all hybrid statutes are), they are free to adopt limiting constructions (as by lenity) and commonly do, but they need not always do so. Mandatory application of lenity in resolving ambiguities in civil applications of hybrid statutes would end path dependence, but this approach suffers from the defects noted above: relative novelty as an interpretive principle, likely frustration of legislative intent, a deficit in the normative rationales that sustain lenity, and dubious normative merits of its own.

However, the Court cannot really mean that the "lowest common denominator must govern," in the sense that courts lack discretion to construe any statute with multiple applications more broadly than they would be bound to in the context calling for the narrowest construction. First, reading the "lowest common denominator must govern" language as mandatory is inconsistent with the Court's statements that authoritative interpretation of an ambiguous statute can foreclose an ambiguity and prevent the application of lenity.[105] If a court confronting a civil application of an ambiguous hybrid statute were governed by the lowest common denominator, it would have to apply lenity. For the Court's statement in *United States v. Lanier* that "clarity at the requisite level may be supplied by judicial gloss on an otherwise uncertain statute"[106] to make sense, the first court to supply such a gloss must have the discretion to do so at all. In other words, if a subsequent court can and should hold that an ambiguity was foreclosed by a prior court's gloss on a hybrid statute in civil application, the prior court must not have been bound by the rule of lenity, because if it were, it would have been bound to resolve the ambiguity in favor of the defendant.[107] Second, if this principle were applied broadly and consistently, it would seriously disrupt the interpretive and

[104] Id. at 380.

[105] See United States v. Lanier, 520 U.S. 259, 266–67 (1997).

[106] Id. at 266.

[107] See Jonathan R. Siegel, The Polymorphic Principle and the Judicial Role in Statutory Interpretation, 84 Tex. L. Rev. 339, 346, 377 (2005).

regulatory landscape and frustrate congressional expectations. The effectiveness of, for example, civil antitrust statutes might be seriously impaired if courts were forced to construe them as parsimoniously as they would be compelled to do by a strong rule of lenity. These statutes intentionally delegated lawmaking power to the courts.[108] Since such delegation is perfectly permissible outside the criminal context, there is no particular reason why a criminal law doctrine should be allowed to undermine that delegation. A more modest interpretation of *Martinez* would be to read the "lowest common denominator" passage as permissive: courts have discretion to render limiting constructions of multiple-application statutes when an application not before the court would call for such a construction, but they are not required to do so. In any event, the pronunciation by the Court in *Martinez* was dictum, though dictum that will probably prove significant in future statutory interpretation cases.

In summary, the *Thompson/Center-Martinez* line of cases offers three lessons. First, lenity can apply in civil statutes. Such application would end path dependence, but it has its own set of drawbacks, both descriptive and normative. Second, lenity applies in civil cases applying hybrid statutes because of the principle of consistent usage; that is, the idea that the same statutory language must receive only one construction. (Part III of this Note will defend this as an appropriate default rule.) Third, *Martinez*'s "lowest common denominator must govern" dictum, though it hints at widespread civil use of lenity, should not be taken at face value, as it is in conflict with other interpretive principles pronounced by the Court.

III. HOW TO CONSTRUE A HYBRID STATUTE—AND HOW NOT TO

Thus far, this Note has established that path-dependent construction of hybrid statutes occurs if conventional interpretive rules apply and that the most obvious alternative—construing hybrid statutes down to the "lowest common denominator" (applying lenity civilly) to avoid path dependence—is problematic. The remainder of this Note will address the merits of some other solutions to path dependence in the context of hybrid statutes: dual construc-

[108] See supra note 59.

tion and inflationary abandonment of the rule of lenity in prosecutions in favor of reliance on mens rea terms to confine the scope of criminality. Section III.A will examine the possibility of dual construction. Dual construction appears to be an easy way to eliminate path dependence and to avoid forcing an unduly narrow set of interpretive rules on remedial constructions—solving both of the problems identified in Part II. Unfortunately, dual construction is an unprincipled form of interpretation; this Part will demonstrate that consistent construction of hybrid statutes is a more appropriate default rule.[109] Section III.B will address how the interpretation of mens rea terms (and other statutory elements unique to the criminal portions of hybrid statutes) fits in. Finally, Section III.C will present some guidelines for how to interpret hybrid statutes consistently, while accommodating, to the degree possible, the concerns underlying the civil and criminal rules of construction.

A. A Theory of Consistent Usage

Having established in Part I that lenity is a normative canon, this Note is prepared to discuss lenity's relationship to canons of consistent usage. This section will argue first that the principle of consistent usage is an interpretive rule with strong descriptive foundations, and second that it is normatively attractive. In fact, the presumption should be strong enough that the mere difference between "remedial" and "penal" construction should not be enough to cause courts to engage ordinarily in intentional dual construction. Instead, courts should take account of the presence of both penal and non-penal applications of a hybrid statute (or terms of art therein) when rendering a construction in either context, and glosses rendered in one context should apply in the other. Courts should generally refrain from invoking lenity, or any canon authorizing broad construction of ambiguous remedial statutes, to justify intentional dual construction of hybrid statutes. Since lenity is a normative canon, it should operate only within the range of inde-

[109] Professor Jonathan Siegel agrees that consistent construction of a single statutory term or phrase is the appropriate default rule (he terms this "the weak unitary principle"), but he vigorously argues that the presumption should be rebuttable—the opposite position from that taken by the Court in *Clark v. Martinez*, if we take the "lowest common denominator must govern" language at face value. Siegel, supra note 107, at 343–50.

terminacy that remains after it is determined that descriptive canons, including the principle of consistent usage, do not persuasively resolve the issue before the court. Since the principle of consistent usage is so probative of likely legislative intent, dual construction is presumptively outside that range of indeterminacy, even if a particular broad civil construction and a particular narrow penal construction would both be within the range of a statute's indeterminacy were the statute not a hybrid. The fact that the same statutory language *could* bear one meaning were civil canons applied to it, and another meaning were criminal canons applied to it, does not mean that it can bear *both*.

1. Descriptive Foundations of the Principle of Consistent Usage

The presumption that hybrid statutes should be construed consistently[110] has strong descriptive foundations; that is to say, it embodies an accurate generalization about congressional intent. Consider the three paths by which a hybrid statute comes into being: (1) a statute is initially passed as a hybrid; (2) a statute creating civil liability is passed, the statute is glossed by the courts, and the statute is later "hybridized" by passage of an identical standard of criminal liability, or a similar standard with additional mens rea requirements; or (3) the criminal statute is passed first, is glossed by the courts, and the civil liability standard is passed later. In the first case, the inference that the terms should be construed coextensively—and thus that precedent rendered in one context should be followed in the other—is strengthened by an increased likelihood that the legislature had actual knowledge that it was passing an identical standard of liability for both contexts.[111] In the second and

[110] That is, the rule that Professor Siegel calls the "weak unitary principle"—a rebuttable presumption that one phrase with multiple applications, or referred to by multiple liability-creating sections of a statute, should receive only one construction. Id.

[111] A critic might fault this statement for wrongly imputing omniscience to the legislature, a criticism that some have leveled against many interpretive canons more generally. See, e.g., Richard A. Posner, Statutory Interpretation—in the Classroom and in the Courtroom, 50 U. Chi. L. Rev. 800, 811 (1983). After all, many pieces of legislation are extraordinarily complex, and when they are, many legislators will not know their contents fully. If the statute is sufficiently complex, none will. Nonetheless, it remains true that legislators and the legislature are more likely to have actual knowledge that any one piece of legislation contains identical terms in two liability-creating provisions than they are to have such knowledge with respect to two statutes passed

third cases, the legislature presumptively is aware of judicial glosses on the relevant terms and adopted them when it passed a related statute with identical language. At least, conventional doctrine holds that the legislature was aware of the glosses in the legally relevant sense.[112] Even if legislators lacked actual knowledge of the identical terms and their glosses, the consistent usage canons can be justified as embodying a common sense principle: when speakers use the same words twice, in the course of speaking about the same topic, they usually mean the same thing both times, absent sarcasm, irony, figures of speech, or the like.[113] Construing identical language identically embodies a principle about how people ordinarily speak English.[114] Of course, the meaning of words is contextual; in Justice Scalia's famous example, an ordinary English speaker can use "bay" to mean a horse or a body of water, depending on context.[115] But civil and criminal statutes that address the same type of conduct (racketeering, water pollution, or the like) can safely be said to be similar contexts. In such similar contexts, the use of identical words is meaningful, and as such statutes employing identical words should be construed consistently. Thus, if the civil and criminal provisions of a hybrid statute are to have different scopes, it must be due to statutory mens rea in the crime and not because some conduct is within the scope of civil liability but does not also fulfill the actus reus elements of the crime.

A discussion of arguments for dual construction also demonstrates the descriptive power of the presumption of consistent us-

at different times, even if the likelihood of such actual knowledge remains somewhat low. However, one need not require "actual knowledge" to believe that the consistent usage principle embodies a sensible generalization about how ordinary people use English, and thus that the canon is justified descriptively on those grounds.

[112] See, e.g., Greenwood Trust Co. v. Massachusetts, 971 F.2d 818, 827 (1st Cir. 1992) ("It is . . . a general rule that when Congress borrows language from one statute and incorporates it into a second statute, the language of the two acts should be interpreted the same way . . . includ[ing] prior judicial interpretations of the transplanted language.").

[113] We can safely assume that statutes are not drafted sarcastically or using figures of speech. Legislation is frequently ironic, but not intentionally.

[114] In contrast, the notion that identical civil and criminal liability-creating provisions should be construed differently solely because of the difference in interpretive context would elevate technical canons of construction over ordinary usage.

[115] Antonin Scalia, Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws, *in* A Matter of Interpretation: Federal Courts and the Law 3, 25–26 (Amy Gutmann ed., 1997).

age and of the statutory landscape we would expect to see if dual construction were an appropriate interpretive default rule for hybrid statutes. Specifically, dual construction could be justified descriptively as a default rule by invoking the notion that Congress legislates with knowledge of background common law principles. The principles of broad construction of remedial statutes and narrow construction of penal statutes constitute part of the legal background of which Congress is presumably aware. These principles, the argument would go, are incorporated by Congress into every hybrid statute, absent evidence to the contrary. Thus, a congress writing a hybrid statute presumptively intends dual construction of a hybrid statute. To rebut this presumption, either Congress could make a clear statement to the contrary, or the courts would likely depart from this presumption if the statute's organization reflected an intention to so depart. Such a clear statement could take one of three forms: (1) repudiating broad remedial construction; (2) repudiating narrow penal construction; or (3) an instruction to construe certain provisions coextensively, but without specifying whether to do so via broad or narrow interpretation.

The problem with this argument is that the presumption of consistent usage is just as much a fundamental interpretive principle as are lenity and broad remedial construction. Choosing dual construction over consistently broad or narrow construction requires a hierarchy of canons: the lenity and broad remedial construction canons must take precedence over the presumption of consistent usage. Conversely, the choice of consistent broad or narrow interpretation over dual construction requires that the "losing" canon (broad or narrow construction) be deemed lower in the interpretive hierarchy than both the presumption of consistent usage and the "winner" of the contest between lenity and remedial construction.[116] Thus, the notion that Congress intends dual construction depends not only on congressional knowledge of the *contents* of interpretive canons, but also on congressional knowledge of a hierarchy of canons. Even if we can believe that Congress is aware of the

[116] Note that when establishing a hierarchy among these three canons, at least, Congress or an interpreter need not pick a "winner," only a "loser." The outcome is the same if the hierarchy is (1) presumption of consistent usage, (2) lenity, (3) broad remedial construction; or (1) lenity, (2) presumption of consistent usage, (3) broad remedial construction, and so forth.

content of interpretive canons, it is less likely that Congress has knowledge of the *hierarchy* of interpretive canons, or, at least, that Congress has knowledge of the sort of hierarchy that would be necessary to embrace dual construction as a default rule. Indeed, the courts have never explicitly spelled out such a hierarchy. Despite the presence of some authority for dual construction, mostly at the state level,[117] there is even more substantial authority against dual construction, most notably the *Crandon-Thompson/Center-Leocal-Martinez* line of cases. In short, intentional dual construction is not a sufficiently engrained interpretive principle such that Congress is unquestionably aware of it when drafting hybrid statutes and thus intends that courts apply it when interpreting them.[118]

Note that this argument for dual construction depends more generally on the presence of substantial "feedback effects" between courts and legislatures. For dual construction to obtain legitimacy from legislative incorporation of interpretive principles and the hierarchy among them, the legislature must be minimally aware of those principles and hierarchies and must adjust its statutory drafting accordingly. The support or lack thereof for the presence of feedback effects as a general matter has been argued elsewhere[119] and is beyond the scope of this Note. Suffice it to say that justifying dual construction by reference to legislative knowledge of a hierarchy of canons is difficult when there is conflicting judicial authority on the matter.[120] Of course, these conflicting authorities and the resulting uncertain level of feedback effects mean that leg-

[117] See, e.g., 3 Norman J. Singer, Statutes and Statutory Construction § 60:4, at 207, 210 (6th ed. 2001) (listing state court cases holding that statutes with both remedial and penal provisions may be construed liberally in remedial contexts and strictly in penal contexts).

[118] However, Congress likely expects a different hierarchy of canons; specifically, the notion that courts will apply interpretive methods that implement "legislative intent" (descriptive canons) before others (normative canons). See supra Part I.

[119] Compare Abner J. Mikva, Reading and Writing Statutes, 28 S. Tex. L. Rev. 181, 183 (1986) ("The 'canons of construction' that courts use to interpret the legislative product are a foreign concept to the legislative process."), with Nelson, supra note 13, at 391 ("[S]ome specialized canons help courts discern Congress's likely intent not because they reflect careful study of what Congress does on its own, but simply because members of Congress know that the courts use them.").

[120] Compare Singer, supra note 117, at 207, 210, and the cases cited therein (preferring lenity and broad remedial construction over consistent usage), with United States v. Thompson/Center Arms Co., 504 U.S. 505, 508 (1992), and its progeny, supra Section II.B (preferring lenity and consistent usage over broad remedial construction).

islatures are probably not "aware" (in the sense of actual knowledge) of a judicial principle favoring consistent interpretation of hybrid statutes either. Such a principle reflects ordinary English usage (as opposed to dual construction, which favors technical conventions over ordinary usage), but it is unlikely that any legislator's choice of diction in drafting a hybrid statute—let alone those of a legislative majority—is made with the conscious realization that courts will construe consistent language consistently.

Regardless of the strength of feedback effects, a default presumption of consistent usage can also be justified descriptively on other grounds. We can reason backwards from the absence of congressional interpretive instructions directing courts to construe statutes coextensively to the premise that Congress generally intends consistent usage. If Congress presumed dual construction of hybrid statutes, we would expect to see interpretive instructions opting out of that presumption, of the sort described above. Assuming that Congress at least occasionally wants civil and criminal liability to be premised on the same conduct and governed by the same legal standard, and assuming further that dual construction is the appropriate background rule, one would expect to see provisions in the United States Code opting out of dual construction in some hybrid statutes, but in fact, there are no such provisions.[121] Given this, two possible conclusions could be drawn: (1) dual construction is the appropriate default rule and Congress never wants to opt out of it; or (2) consistent usage is the appropriate default rule. The latter seems far more likely. It seems unlikely that Congress never wants civil and criminal provisions appearing in hybrid statutes to be construed identically. The absence of any opt-out

[121] RICO's liberal construction provision is arguably to the contrary—it instructs that both RICO's civil and criminal provisions be construed "liberally" to further that statute's "remedial purposes." Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 922, 947 (1970). More likely, however, that provision was intended to revoke lenity or at least narrow the scope of lenity's operation to whatever degree possible, and not to rebut some presumption of dual construction. Such "liberal construction" provisions litter the federal criminal code generally, not just hybrid statutes. See Kahan, supra note 24, at 383 n.187 (identifying "liberal construction" statutes). These provisions are obviously aimed at avoiding lenity-based narrowing constructions, to whatever extent the courts permit the liberal construction provisions to operate. That such provisions are associated primarily with "pure" criminal statutes, and not with hybrid statutes, strongly suggests that RICO's liberal construction provision is intended to abrogate lenity, not the presumption of consistent usage.

provisions is persuasive evidence that consistent usage is the appropriate default rule.[122]

2. Normative Arguments for Consistent Usage

So far, the discussion has focused on why consistent construction of hybrid statutory provisions is a default rule that reflects both likely "legislative intent" and ordinary English usage. This Note has also argued that the absence of any interpretive instructions opting out of dual construction is good evidence that consistent construction embodies a sound generalization about likely congressional intent. These are descriptive arguments for a strong presumption of consistent usage. There are normative arguments as well. Presuming that dual construction is the default rule would make it unduly difficult for Congress to create coextensive civil and criminal prohibitions. Under a default presumption of consistent usage, Congress can easily differentiate terms. In contrast, under a default presumption of dual construction, it may prove difficult or impossible for Congress to create coextensive civil and criminal prohibitions. Thus, assuming again the existence of some modest feedback effects, a presumption of consistent usage makes it easier both for Congress to express its intent and for the courts to effectuate that intent.

First, a rule of dual construction might make it unduly costly for Congress to create coextensive civil and criminal prohibitions. By presuming dual construction, courts would effectively require an express interpretive instruction from the legislature in order to abrogate the rules of lenity and broad remedial construction. Identical language is the most probative evidence that the legislature

[122] In theory, one could make a contrary argument—specifically, if consistent construction is the appropriate default rule, and Congress occasionally wants civil and criminal liability premised on hybrid statutes to have different scopes, why do we not see interpretive instructions directing the courts to construe the provisions differently? The response to this is that when Congress wants civil and criminal liability under hybrid statutes to have different scopes, it narrows the criminal prohibition with mens rea terms. See, e.g., 17 U.S.C. §§ 501, 506 (2000) (adding the term "willfully" for criminal liability in section 506, where "willfully" is not required for civil liability in section 501). Moreover, Congress may rely on prosecutorial discretion to narrow the scope of the criminal prohibition in practice. If prosecutors prosecute only egregious violations while civil plaintiffs pursue more marginal interpretive theories, the effect is the same as if Congress wrote the criminal portion of the statute more narrowly.

could use to show that it intended the civil and criminal standards of liability to be coextensive (aside from writing identical standards and then declaring the obvious in a third provision).[123] Requiring the legislature to include such a statement in order to obtain consistent construction is counterintuitive and would impose needless drafting costs. Such a boilerplate statement would be easy to include when needed, but it would have to be included frequently. The better default rule would be one that renders such statements unnecessary.

In contrast to the difficulty that Congress might have in convincing courts presuming dual construction that it wants to conflate two terms, it can easily direct courts presuming consistent usage to interpret identical terms to mean different things simply by making a clear statement. For example, it can provide two meanings in the statutory definition: "for purposes of section 1, 'point source' shall mean *X*, but for purposes of section 2, 'point source' shall mean *X* plus *Y*." This may be inelegant, but it is precise. Similarly, Congress can employ synonymous words or terms when it wants the scope of civil and criminal liability to diverge. The use of synonymous rather than identical terms would demonstrate that the legislature probably intended that the terms have a different scope or meaning.[124] Just as the use of identical terms in a related context is significant, so is the use of different terms. Of course, in some contexts synonymous words or phrases may not exist, or some terms might be synonymous in ordinary usage but as terms of art have different meanings than Congress intends for the scope of the two separate provisions. In other words, Congress may in some circumstances be forced to use one word or term in two separate liability-creating provisions, even when it desires separate meanings, simply because alternatives do not exist. Fortunately, this is easily remedied. If Congress has a very precise intent about the different scope of two

[123] If courts are willing to engage in dual construction of identical terms in hybrid statutes, there is no particular reason to think they would be swayed by a "coextensiveness" instruction. Such courts might simply view lenity and broad remedial construction as part of due process, or as interpretive tools inherent in the judicial power, and thus essentially irrebuttable.

[124] See, e.g., United States v. Hernandez, 189 F.3d 785, 791 (9th Cir. 1999) (standing for the proposition that using different language from another statute when similar language could have been used signifies Congress intended a different meaning); Alaska Wildlife Alliance v. Jensen, 108 F.3d 1065, 1070 (9th Cir. 1997) (same).

different provisions, but cannot find two terms whose off-the-rack meanings as terms of art precisely track the distinction it desires, it can simply write two definitions. Thus, there are at least two ways Congress can differentiate the meaning of words or phrases with minimal effort in the statutory text. Since the cost of differentiating terms is low, insisting on a clear statement when the legislature intends to use one phrase or term of art in two different senses will not impose great burdens on the legislature to make itself clear.

3. Practical Implications

A strong presumption of consistent usage carries with it significant practical implications. Most importantly, giving identical language two constructions, simply because of the difference between the "remedial" and "penal" context, is improper. Such analysis assumes that legislatures put as much weight on the remedial/penal distinction as courts do. There is no reason to think that they do. Lenity is primarily a normative canon, a creature of the judiciary. Courts employ it not because it fairly reflects a legislative desire that ambiguous penal statutes are resolved in favor of defendants, but because it serves values the judiciary finds important.[125] The status of broad remedial construction is more unclear, but whatever descriptive force it might have is hardly a match for that of the presumption of consistent usage. The fact that courts apply grammatical canons first suggests, at least intuitively, that broad remedial construction has less descriptive force and is instead in part normatively justified. The principle of consistent usage, then, forms part of the descriptive boundary within which normative canons like lenity and broad remedial construction can operate.

To say that hybrid statutes should be construed consistently, however, says nothing about whether that construction should be broad, narrow, or somewhere in between. There is no right answer for all statutes, since contextual factors specific to each statute may pull in one direction or the other. Indeed, the presence of penal sanctions in a statute is itself a factor cutting in favor of a narrow reading, although the presence of non-penal remedies will frequently cut the other direction. Courts construing a hybrid statute

[125] See supra Part I.

have to decide whether, within the boundaries imposed by descriptive canons, ambiguities should be resolved broadly or narrowly.

This Note contends that ambiguities cannot be resolved one way in penal interpretation and another way in remedial interpretation. Such a construction would be outside the boundaries of judicial discretion imposed by the descriptive canons. Neither should "the lowest common denominator govern," at least not in every case. In other words, courts should not necessarily construe ambiguities narrowly in hybrid statutes just because of the possibility of criminal applications. Perhaps for some statutes a court would choose a narrow construction, which would apply to both penal and remedial applications. But a court should not feel compelled to do so merely due to the presence of penal applications. The presence of penal applications should narrow the range of ambiguity, but unlike when interpreting a purely criminal statute, it should not be decisive within that realm of ambiguity unless it is clear that the statute will be primarily enforced criminally. In other words, the mere determination that an ambiguity exists should not be decisive, either in favor of broad or narrow construction. Instead, as a starting presumption at least, hybrid statutes should be interpreted evenhandedly in both civil and criminal applications. Evenhandedly means that once a court finds a statute sufficiently ambiguous that it would apply lenity were the statute entirely penal, it should instead press on with the task of interpretation. It should not let the remedial or penal nature of a statute determine as a matter of course the direction in which ambiguities will be resolved.[126] Presumptions of lenity or broad construction should not be decisive of ambiguities in hybrid statutes, unless the court makes a determination that the statute is hybrid in name only—that is, its enforcement and application are so overwhelmingly civil or criminal that permitting purely civil or purely criminal rules of construction to govern will be appropriate. Evenhanded construction should be the presumption.

This interpretive rule has a number of advantages. It is consistent with the Constitution—lenity is not constitutionally required,

[126] Indeed, it is impossible for courts to fall back on the fact that a hybrid statute is "remedial" or "penal" in determining whether to resolve ambiguities broadly or narrowly, because it is both.

and while automatic resolution of all ambiguities against an accused would be unconstitutional, even-handed interpretation of criminal statutes would not be. It ends path-dependent construction, which is predicated on different interpretive rules governing in the civil and criminal contexts, and on glosses from one context applying in the other. Moreover, it allows courts to construe statutes consistently in the penal and remedial contexts, while neither allowing the rule of lenity to impair civil interpretation, nor allowing courts to automatically read ambiguous provisions so broadly as to be unfair to criminal defendants.

B. The Role of Mens Rea

So far, this Note has not addressed in depth how courts should address mens rea provisions or other textual elements unique to the criminal portion of a hybrid statute. Such statutes, of course, manifest a legislative intent that the statute's criminal prohibition be narrower than the civil prohibition. This Section will address two issues: whether and how mens rea terms should affect judicial interpretation of other terms of art common to the two statutes, and how mens rea terms themselves should be interpreted. In particular, this Note intends to address how the interpretation of mens rea terms helps to control statutory inflation, particularly in the absence of lenity or a similar interpretive rule. As noted, one solution to the problem of path dependence is abandoning the rule of lenity altogether in interpreting hybrid statutes. If the consequences of abandoning lenity are intolerable, we must either look for the solution to path dependence elsewhere or embrace path dependence as the lesser evil.

The first issue, whether terms of art common to hybrid statutes should be interpreted coextensively when the criminal prohibition is narrowed by mens rea, is the easier one. Under a presumption of consistent usage, terms of art common to civil and criminal portions of hybrid statutes should be interpreted as having the same meaning. The presence of mens rea terms in the criminal portion of the statute does not affect the probative value of the legislative decision to use the term of art in both contexts. As such, jurisprudence developing the common term in one context should be precedent and have stare decisis effect in the other rather than writing on an entirely clean state due to the mens rea term. The

common term should have the same application in both civil and criminal cases, even though the civil and criminal portions of the statute are different in an important respect: the presence of mens rea. To whatever degree the criminal portion of the statute applies to a narrower range of conduct, that narrowing should be done by the mens rea terms. The fact that the two portions of the statute address the same general type of conduct (for example, anticompetitive behavior, water pollution, or racketeering) and use the same terms is sufficient to bring them within the range of the presumption of consistent usage. If the statute is drafted in such a way that a substantive prohibition is contained in Section One, and Section Two creates criminal liability by reference to it with an additional willfulness requirement, the presumption that Section One should have but one meaning is even stronger. From the presence of the mens rea terms, an interpreter can infer that the criminal prohibition was intended to be narrower. But that inference derives its force entirely from the difference between the two sections, which is the mens rea itself. In other words, the mens rea terms were intended to do the work of narrowing, not judicial interpretation of the other terms of the statute. Identical terms should be interpreted identically; differences in coverage should be implied from points of departure in the statutory language.

This account of how hybrid statutes should be interpreted also necessitates that the rule of lenity apply with full force when construing mens rea terms. Unlike terms of art common to the civil and criminal portions of hybrid statues, mens rea terms are present only in the criminal portions. Thus, when construing mens rea terms, a court is truly construing penal legislation, and the rule of lenity should apply as it ordinarily would. There are no remedial considerations competing with lenity, as there are when construing the hybrid portions of the statute.

This approach has the advantage of preserving a fully operational rule of lenity in the area where it is most needed to prevent statutory inflation. When the criminal provisions of a hybrid statute have mens rea terms that the civil provisions do not, those terms could pose a check on statutory inflation, completely independent of any interpretive doctrines used to interpret the com-

mon terms of art.[127] Legislative imposition of mens rea terms coupled with judicial construction of them in a way that requires high levels of knowledge or intent has been recognized by Professors Solan[128] and Sachs[129] as an effective means of controlling statutory inflation. However, whether mens rea terms succeed in controlling statutory inflation depends on the interpretive methods used in construing them. It is not clear that, absent lenity, those interpretive methods would succeed. Federal criminal law lacks both a consistent definition of mens rea terms and a consistent methodology for parsing mens rea terms in statutes.[130] This compares unfavorably to the Model Penal Code, which provides that courts must pour content into mens rea terms with rule-like interpretive instructions.[131] In such a regime, there would be almost no room for lenity to operate with respect to parsing mens rea provisions. Moreover, some extant statutes simply lack mens rea terms, and courts must then decide whether to read such terms into those statutes.[132] Perhaps this unguided judicial discretion is an inevitable or unproblematic feature of federal criminal law, but the Model Penal Code

[127] Notice that the implication of this is that statutory inflation occurs only with respect to the actus reus elements of a crime.

[128] Solan, supra note 3, at 2262–63 ("Congress can attempt to regain control of the legislative process by doing in advance what courts do later: It can control statutory inflation, as part of the legislative process, either by specifying the mens rea requirement for prosecutions, or by actually including rules of construction in the statute itself. . . . I argue below, however, that the former approach is far more likely to be successful.").

[129] Margaret V. Sachs, supra note 12, at 1056 ("The framework [for interpreting hybrid statutes generally and the Exchange Act in particular] is bottomed on the core principle of one interpretation per prohibition. . . . Concerns about fair warning should be addressed through enforcement of the Exchange Act's willfulness requirement for criminal actions . . . .").

[130] See, e.g., Solan, supra note 3, at 2265 ("Neither Congress nor the Supreme Court, however, has settled on a uniform vocabulary for expressing these small differences in proof, leaving the law governing state of mind requirements in a somewhat muddled state."); id. at 2270 ("The guesswork imposed on the courts to divine legislative intent from statute to statute suggests that Congress does not do a very good job in this area.").

[131] Specifically, a mens rea term presumptively modifies every actus reus element in the offense. Model Penal Code § 2.02(4) (Proposed Official Draft 1962). Additionally, mens rea terms like "purpose," "knowledge," and the like receive standard definitions. Id. § 2.02(2).

[132] See, e.g., United States v. U.S. Gypsum Co., 438 U.S. 422, 438–43 (1978) (finding that a criminal violation of Sherman Act requires mens rea, notwithstanding absence of one specified by statute).

suggests otherwise, at least as to inevitability.[133] If the goal is to specify the content of criminal law legislatively to the maximum degree possible, Model Penal Code-style rules are better than the current regime of standards in guiding courts about how to pour content into mens rea terms. The point is that, given the uncertain and standard-like approach that courts currently take in construing statutory mens rea terms, lenity provides an important backstop against runaway statutory inflation. Someone who thinks statutory inflation should be avoided, or that it at least needs regulation, should want lenity to apply with full force in construing mens rea terms. The account of consistent usage that this Note has propounded mandates precisely this result.

C. Some Applications

1. Pattern One: A Highly Ambiguous Statute

Suppose a hybrid statute is ambiguous as to some point within the domain of the statute's civil and criminal applications. Application of the purely descriptive canons does not resolve the ambiguity. In fact, they scarcely narrow the range of interpretive uncertainty at all,[134] so that were the statute purely criminal, lenity could justifiably be invoked to construe the statute narrowly, and were the statute purely civil, a broader construction could be justified on the basis of the general "broad remedial construction" canon or some interpretive principle more specific to a particular area of law counseling in favor of resolving ambiguities broadly.[135] Suppose further that Court One has confronted this ambiguity in a civil case, and that, rather than relying on the "lowest common denominator must govern" principle and applying lenity, rendered a broader interpretation than it would have rendered had it applied lenity. Now

[133] Model Penal Code § 2.02(2), (4) (Proposed Official Draft 1962).

[134] A good example of such an ambiguous statutory term is RICO's "pattern" requirement. 18 U.S.C. § 1962 (2000). For a description of the difficulty that courts have had in elucidating the meaning of the term, see H.J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 251–56 (1989) (Scalia, J., concurring).

[135] See, e.g., Jefferson County Pharm. Ass'n v. Abbott Labs., 460 U.S. 150, 157–59 (1983) (stating that antitrust laws are to be construed liberally with a heavy presumption against implicit exceptions to antitrust law); Begala v. PNC Bank, 163 F.3d 948, 950 (6th Cir. 1998) (stating that the Truth in Lending Act should be construed liberally in light of its remedial purpose).

suppose that Court Two faces the same issue in a criminal case and concludes that the statute is sufficiently ambiguous such that, were the statute a purely criminal one, it would apply lenity. So, Court One's broad interpretation would be permissible were the statute purely remedial, and recourse to lenity would have been appropriate were the statute purely penal. Nonetheless, if this Note's account of the presumption of consistent usage is correct, Court Two should not invoke lenity in this situation to engage in dual construction because dual construction is outside the range of permissible interpretation. Lenity, as a normative canon, can only be permitted to operate within the realm of ambiguity established by descriptive canons, including the presumption of consistent usage. Applying it here would create a dual construction and thus be outside the boundaries of acceptable interpretation established by the descriptive canon of consistent usage.

At this point, it is necessary to address a counterargument. That argument would run something like this: "Of course Court Two should not apply lenity to do obvious violence to legislative intent. But like other normative canons, lenity applies only within the realm of a statute's indeterminacy—when descriptive tools are exhausted. Within that ambiguity, why should courts not be allowed to accommodate both the rule of lenity and whatever interpretive rules militate in favor of a broad civil construction? This would not do violence to the intended meaning of the statutory language, or to what we know of it, since we have already established that the language can accommodate both readings."[136]

However, even though a broad remedial construction and a narrow penal construction, considered separately, would each be within the realm of indeterminacy, both cannot be within that realm at the same time. An interpreter might not know whether the statute was intended to be construed broadly or narrowly, but he can be fairly certain that it was intended to be construed consistently. Dual construction does violence to that aspect of legislative intent, even if both a broad and narrow construction lie within the realm of the statute's ambiguity.

[136] This argument is similar to one made by Professor Siegel, who notes that giving one statutory provision multiple constructions should not involve a "departure from statutory text, but only giving statutory text meanings that it can bear." Siegel, supra note 107, at 376.

Now, suppose we modify the hypothetical a bit. Suppose a court is confronting an issue of first impression in a criminal context. The statute is the same as described above—ambiguous enough that neither a broad nor a narrow reading can be called obviously contrary to legislative intent. Should the court apply lenity? Conventionally, the answer would be "yes," but this Note contends that the answer is "not necessarily." The court should first ask whether, if the case were civil, it would render a construction as narrow as lenity would require. If not, the court should not necessarily apply such a narrow construction in the criminal context either. Hybrid statutes should be construed mindful of the possibility of both civil and criminal applications.[137]

In other words, when a hybrid statute is sufficiently ambiguous that a court would apply lenity were the statute purely criminal, and the court concludes (based on the "pull" of any other relevant interpretive rules) that the statute should be read more broadly in the remedial context than lenity would permit, the presumption of consistent usage should almost always lead it to apply a broader reading in the penal context than lenity would permit. However, the court should not necessarily construe the statute as broadly as it would if the only interpretive rules were those favoring broad construction. The presence of penal applications militates against that. However, if those penal applications are infrequent, the court might decide that the "push" of the penal applications (cutting in favor of narrow construction) is so outweighed by the "pull" of remedial applications (cutting in favor of broader construction) that, for practical purposes, it can interpret the statute as if it were purely civil. This should not be undertaken lightly, but it will be

[137] Perhaps the most salient objection to the interpretive rule proposed herein is that it requires more foresight than any court can be expected to possess. It would ask courts to consider all potential applications at the time they render their first interpretation, a degree of foresight that may be extremely difficult. Moreover, the consequence of error may be magnified by the extra-strong effect of stare decisis in statutory cases. See William N. Eskridge, Jr., Overruling Statutory Precedents, 76 Geo. L.J. 1361, 1362 (1988) ("Statutory precedents . . . often enjoy a super-strong presumption of correctness."). However, scholarship and common sense suggest that courts will consider potential future applications even under the current interpretive regime, which purports to require courts to construe hybrid statutes in such a manner as to satisfy the "lowest common denominator." Siegel, supra note 107, at 377–78. This Note's proposed rule, then, requires no more foresight than the current interpretive regime does in practice.

appropriate in construing many hybrid statutes.[138] Indeed, many hybrid statutes arise when Congress is passing civil legislation and adds criminal penalties as an afterthought, thinking that doing so will create additional deterrence, but most likely not realizing that these criminal penalties may result in narrowing civil constructions as the *Thompson/Center-Martinez* line of cases mandates.[139] At the other extreme, if the court knows that a hybrid statute is overwhelmingly enforced criminally, it might decide that lenity is an appropriate rule for construing all of the statute's ambiguities. Many hybrid statutes, however, fall somewhere in the middle; there will be a mix of civil and criminal enforcement, and of remedial and penal purposes. Again, the initial presumption should be that, if there is no other evidence in a hybrid statute suggesting that civil or criminal rules of construction would be appropriate for resolving all ambiguities (regardless of context), a court should simply interpret the statute as evenhandedly as possible, even within the realm of ambiguity. The mere existence of an ambiguity sufficient to trigger lenity should not determine the outcome either way.

[138] For example, it would be appropriate in construing the common provisions of the Bankruptcy Code and bankruptcy crimes. The standards for commission of a bankruptcy crime are substantially similar to those for a denial of discharge. For example, compare 11 U.S.C. § 727(a) (2000), with 18 U.S.C. §152(7) (2000). The West reporting system contains eight published bankruptcy crime prosecutions in 2005. In contrast, in the twelve-month period ending June 30, 2005, there were 1,637,254 bankruptcy petitions, though this number may reflect a slight upturn due to the impending effectiveness of amendments to the Bankruptcy Code in October 2005. The previous twelve-month period (ending June 30, 2004), saw 1,635,725 filings. Press Release, Admin. Office of the U.S. Cts., Number of Bankruptcy Cases Filed in Federal Courts Up Less Than One Percent for 12-Month Period, Quarterly Filings up 11 Percent (Aug. 24, 2005), http://www.uscourts.gov/Press_Releases/bankruptcyfilings82405.html. The point is that any terms of art that are common to the two statutes are clearly predominantly civil in application. The same is true of terms common to civil and criminal copyright infringement, 17 U.S.C. § 501 (2000) and 17 U.S.C. § 506 (2000), respectively. See supra note 87 for a list of which hybrid statutes are applied exclusively or almost exclusively in civil litigation, and which have more frequent criminal application.

[139] Siegel, supra note 107, at 392 (consistent construction of hybrid statutes "creates the paradox that, although Congress would probably imagine itself to be *strengthening* a statute by adding criminal penalties to it, in some respects the addition of such penalties has the effect of *weakening* the statute, because courts may then feel obliged to apply the rule of lenity even when applying the statute in civil cases").

2. Pattern Two: An Egregious Interpretive Error

The pressure to engage in dual construction will be at its greatest when a prior court makes an egregious interpretive error, but stare decisis doctrine counsels against overruling. What should be done in such a situation?

Suppose that Congress intends the same conduct to be subject to civil and criminal liability, and it intends Rule *X* to govern them both. It indicates this by using identical language in the relevant portions of a hybrid statute. Suppose further that because it seizes on a marginal ambiguity and applies the rule of lenity too aggressively, Court One nonetheless read the statute to establish Rule *X-Y* with respect to criminal liability. With respect to civil liability, would Court Two, which wants to best approximate congressional intent, read the statute to establish Rule *X-Y* (on the theory that Congress intended the two issues to be treated the same) or Rule *X* (on the theory that Congress meant to establish Rule *X* for both issues, and the fact that the rule of lenity prevented that from happening as to criminal liability should not force a deviation from the substantive outcome that Congress expected as to civil liability)? How does one establish a priority between the two conflicting intentions—the intention to treat both issues the same and the intention to establish Rule *X* for civil liability?

Suppose first that the prior precedent establishing rule *X-Y* was erroneous. In fact, it was so erroneous that any fair reading of the relevant statute would reveal it to be so—in other words, it is outside the zone of the court's discretionary authority delineated by the textual canons.[140] Moreover, assume that it proved to be unworkable law and, for whatever reason, generated no reliance interests, such that current stare decisis doctrine would not prevent a subsequent court from overruling it.[141] Court Two would overrule

[140] For a defense of the idea that a precedent can be demonstrably erroneous in this fashion, see Caleb Nelson, *Stare Decisis* and Demonstrably Erroneous Precedents, 87 Va. L. Rev. 1, 1–2, 54–60, 78–81 (2001).

[141] The classic discussion of stare decisis, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 854–56 (1992), considers, in deciding whether to overrule a precedent, if it (i) has produced workable law, (ii) has engendered reliance interests, (iii) has been rendered obsolete by changes in other law, or (iv) has been robbed of "significant application or justification" by factual changes. *Casey* applied these factors to resolve an issue of constitutional stare decisis, which is typically understood to be weaker than its statutory counterpart. See Eskridge, supra note 137, at

the precedent, even in the penal context, and implement rule *X*. If so, Court Two should implement rule *X* in the civil context as well. The changed interpretive context should not affect the court's stare decisis calculation: if it would overrule in one context, and implement Rule *X*, it should establish the same rule in the other context. Superficially, this is a difficult hypothetical for this Note's theory of consistent usage: dual construction is not within the zone of interpretive indeterminacy, but neither is the precedent to which the court is being asked to adhere. Either way, some violence will be done to what the court knows of legislative intent. In reality, though, while Court Two's adoption of a different rule looks like a species of dual construction, it really should not be considered as one. Court Two is not creating a separate line of precedent in the civil context; instead, it is saying that Court One was wrong and that Rule *X* should govern both civil and criminal liability.

Now suppose a different set of facts. Suppose instead that Court One renders the same manifestly erroneous precedent, but assume that because of stare decisis, Court Two would not overrule Court One in the penal context. (Reliance interests might cut in this direction; Court Two might be hesitant to authorize prosecution for conduct a prior court held was not unlawful.) Court Two would like to overrule Court One in both the penal and remedial contexts, but is restrained by stare decisis from doing so in the former. Therefore, Court Two might be tempted to confine Court One's erroneous ruling to the criminal context, and establish Rule *X* to govern civil liability. This truly would be a species of dual construction, but one that looks plausible as a second-best solution. Better for Court One not to err, but since its error has induced reliance interests, current stare decisis doctrine makes it unlikely to be overruled. Thus, one way of viewing Court Two's choice is between ex-

1362. However, courts make similar judgments in deciding whether to overrule or modify precedent in statutory or constitutional cases; the salient difference is that overruling a statutory precedent requires a stronger showing, not a qualitatively different one. See Eskridge, supra note 137, at 1363 (noting that "a given statutory precedent is particularly vulnerable to modification or overruling if the Court's original discussion was procedurally unsatisfactory, if the statute being interpreted is generally worded and has not been the subject of extensive legislative tinkering, and/or if subsequent legislative developments have undercut the rationale of the decision and private parties have not extensively relied on it"); see also Nelson, supra note 140, at 1–2.

tending an error and confining it. When viewed that way, dual construction looks appealing. More precisely, however, its choice is between extending a substantive error to a new application, or confining that error while introducing a new error— namely dual construction. After all, if Court Two extends Court One's error to the civil context, at least it will have vindicated one congressional intent—namely, consistent construction— even if it renders the wrong substantive interpretation. Of course, one could argue that consistent construction is less important than the actual scope of the substantive rule. That is probably true in most cases, but it might not always be. One can imagine hybrid statutes where Congress valued consistent construction above all else and would prefer an erroneously but consistently construed statute (or none at all) to a dually constructed one.[142]

Regardless of whether the scope of liability or consistent construction is the more tolerable error, however, the hypothetical is flawed. Its apparent difficulty is premised on the idea that there is a sharp distinction between remedial and penal construction of hybrid statutes. This idea is wrong. This Note contends that there is such identity between the remedial and penal applications of a hybrid statute that it makes little sense to speak of "limiting" a particular construction of the common terms of a hybrid statute to one or the other application. Altering the construction of a term in one context modifies it in the other. There is only one statute to construe, one operative set of terms the meaning of which must be discerned (or constructed). If Court Two adopts a broader understanding of the statute than did Court One, but in the opposite interpretive context, Court Two should be understood as overruling Court One's decision, even if the court itself does not think that it is doing so. Thus, Court Two's decision becomes much harder. It cannot pretend that it is limiting a prior erroneous precedent to one context to avoid the effect of stare decisis doctrine which counsels in favor of following even an erroneous decision. Conversely, Court Two's decision becomes much easier, because its discretion is more restricted than it appeared initially. If stare decisis counsels

[142] One also might plausibly imagine that if courts incorrectly divine legislative intent as to both civil and criminal liability, they will be more likely to provoke legislative clarification.

that it follow precedent in one interpretive context, it should do so in the other.

In short, the fact that a particular interpretation of the substantive duty was rendered in a remedial or penal context should be irrelevant to its force as precedent, unless the interpretation is of mens rea or some uniquely criminal portion of the statute. Moreover, limiting an erroneous construction to civil or criminal application sounds like a good idea, but ultimately it is not a meaningful one.

CONCLUSION

Above all, hybrid statutes should be construed consistently and evenhandedly, at least as a default rule. Consistent construction of hybrid statutes should be regarded as part of a statute's "plain meaning." That is, it should be thought of as a descriptive canon,[143] which along with elementary rules of grammar and usage establish the bounds within which normative canons can operate. But in order for consistent constructions to avoid cramping civil regulation or sacrificing the normative values underlying the rule of lenity, the mere existence of an ambiguity in a hybrid statute cannot result in knee-jerk invocation of either broad or narrow construction. Courts should learn to live with something other than a "pure" rule of lenity when construing elements of hybrid statutes common to civil and criminal applications. The Constitution does not require lenity, and moreover, lenity would continue to operate unimpeded where it is most needed to curb statutory inflation—in construing mens rea terms. By minimizing or eliminating the distinction between civil and criminal rules of construction, the likelihood of path dependence is minimized, and the legislative intent for consistent construction can be implemented.

[143] Because it is a descriptive canon, even consistent construction cannot be an irrebuttable interpretive rule. However, courts should require extraordinarily persuasive evidence before they depart from it—including, most crucially, more evidence than the mere difference in "remedial" and "penal" applications.