

Bankruptcy, Lenity, and the Statutory Interpretation of Cognate Civil and Criminal Statutes[†]

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INTRODUCTION

Lenity and bankruptcy are not terms often found in close company. Lenity is a rule of statutory construction used to interpret criminal laws;¹ bankruptcy refers to our civil system of debt relief and financial reorganization.² Yet modern bankruptcy's origins lie in criminal law, and descendants of those first criminal statutes appear in federal criminal law today.³

Lenity appears to be developing a similar dual character. In two recent cases, the Supreme Court has used lenity to assist it in the interpretation of statutes in civil contexts.⁴ Although no court has yet extended lenity to interpretations of civil bankruptcy, such an extension is not fanciful. In addition, there might appear to be some benefits. Such an extension would provide an opportunity to once again unite civil and criminal bankruptcy, and could create a close interpretive relationship between the two.

This would be disastrous. Although the two sides of bankruptcy share common terms and concepts, they have wholly different functions. Civil bankruptcy provides for collective proceedings which focus on debt relief and restructuring and on the allocation of the burden this relief imposes.⁵ It imposes shared sacrifice—through debt discharge⁶—to promote an individual's or an organization's return to productivity.⁷ To be sure, civil bankruptcy attempts to exclude the unworthy; those who give false oaths during their bankruptcy proceedings and those who hide assets from their trustees, for example, do not receive the benefits of debt forgiveness.⁸

Those who make false oaths and hide assets in civil bankruptcy proceedings can also be jailed.⁹ But not all acts which result in a denial of discharge lead

1. See generally *Crandon v. United States*, 494 U.S. 152, 168 (1990); *United States v. Williams*, 458 U.S. 279, 290 (1982); *McElroy v. United States*, 455 U.S. 642, 657 (1982); *United States v. Bass*, 404 U.S. 336, 347 (1971); *Rewis v. United States*, 401 U.S. 808, 812 (1971).

2. Bankruptcy law is codified in Title 11 of the United States Code. 11 U.S.C. §§ 101-1330 (1988).

3. See 1 COLLIER ON BANKRUPTCY ¶ 7A.01 (Lawrence P. King ed., 15th ed. 1993) [hereinafter COLLIER].

4. *United States v. Thompson/Center Arms Co.*, 112 S. Ct. 2102 (1992); *Crandon*, 494 U.S. 152.

5. A large amount of literature explores the nature of the bankruptcy process. See Barry E. Adler, *Financial and Political Theories of American Corporate Bankruptcy*, 45 STAN. L. REV. 311 (1993); Douglas G. Baird, *Loss Distribution, Forum Shopping, and Bankruptcy: A Reply to Warren*, 54 U. CHI. L. REV. 815 (1987); Richard E. Flint, *Bankruptcy Policy: Toward a Moral Justification for Financial Rehabilitation of the Consumer Debtor*, 48 WASH. & LEE L. REV. 515 (1991); Thomas H. Jackson, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain*, 91 YALE L.J. 857 (1982); Thomas H. Jackson & Robert E. Scott, *On the Nature of Bankruptcy: An Essay on Bankruptcy Sharing and the Creditors' Bargain*, 75 VA. L. REV. 155 (1989); Elizabeth Warren, *Bankruptcy Policy*, 54 U. CHI. L. REV. 775 (1987). See generally H.R. REP. NO. 595, 95th Cong., 1st Sess. 220-41, 383-85 (1977) (reorganizations); *id.* at 383-85 (distributive aim and individual discharge).

6. 11 U.S.C. §§ 727, 1141, 1228, 1328.

7. See generally *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984) ("The fundamental purpose of reorganization is to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources."); *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 203 (1983); Charles J. Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 AM. BANKR. L.J. 325 (1991).

8. 11 U.S.C. § 727(a)(2), (4).

9. 18 U.S.C. § 152 (1988).

to criminal liability, and criminal liability may exist even in the absence of creditor prejudice. Unlike the collective proceeding present in a civil bankruptcy, which attempts to accommodate all parties to a particular case of financial distress, criminal bankruptcy positions the state against the individual. In short, criminal bankruptcy cares little for the effects or results in any particular civil case, while those effects and results are the primary goal of the civil side of bankruptcy.¹⁰

An uncritical extension of the doctrine of lenity to the interpretation of the Bankruptcy Code could blur these distinctions in ways which would distort and frustrate the aims of both criminal and civil bankruptcy. Civil bankruptcy could suffer from too narrow an interpretation of key concepts; criminal bankruptcy could become unnecessarily complex. As a result, I argue against this extension.

This Article first examines the doctrine of lenity and the Court's recent extensions of it to civil contexts. It next reviews in detail the points of intersection between civil and criminal bankruptcy and analyzes possible extensions of lenity to bankruptcy under the Court's recent decisions. These extensions are then rejected as both untrue to the spirit of lenity and as unwise tools to administer a civil or a criminal bankruptcy system.

At the heart of this rejection is the assertion that it is wise to interpret terms and concepts common to both criminal and civil bankruptcy differently in each context. In short, it rejects the proposition that the statutes should be read *in pari materia*. The Article concludes with some observations regarding the proper intersection of criminal and civil bankruptcy.

I. LENITY

As traditionally understood, lenity is a doctrine of statutory interpretation that directs a court to prefer a narrow reading of an ambiguous penal statute.¹¹ So stated, the doctrine appears disarmingly simple. In the case of ambiguity, assess the defendant's conduct against the narrower reading of the law. The Court, however, has disagreed over when to employ the doctrine, how to determine ambiguity, and even what constitutes ambiguity. In light of this confusion, a short examination of the doctrine is in order.

10. The relative numbers of case filings under each system tend to confirm this statement; for every criminal bankruptcy case filed, approximately ten thousand civil bankruptcies are initiated. In fiscal year 1990, for example, 880,399 cases were commenced under Title 11. Ed X. Flynn, *Bankruptcy by the Numbers*, ABI NEWSLETTER 16 (Feb. 1992). Most of these are voluntary filings initiated by debtors. *Id.* In contrast, during that same period the government initiated only 89 prosecutions for bankruptcy crimes. UNITED STATES DEP'T OF JUSTICE, STATISTICAL REPORT, FISCAL YEAR 1990, REPORT 1-21 tbl. 3 (1991).

11. *Crandon v. United States*, 494 U.S. 152, 168 (1990); *United States v. Williams*, 458 U.S. 279, 290 (1982); *McElroy v. United States*, 455 U.S. 642, 657 (1982); *United States v. Bass*, 404 U.S. 336, 347 (1971); *Rewis v. United States*, 401 U.S. 808, 812 (1971).

A. History and Policies Served

The Court often refers to lenity as a "venerable" doctrine,¹² and has on occasion offered no citation upon its invocation.¹³ This acceptance may, however, mask deep differences over the doctrine's scope.

At its core, lenity currently serves both due process and separation of powers concerns.¹⁴ Due process concerns are easy to articulate; a penal statute, the violation of which can bring fines, incarceration, or both, should be clear. Citizens should have notice of those activities which the state will punish. Moreover, separation of powers concerns make clarity the legislature's task.¹⁵ The Court enforces this responsibility by not allowing activities which are not proscribed by sufficiently clear statutory language to be punished.

*United States v. Wiltberger*¹⁶ is an early example of the policies underlying the rule of lenity. Wiltberger was a master of an American vessel trading in China. He killed a seaman in his charge under circumstances that Congress had labelled manslaughter if done on "the high seas."¹⁷ The problem, however, was that when Wiltberger killed the seaman the boat they were both on was:

in the river Tigris, in the empire of China, off Wampoa, and about 100 yards from the shore, in four and a half fathoms water, and below the low water mark, thirty-five miles above the mouth of the river. . . . At the mouth of the Tigris, the government of China has forts on each side of the river, where customhouse officers are taken in by foreign vessels to prevent smuggling. The river at the mouth, and at Wampoa, is about half a mile in breadth.¹⁸

12. *Smith v. United States*, 113 S. Ct. 2050, 2059 (1993); *United States v. R.L.C.*, 112 S. Ct. 1329, 1338 (1992); *Moskal v. United States*, 498 U.S. 103, 131 (1990) (Scalia, J., dissenting). Even as early as 1820, Chief Justice Marshall referred to the interpretive rule that a criminal statute should be strictly construed as an "ancient maxim." *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820); see also *United States v. Lacher*, 134 U.S. 624, 628 (1890). The "ancient maxim" seems to have been grounded in the amelioration of capital punishment for all felonies. G.A. ENDLICH, A COMMENTARY ON THE INTERPRETATION OF STATUTES § 329 (1888).

13. See, e.g., *Bell v. United States*, 349 U.S. 81, 83-84 (1955); *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-22 (1952).

14. E.g., *Dunn v. United States*, 442 U.S. 100, 112 (1979) ("This practice reflects not merely a convenient maxim of statutory construction. Rather, it is rooted in fundamental principles of due process which mandate that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited."); *United States v. Bass*, 404 U.S. 336, 347-48 (1971) ("This principle is founded on two policies that have long been part of our tradition. First, 'a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.'") (citations omitted); *McBoyle v. United States*, 283 U.S. 25 (1931).

15. See, e.g., *Bass*, 404 U.S. at 348 ("This principle is founded on two policies that have long been part of our tradition. . . . Second, because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity. This policy embodies 'the instinctive distastes against men languishing in prison unless the lawmaker has clearly said they should.'") (citations omitted).

16. *Wiltberger*, 18 U.S. (5 Wheat.) 76 (1820).

17. Act of Apr. 30, 1790, ch. 9, § 12.

18. *Wiltberger*, 18 U.S. (5 Wheat.) at 77.

Wiltberger argued that this was not the high seas.¹⁹

The same statute which punished manslaughter only on the high seas criminalized murder and robbery on the high seas *and* “in any river, haven, basin, or bay, out of the jurisdiction of any particular state.”²⁰ Had this later section been inserted in the manslaughter section of the statute, a conviction was assured because the Tigris was a “river . . . out of the jurisdiction of any particular State.” The government argued that this jurisdictional extension should have been read into the manslaughter provision, it being “within the intention and reason [of Congress, thus,] it must be considered as within the letter of the statute.”²¹ The government also asserted that because Congress had passed the statute “on the first organization of the government,” it must have intended to exercise the admiralty powers to the fullest extent, and to punish all crimes of equal repugnance—manslaughter and murder meeting this test—within that jurisdiction.²²

Chief Justice Marshall focused on the jurisdictional issue. He first noted that a river thirty-five miles inland was not, in common parlance, the “high seas.”²³ In addition, it was not the “high seas” as understood at common law.²⁴ These two conclusions brought him to the government’s main point: that it would be incongruous to exempt manslaughter from the statute’s jurisdictional reach when murder and robbery were not. But on this point, Marshall was firm. He stated:

The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment.²⁵

This passage captures most of lenity’s subtleties and controversies. It begins with what today we would call due process concerns; Chief Justice Marshall used the phrase the “tenderness of the law for the rights of individuals.”²⁶ This due process point is quickly followed by a structural point: an acknowledgement that the definition of crimes is, in our system, legislative.²⁷

The next paragraph, however, is more interesting for what it tells us about the content of the rule. Here, Marshall outlines a procedure for employing lenity, which is worth reprinting at length:

19. *Id.* at 86-87.

20. Act of Apr. 30, 1790, ch. 9, § 8.

21. *Wiltberger*, 18 U.S. (5 Wheat.) at 91.

22. *Id.*

23. *Id.* at 94.

24. *Id.* at 106-16.

25. *Id.* at 95.

26. *Id.*

27. *Id.* *Wiltberger* was decided soon after the Court had held that there were no federal common law crimes. *United States v. Coolidge*, 14 U.S. (1 Wheat.) 415 (1816); *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812).

It is said, that notwithstanding this rule, the intention of the law maker must govern in the construction of penal, as well as other statutes. This is true. But this is not a new independent rule which subverts the old. It is a modification of the ancient maxim, and amounts to this, that though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. The maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases which those words, in their ordinary acceptation, or in that sense in which the legislature has obviously used them, would comprehend. The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction. The case must be a strong one indeed, which would justify a Court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute, its language must authorise us to say so. It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated.²⁸

As a result, Marshall declined to find jurisdiction. Wiltberger went free, with Marshall acknowledging that had Wiltberger murdered or robbed he would have been jailed.²⁹

Marshall's interpretive plan which leads to this somewhat anomalous result³⁰ seems simple. Start first, he indicates, with the words of the statute. Lenity applies only if there is some doubt after reading these words: "[w]here there is no ambiguity in the words, there is no room for construction."³¹ What can legitimately be cited in an effort to demonstrate ambiguity? On this point, the opinion is less clear. It seems to indicate that we can look to the "ordinary acceptation" of the words used, and possibly to a different sense if "the legislature has obviously used them" in that different sense.³²

Do we get to look to more? The opinion is silent on this point, although it does state that "[t]o determine that a case is within the intention of a statute,

28. *Wiltberger*, 18 U.S. (5 Wheat.) at 95-96.

29. *Id.* at 105.

30. Seemingly hypertechnical results such as those in *Wiltberger* may be one of lenity's legacies. An early example illustrates this point. In 1547, Parliament passed a law making the "stealing of horses, geldings or mares" a felony without benefit of clergy. An Acte for the Repeale of Certaine Statutes Concerninge Treasons, Felonyes, &c, 1 Edw. 6, ch. 12, § 9 (1547) (text modernized). But what of the theft of just one horse? Apparently, some judge believed that the statute, being in the plural, did not cover the situation. In the very next year, Parliament passed an amendment to the statute depriving the benefit of clergy from "all and singular person and persons feloniously taking or stealing any horse, gelding or mare." An Acte that no Man Stealinge Horse or Horses Shall Enjoye the Benefit of His Clergie, 2 & 3 Edw. 6, ch. 33 (1548) (text modernized). The preamble to this legislation noted that it was necessary "[f]or as much as it is and hath been ambiguous and doubtful, upon the words mentioned [in the prior act] is due form of the law [to have been] found guilty or otherwise attainted or convicted for felonious stealing of one horse, gelding or mare . . ." *Id.* (text modernized). For other examples, see FORTUNATUS DWARRIS, A GENERAL TREATISE ON STATUTES: THEIR RULES OF CONSTRUCTION, AND THE PROPER BOUNDARIES OF LEGISLATION AND JUDICIAL INTERPRETATION 246-47 (Platt Potter ed., 1885).

31. *Wiltberger*, 18 U.S. (5 Wheat.) at 95-96.

32. *Id.*

its language must authorise us to say so."³³ A little of what Marshall means by this can be illuminated by his method. Most of *Wiltberger* is a close textual examination of the act in which the disputed statute was found.³⁴ Marshall attempts to glean from the drafting of other sections of the same act the meaning or the application of the disputed section.

Marshall had employed this method before. In *United States v. Fisher*,³⁵ a federal statute accorded debts owed to the United States priority whenever "any revenue officer or other person, hereafter becoming indebted to the United States" became insolvent.³⁶ The insolvent person in *Fisher* was not a revenue officer; he was an indorser of a foreign bill of exchange which the United States had purchased.³⁷ As such, he did seem to be, however, an "other person." The argument against priority was that the title of the act was limited to "receivers of public money" and that the first four (out of five) sections of the act could not apply to the type of insolvent person present before the court.³⁸

Marshall's method in *Fisher* was similar to that which he would later employ in *Wiltberger*. He undertook a close examination of each provision of the statute in question, both independently and in relation to the rest of the statute.³⁹ But he also went further. He looked to the purpose of the statute,⁴⁰ to other similar statutes,⁴¹ as well as to the title of the act.⁴² His reasoning for this method was to be echoed later in *Wiltberger*:

Where the intent is plain, nothing is left to construction. Where the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived; and in such case the title claims a degree of notice, and will have its due share of consideration.⁴³

B. Current Readings

Wiltberger's focus on language seems sufficiently specific to guide future applications of lenity once ambiguity is agreed to be present. But although it

33. *Id.* at 96.

34. *Id.* at 96-102.

35. *Fisher*, 6 U.S. (2 Cranch) 358 (1805).

36. *Id.* at 385.

37. *Fisher* was the assignee of one Blight, a bankrupt under the 1800 Bankruptcy Act. Blight, prior to his bankruptcy, had endorsed a bill of exchange (probably what we would today call a check) to a person who then sold it (presumably in return for some equivalent consideration) by endorsing it to the United States. *Id.* at 370. Under the law of commercial paper then and now extant, Blight became liable to the United States (along with all other endorsers and the original drawer) upon dishonor of the bill of exchange. See U.C.C. § 3-415(a) (1991).

38. *Fisher*, 6 U.S. (2 Cranch) at 386-87.

39. *Id.* at 388-89.

40. *Id.* at 389-90.

41. *Id.* at 391-94.

42. *Id.* at 386.

43. *Id.*

governs most cases—and approves of idiosyncratic results in the process⁴⁴—it leaves open how we are to determine plain meaning or the “different sense” of the legislature. In many cases, the Court dismisses claims of ambiguity with little more than the assertion that the claim is frivolous or not well taken.⁴⁵ In other cases, however, the Court seems to struggle with claims of ambiguity. Much of this stress centers around the appropriate context within which to read a statute.⁴⁶

Most cases agree with Chief Justice Marshall’s belief that context can make meaning plain; or, as he put it, “ordinary acceptation” is an appropriate context. But simply stating that a statute’s meaning is plain is rarely dispositive. *Smith v. United States*⁴⁷ provides a recent example of a plain meaning debate. At issue in *Smith* was whether a person “uses . . . a firearm” “during and in relation to” a drug transaction—resulting in an enhanced sentence—if the gun was part of the consideration for an exchange for drugs, rather than a tool for the enforcement of one side’s terms.⁴⁸ The Court found that “plain meaning” captured “use” as a medium of consideration, and approved the greater punishment.⁴⁹ In dissent were Justices Scalia, Souter, and Stevens, who saw the issue differently; in their view, so long as the proper interpretation is “eminently debatable,” lenity applies.⁵⁰

The Court’s decisions also recognize specialized meaning; that is, the use of terms of art known to lawyers but not necessarily to the public at large. Examples of this type of meaning are the Court’s treatment of Congress’ use of elements of common law crimes in statutes without defining such elements. Thus, the Court has divided over whether the common law of forgery labelled

44. See *supra* note 30.

45. See, e.g., *Gozlon-Peretz v. United States*, 498 U.S. 395, 409-10 (1991); *Chapman v. United States*, 111 S. Ct. 1919, 1929 (1991); *United States v. Rodgers*, 466 U.S. 475, 484 (1984); *United States v. Culbert*, 435 U.S. 371, 379 (1978); *Huddleston v. United States*, 415 U.S. 814, 839-42 (1974).

46. The point here is the old one that context matters to meaning. Take, for example, a statute that states, “Whoever takes property of a value greater than \$1000 from a bank without authorization or approval shall be fined \$5000 and imprisoned for 5 years.” Upon first reading, this may appear to be a prohibition on robbery or embezzlement from financial institutions. But what if the statute appeared in Title 42 as part of an environmental law designed to save the nation’s river resources?

47. *Smith*, 113 S. Ct. 2050 (1993).

48. See 18 U.S.C. § 924(c).

49. *Smith*, 113 S. Ct. at 2060. In rejecting the dissent’s claim that juxtaposition of “use” with “firearm” excluded “use” as consideration, the Court noted that “[l]anguage, of course, cannot be interpreted apart from context. The meaning of a word that appears ambiguous if viewed in isolation may become clear when the word is analyzed in light of the terms that surround it.” *Id.* at 2054.

50. *Id.* at 2063 (Scalia, J., dissenting) (“That is enough, under the rule of lenity, to require finding for the [defendant].”); see also *Evans v. United States*, 112 S. Ct. 1881, 1900 (1992) (Thomas, J., dissenting) (“Because the Court’s expansive interpretation of the statute is not the only plausible one, the rule of lenity compels adoption of the narrower interpretation.”). Chief Justice Rehnquist and Justice Scalia joined Justice Thomas’ dissent in *Evans*. Cf. *Young v. Community Nutrition Inst.*, 476 U.S. 974, 988 (1986) (Stevens, J., dissenting) (indicating that a statute is not “unclear unless we think there are decent arguments for each of the two competing interpretations of it.” (quoting RONALD DWORNIK, *LAW’S EMPIRE* 352 (1986))).

The dissenters in *Smith* also agreed that context was important. “It is . . . a ‘fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used.’” *Smith*, 113 S. Ct. at 2060-61 (quoting *Deal v. United States*, 113 S. Ct. 1993, 1996 (1993)).

as "falsely made" documents that were genuine on their face but which incorporated false information,⁵¹ has disagreed over whether writing a check on an account with insufficient funds constitutes making a false statement,⁵² and has disagreed over whether Congress' use of "burglary" incorporated all of the common law elements.⁵³

In each of these cases, issues of appropriate context and fair meaning arise as the result of the arguments of the advocates.⁵⁴ Partially as a consequence of the ease with which a clever mind can create disparate readings of a particular text, most cases are consistent with the proposition that it is an insufficient ground for ambiguity that a litigant or some other judge has produced two plausible readings.⁵⁵ Beyond that, however, there is little common ground over the path to the application of lenity.

C. Extension to Civil Contexts

This confusion in criminal cases threatens to spill over into civil areas. Two recent cases, *Crandon v. United States*⁵⁶ and *United States v. Thompson/Center Arms Co.*,⁵⁷ explicitly apply lenity to cases arising in civil contexts. At issue in *Crandon* was whether the government could recover, in a civil suit, compensation allegedly paid illegally to government employees. *Thompson/Center* involved the definition, for taxing and registration purposes, of a firearm. In both cases, the terms construed were also found in cognate criminal statutes, so the Courts believed that their construction of the terms involved would have implications for future criminal cases.⁵⁸

In *Crandon* five individuals had left Boeing to join the Reagan Administration. Before they officially became government employees, Boeing paid each

51. *Moskal v. United States*, 498 U.S. 103 (1990).

52. *United States v. Williams*, 458 U.S. 279 (1982).

53. *Taylor v. United States*, 495 U.S. 575 (1990).

54. The debate over appropriate meaning has resulted in minor acrimony. After all, if a case turns on whether Justice X or Justice Y agrees with the argument that some specified text is ambiguous, the dispute goes beyond the case before the Court and into particular Justices' command of English. An example of this type of dispute can be found in *Deal*, 113 S. Ct. 1993. There, Justice Stevens in his dissent accused the majority of "sentence-parsing." *Id.* at 2004 (Stevens, J., dissenting). Writing for the majority, Justice Scalia characterized Stevens' comments as containing "a degree of verbal know-nothingism that would render government by legislation impossible . . . [I]n the context at issue here, it is entirely clear without any 'sentence-parsing' that [our view is correct]." *Id.* at 1998; see also *United States v. Yermian*, 468 U.S. 63, 76 (1989) (Rehnquist, C.J., dissenting) (characterizing the argument for the existence of ambiguity as "sparsely supported.").

55. *Moskal*, 498 U.S. at 108; *United States v. Rodgers*, 466 U.S. 475, 484 (1984); *McElroy v. United States*, 455 U.S. 642, 657-58 (1982).

56. *Crandon*, 494 U.S. 152 (1990).

57. *Thompson/Center*, 112 S. Ct. 2102 (1992).

58. *Crandon*, 494 U.S. at 158 ("[B]ecause the governing standard is set forth in a criminal statute, it is appropriate to apply the rule of lenity in resolving any ambiguity in the ambit of the statute's coverage."); *Thompson/Center*, 112 S. Ct. at 2109-10 ("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 [National Firearms Act] has criminal applications that carry no additional requirement of willfulness. . . . Making a firearm without approval may be subject to criminal sanction, as is possession of an unregistered firearm and failure to pay the tax on one, 26 U.S.C. §§ 5861, 5871. It is proper, therefore, to apply the rule of lenity and resolve the ambiguity in *Thompson/Center's* favor.").

of the five a lump sum payment "to mitigate the substantial financial loss each employee expected to suffer by reason of his change in employment."⁵⁹ The aggregate amount of the payments made was \$485,000.⁶⁰ The government sought to recover that amount from Boeing, relying on § 209(a) of the Federal Criminal Code which makes illegal the payment or acceptance of supplemental compensation for government service.⁶¹ It also sought to impose a constructive trust on the payments in the hands of the individuals.⁶² Its pretext for these recoveries was a simple common law civil suit for the disgorgement of property received in contravention of law.⁶³

The government did not initiate a criminal action, although the government's recovery largely depended on a finding that the payment and receipt of the funds violated the criminal statute.⁶⁴ The defense disputed that any crime had occurred, noting that § 209(a) was silent as to *when* the prohibition accrued. Because, they argued, all payments were made and accepted before the individuals entered government service, the defendants committed no crime.

The Court's opinion primarily reviews the history and purpose of § 209.⁶⁵ This review left the Court with the impression that such payments were not criminal because the limitation had not been applicable when the payments were made or received. The Court could have stopped at this point. "To the extent that any ambiguity over the temporal scope of § 209(a) remains,"⁶⁶ it invoked lenity as a canon of construction, because "the governing standard is set forth in a criminal statute."⁶⁷ As the Court saw it, application of lenity in this civil context "ensure[d] both that there is a fair warning of the boundaries of criminal conduct, and that legislatures, not courts, define criminal liability."⁶⁸

Thompson/Center also involved a civil case. There, *Thompson/Center* packaged a pistol with a kit that could transform the pistol into a long-barrelled rifle. The production of pistols and long-barrelled rifles are nontaxable events, and the guns thus produced do not need to be registered.⁶⁹ The problem was that a partial conversion—use of the kit's shoulder stock but not its new gun barrel—produced a short-barrelled rifle. In contrast to pistols

59. *Crandon*, 494 U.S. at 154.

60. *Id.* at 155.

61. *Id.* at 156.

62. *Id.*

63. *Id.*

64. *Id.* at 158. Nothing in § 209 authorizes civil damages actions. The government proceeded on the theory that receipt of illegal payments violated fiduciary or statutory duties embodied in § 209, and that such payments could thus be disgorged. Although the Court believed that proof of violation of § 209 was essential, *id.*, that conclusion does not necessarily follow. Although a violation of § 209 could also be said to be a violation of a fiduciary duty to the United States—the converse is not true. Fiduciary duties exist which do not have criminal implications if breached.

65. *Id.* at 158-64.

66. *Id.* at 168.

67. *Id.* at 158.

68. *Id.* (citations omitted).

69. *United States v. Thompson/Center Arms Co.*, 112 S. Ct. 2102, 2104 (1992).

and long-barrelled rifles, the production of a short-barrelled rifle is taxable and the maker of each such gun has to register it before sale.⁷⁰ The government notified Thompson/Center that the sale of the package was subject to tax and regulation under the National Firearms Act.⁷¹ Thompson/Center responded by paying the tax on one package, and then immediately suing for a refund.⁷²

A subsidiary issue, but one not directly in issue since the government did not seek an indictment, was that one who "makes" but does not register a short-barrelled rifle commits a felony for which lack of willfulness or knowledge is not a defense.⁷³

The Court saw the issue as whether Thompson/Center could be said to have "ma[de]" the regulated rifle as prohibited by the National Firearms Act when it provided the parts which could be used to create either a regulated gun or an unregulated gun, but not both.⁷⁴ Its review of the National Firearms Act left it with no clear answer.⁷⁵ Since the term "makes" appears in both the civil and criminal statutes, the Court then employed lenity to resolve ambiguities in Thompson/Center's favor.⁷⁶ The Court felt this application of lenity appropriate since the criminal statute involved did not incorporate any requirement of willfulness or knowledge; if Thompson/Center did "make[]" a regulated firearm, the only thing preventing a conviction after the decision would be the running of the applicable statute of limitations or the exercise of prosecutorial discretion not to prosecute.⁷⁷

Although *Thompson/Center* cites *Crandon*, the citation does no more than compound the problem through repetition without analysis.⁷⁸ Both cases seemingly rely on the happenstance of cognate criminal statutes to invoke lenity.⁷⁹ Absent from either case is any articulated justification for the

70. *Id.*

71. *Id.* at 2105.

72. *Id.*

73. 26 U.S.C. §§ 5861(f), 5871 (1986). The Court also referred to the relaxation of the specific intent standard for the crime of willful failure to pay any taxes related to such "making." *Thompson/Center*, 112 S. Ct. at 2109-10.

74. *Thompson/Center*, 112 S. Ct. at 2106.

75. *Id.* at 2109.

76. *Id.* at 2110.

77. *Id.* Justices Scalia and Thomas concurred on the lenity issue, but believed that the ambiguity arose from considerations different from those the Court identified. *Id.* at 2110-12 (Scalia, J., concurring). Justice Stevens dissented, stating that "[i]f this were a criminal case in which the defendant did not have adequate notice of the Government's interpretation of an ambiguous statute, then it would be appropriate to apply the rule of lenity." *Id.* at 2113 (Stevens, J., dissenting). He recognized the difference between criminal sanctions and civil regulation, stating that regulation of concealed firearms "is a field that has long been subject to pervasive government regulation The public interest in carrying out the purposes that motivated enactment of the statute is, in my judgment and on this record, far more compelling than a mechanical application of the rule of lenity." *Id.*

78. *Id.* at 2110 (Scalia, J., concurring) ("Making a firearm without approval may be subject to criminal sanction, as is possession of an unregistered firearm and failure to pay the tax on one, 26 U.S.C. §§ 5861, 5871. It is proper, therefore, to apply the rule of lenity and resolve the ambiguity in Thompson/Center's favor. See *Crandon v. United States*, 494 U.S. 152, 168[] (1990) (applying lenity in interpreting a criminal statute invoked in a civil action)").

79. *Thompson/Center*, 112 S. Ct. at 2110 (Scalia, J., concurring) ("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

extension of lenity to the civil case at issue. As Justice Stevens points out in dissent in *Crandon*, none of lenity's concerns are implicated: "The risk that this respondent would be the victim of [punishment without fair notice] is . . . extremely remote."⁸⁰ Structural concerns are also absent. Given the broad scope of firearms regulation, the Court is not in the position of creating new regulation, but rather of consistently sorting out Congress' already pervasive system. In short, the Court seems to use lenity not for its embodiment of due process and structural concerns, but as a tie-breaker for tough issues.

This use of lenity as a mechanical method of resolving disputes might initially seem consistent with lenity's due process and separation of powers concerns. It answers the question, and in favor of the nongovernmental entity, thereby forcing Congress to amend the statute to attain a different result. But this mechanical resolution comes only after the Court engages in interpretation and has found ambiguity. Thus the outcome can be determined by the interpretive method chosen, but justified by resort to lenity's mechanical, tie-breaking, application. The focus, then, should be on ways in which, or the circumstances under which the Court finds ambiguity; and this is an area, as shown below, in which the Court is deeply divided.

D. Current State of Lenity

After this review, what can be said about the current state of the rule of lenity? As a starter, formulation of the doctrine of lenity is simple and relatively noncontroversial. When a penal statute is ambiguous, construe it narrowly. What is controversial, and not so simple, are the procedures used to find ambiguity. At least five current members of the Court have endorsed surprisingly subjective standards of ambiguity; for example, whether the divergent readings are "eminently debatable" or "plausible."⁸¹ These differences seem to be over the appropriate context to use in determining ambiguity. In one sense, the problem is like determining the proper perspective for creating a painting or photograph of a particular subject; where the creator stands in relation to the subject—and how much background she chooses to include—can affect the impression conveyed. A concrete example might be the question of how to interpret the word "sanction" in a statute; it can mean either to prohibit or to validate. Only context will aid in resolving

NFA has criminal applications that carry no additional requirement of willfulness. . . . Making a firearm without approval may be subject to criminal sanction, as is possession of an unregistered firearm and failure to pay the tax on one, 26 U.S.C. §§ 5861, 5871. It is proper, therefore, to apply the rule of lenity and resolve the ambiguity in *Thompson/Center's* favor."); *Crandon*, 494 U.S. at 158 ("[B]ecause the governing standard is set forth in a criminal statute, it is appropriate to apply the rule of lenity in resolving any ambiguity in the ambit of the statute's coverage.").

80. *Thompson/Center*, 112 S. Ct. at 2114 (Stevens, J., dissenting).

81. See *supra* note 50 and accompanying text.

the dispute.⁸² The approach of the current Court can be seen as a mix of approaches to the problem of context.⁸³

Some justices focus on the text of the statute, their understanding of English, and not much else. These justices focus on "plain meaning"; that is, they use the perspective of a person unaided by history or by a lawyer.⁸⁴ They follow Chief Justice Marshall's deference in *Wiltberger* to the "ordinary acceptance" of the statute's words.⁸⁵ In this effort, they use lenity's notice function as a reason for not investigating context further; if a criminal statute's true meaning can only be gleaned after significant research, then it cannot provide the type of fair notice of the actions it condemns.⁸⁶

Occasionally, these and other justices will also look to the sense a term or phrase carries in a specialized context, or in an independent system. Statutes that incorporate words that held special status at common law may be examples of this type of inquiry,⁸⁷ as may be environmental or health statutes which incorporate scientific terms. Marshall recognized this type of inquiry. He wrote of "that sense in which the legislature has obviously used" the words in contradistinction to the "ordinary acceptance" of such words.⁸⁸

Still other justices focus on the material and sources available to the legislators who passed the statute in question.⁸⁹ These items include the

82. *Cf. Deal v. United States*, 113 S. Ct. 1993, 1996 (1993) ("There is not the slightest doubt, for example, that § 924(c)(1), which deals with punishment in this world rather than the next, does not use 'conviction' to mean the state of being convicted of sin. Petitioner's contention overlooks, we think, this fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used.")

83. The Court is concerned with context outside the realm of lenity as well. *See King v. St. Vincent's Hosp.*, 112 S. Ct. 570, 574 (1992) ("In so concluding we do nothing more, of course, than follow the cardinal rule that a statute is to be read as a whole . . . since the meaning of statutory language, plain or not, depends on context."); *Shell Oil Co. v. Iowa Dep't of Revenue*, 488 U.S. 19, 25 n.6 (1988) ("Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used . . ."); *United States v. Hartwell*, 73 U.S. (6 Wall.) 385, 396 (1868) (in construing statute, a court should adopt that sense of words which best harmonizes with context and promotes policy and objectives of legislature). *See generally* WILLIAM D. POPKIN, *MATERIALS ON LEGISLATION: POLITICAL LANGUAGE AND THE POLITICAL PROCESS* 55-63 (1993).

84. *See United States v. R.L.C.*, 112 S. Ct. 1329, 1339-40 (1992) (Scalia & Thomas, JJ., concurring); *Evans v. United States*, 112 S. Ct. 1881, 1899-1900 (1992) (Thomas & Scalia, JJ., and Rehnquist, C.J., dissenting).

85. As captured by Justice Scalia:

'[T]he rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal' It may well be true that in most cases the proposition that the words of the United States Code or the Statutes at Large give adequate notice to the citizen is something of a fiction . . . albeit one required in any system of law; but necessary fiction descends to needless farce when the public is charged even with knowledge of Committee Reports.

R.L.C., 112 S. Ct. at 1340 (Scalia, J., concurring).

86. *Id.*

87. *See, e.g., Evans*, 112 S. Ct. 1881 (extortion); *Taylor v. United States*, 495 U.S. 575 (1990) (definition of burglary); *United States v. Williams*, 458 U.S. 279 (1982) (whether check drawn on insufficient funds was a false statement under 18 U.S.C. § 1014); *see also Commissioner v. Acker*, 361 U.S. 87, 95 (1959) (Frankfurter, J., dissenting).

88. *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820).

89. *See Moskal v. United States*, 498 U.S. 103, 108 (1990) ("We have always reserved lenity for those situations in which a reasonable doubt persists about a statute's intended scope even after resort to 'the language and structure, legislative history, and motivating policies' of the statute.") (quoting

standard inventory of legislative history; conference and committee reports; floor statements and other indicia of both the problem addressed and the remedy selected.⁹⁰

Each of these approaches accepts that neither the existence of two or more possible readings of a statute or splits in judicial authority, by themselves, create ambiguity.⁹¹ Beyond that agreement, however, confusion exists over when to stop the inquiry and declare ambiguity present.

The Court's recent dalliance with lenity in civil contexts can only serve to increase this confusion. The Court seems to be willing to invoke lenity—and thus adopt narrow construction—when the term or phrase involved appears in both a civil and criminal statute and construction of the term in one context will affect its construction in another. Thus, since it was essential to the government's position in *Crandon* that a crime had been committed, the Court invoked lenity. Similarly, in *Thompson/Center*, the Court believed that, given the apparent lack of a culpable mental state in the cognate criminal statute, construction of the term "makes" in a taxing and regulatory context would spill over into construction of the same term in a criminal context. But neither of these cases carefully and fully analyzes the reasons—other than the presence of similar terms and concepts—for the extension of lenity outside the criminal sphere.

II. THE SIMILARITIES BETWEEN CIVIL AND CRIMINAL BANKRUPTCY

The lack of a satisfactory analysis in *Crandon* and *Thompson/Center* raises troubling issues for regulatory systems, such as bankruptcy, that have both civil and criminal elements.⁹² The source of this trouble is that the common terms and concepts of such systems are often central to their understanding and administration. A review of the commonality present in civil and criminal bankruptcy, and the common heritage which brought about that commonality, demonstrates the critical nature of the key terms and concepts.

Bifulco v. United States, 447 U.S. 381, 387 (1980)) (emphasis in original); see also *Crandon v. United States*, 494 U.S. 152, 158 (1990) ("In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy."); *Scarborough v. United States*, 431 U.S. 563, 577 (1977).

90. See, e.g., *Taylor*, 495 U.S. 575.

91. *Smith v. United States*, 113 S. Ct. 2050, 2059 (1993) ("The mere possibility of articulating a narrower construction, however, does not by itself make the rule of lenity applicable."); *Moskal*, 498 U.S. at 108 (both); *United States v. Rodgers*, 466 U.S. 475 (1984) (litigants); *McElroy v. United States*, 455 U.S. 642 (1982) (judicial division).

92. The issue is particularly acute with bankruptcy in that there is no agency charged with supervising or administering the Bankruptcy Code. In other areas, such as environmental law or taxation, federal agencies have been accorded the ability to implement congressional policy, and have been given wide latitude in carrying out the goal. See ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, *ADMINISTRATIVE LAW* § 13.7.2 (1993). This Article does not explore the intersection of lenity and administrative law. See Mark D. Alexander, Note, *Increased Judicial Scrutiny for the Administrative Crime*, 77 CORNELL L. REV. 612 (1992).

Present federal criminal law lists thirteen bankruptcy crimes spread across five sections of the Criminal Code.⁹³ These crimes have a long heritage; they trace at least back to an English statute passed in 1542.⁹⁴ American law for the most part adopted principles inherent in the English system for both civil and criminal bankruptcy.⁹⁵ Indeed, prior to 1948, the current bankruptcy crimes statute was located in title 11, along with the civil provisions relating to bankruptcy.⁹⁶ Indeed, the current bankruptcy crimes statute was enacted as part of the 1898 Bankruptcy Act.⁹⁷

The current federal criminal bankruptcy statutes share several terms and concepts with civil bankruptcy which reflect this common heritage. These common terms are some of the most basic to both systems; they include the definitions of "property of the estate," "transfer," and others. The common concepts are also central; the acts condemned in § 152 are essentially the grounds for the denial of a discharge and of a fraudulent transfer.⁹⁸ These similarities are explored below.

A. The Common Terms

As might be expected, the terms common to both civil and criminal bankruptcy define or affect core concepts. As a consequence, if lenity or any other doctrine is improperly used to construe them, there are potentially far-reaching effects.

1. Estate Property

Since bankruptcy involves the debtor-creditor relationship, it is no mystery that conceptions of property are critical to the administration of both civil and criminal bankruptcy. On the civil side, the Bankruptcy Code broadly defines what property and property interests are affected by a debtor's bankruptcy. In

93. These crimes are reprinted *infra* Appendix A.

94. Statute of Bankrupts, 1542, 34 & 35 Hen. 8, ch. 4 (Eng.). For a more extensive view of the historical evolution of bankruptcy crimes, see COLLIER, *supra* note 3, ¶ 7A.01.

95. *Sexton v. Dreyfus*, 219 U.S. 339, 344 (1911) ("We take our bankruptcy system from England, and we naturally assume that the fundamental principles upon which it was administered were adopted by us when we copied the system, somewhat as the established construction of a law goes with words where they are copied from by state."); F. REGIS NOEL, A HISTORY OF THE BANKRUPTCY CLAUSE OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 32, 124 (1919); HAROLD REMINGTON, A TREATISE ON THE BANKRUPTCY LAW OF THE UNITED STATES § 2, at 5 (James M. Henderson ed., Lawyer's Cooperative, 5th ed. 1950). American and English law on criminal bankruptcy seems to have diverged around 1870, with English law emphasizing both the number and the penalty imposed. Current law in the United Kingdom lists 69 bankruptcy offenses, the most serious of which carry seven year prison terms. Insolvency Act, 1986, ch. 45, sched. 10 (Eng.).

96. 1898 Bankruptcy Act, ch. 541, § 29(b), 30 Stat. 544 (repealed and transferred in 1948). As part of its recodification of the Criminal Code in 1948, Congress moved § 29 from Title 11—the Bankruptcy Code—to Title 18—the Criminal Code. See Act of June 25, 1948, ch. 645, 62 Stat. 689.

97. 1898 Bankruptcy Act, ch. 341, § 29, 30 Stat. 544 (*codified at* 11 U.S.C. § 52 (repealed and transferred in 1948)).

98. See *infra* Appendix B for a comparison of the provisions of § 727 of the Bankruptcy Code, relating to denial of discharge, and § 152 of the Criminal Code, providing for various bankruptcy crimes.

particular, § 541 states that property of the estate includes "all legal or equitable interests of the debtor in property as of the commencement of the case,"⁹⁹ as well as "[p]roceeds, product, offspring, rents, or profits of or from property of the estate,"¹⁰⁰ and "[a]ny interest in property that the estate acquires after commencement of the case."¹⁰¹

This breadth is intentional and has concrete implications. The automatic stay prohibits any creditor from taking any collection action with respect to estate property,¹⁰² and the administrative powers limit the debtor's right to use estate property.¹⁰³ After full administration, creditors are paid only from property of the estate.¹⁰⁴

For many of the crimes specified in § 152 through § 155, no bankruptcy crime exists unless the property that is the subject of the indictment is property of the bankruptcy estate.¹⁰⁵ A defendant can thus effectively defend such actions by showing, for example, that the property concealed or transferred was not property of the estate.¹⁰⁶

2. Transfer

Another example of a core concept is the term "transfer." Title 11 employs a broad definition,¹⁰⁷ used primarily in the definition of the Bankruptcy Code's avoiding powers, including preferences¹⁰⁸ and fraudulent transfers.¹⁰⁹ These types of actions seek to ensure the type of equitable distribution anticipated in Title 11.

The word "transfer" appears twice in the text of bankruptcy crimes. The seventh paragraph uses it to define certain transactions,¹¹⁰ and § 153 uses

99. 11 U.S.C. § 541(a)(1).

100. *Id.* § 541(a)(6).

101. *Id.* § 541(a)(7); *see also* United States v. Moody, 923 F.2d 341, 349 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 80 (1991), in which the court used § 541(c) of the Bankruptcy Code to determine whether an interest in a spendthrift trust was estate property within the meaning of § 152.

102. 11 U.S.C. § 362(a).

103. *Id.* § 363(b).

104. *Id.* § 726.

105. *See, e.g.*, 18 U.S.C. § 152, para. 1 (1988) (concealment of estate property); *id.* para. 7 (transfer or concealment of estate property); *id.* para. 8 (falsification or destruction of estate records); *id.* para. 9 (withholding estate records); *id.* § 153 (embezzlement of estate property); *id.* § 154, para. 1 (court officer's purchase of estate property); *id.* para. 2 (court officer's refusal to permit inspection of estate property); *id.* § 155 (fee fixing arrangements to be paid out of estate assets).

106. This determination is made by the factfinder. United States v. Weinstein, 834 F.2d 1454, 1461 (9th Cir. 1987); United States v. Moynagh, 566 F.2d 799, 803 (1st Cir. 1977), *cert. denied*, 435 U.S. 917 (1978); United States v. Butler, 704 F. Supp. 1338, 1344 (E.D. Va. 1989), *aff'd*, 905 F.2d 1532 (4th Cir. 1990), *cert. denied*, 498 U.S. 900 (1990).

107. 11 U.S.C. § 101(54) (1988) ("['T]ransfer' means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property . . .").

108. *Id.* § 547.

109. *Id.* § 548.

110. 18 U.S.C. § 152.

the term in defining embezzlement.¹¹¹ Criminal cases have tended to borrow Title 11's definition.¹¹²

B. The Common Concepts

1. Denial of Discharge

Civil and criminal bankruptcy also share concepts. Included among these is a concept which is at the core of civil bankruptcy: grounds for denial of discharge. Many, but not all, of the acts which may form the basis of a denial of discharge are the same or similar acts for which criminal penalties may lie. For example, debtors who conceal assets or lie under oath not only may lose their discharge, but also may be criminally prosecuted.¹¹³

The concept of discharge is central to civil bankruptcy. Discharge is close to a right—the statute says that the debtor *shall* receive a discharge.¹¹⁴ Those who receive a discharge may not be compelled to pay a pre-petition debt.¹¹⁵ Indeed, they may enjoy and receive compensation from those who attempt to collect such debts.¹¹⁶ Of course, the price for such a benefit is the loss of all non-exempt property, which is paid pro rata to creditors.¹¹⁷ As a consequence, loss of the ability to receive a discharge effectively deprives a debtor of much of the incentive to file bankruptcy.

There is a long, albeit not very well articulated, history of narrowly construing exceptions to discharge.¹¹⁸ The commission of bankruptcy crimes, however, has always fit within this exception. Prior to 1978, the Bankruptcy Act specifically referred to commission of a bankruptcy crime as a grounds

111. 18 U.S.C. § 153.

112. See *United States v. Pfingst*, 477 F.2d 177, 182-83 (2d Cir. 1973) (causing debtor to purchase shares of corporate stock of company under defendant's common control), *cert. denied*, 412 U.S. 941 (1973); *Butler v. United States*, 310 F.2d 214, 218-19 (9th Cir. 1962) (finding that the pre-petition sale of debtor's cars combined with lack of full accounting of proceeds were sufficient to sustain the conviction); *United States v. Strauss*, 283 F.2d 155, 158-59 (5th Cir. 1960) (holding that an allegation of post-petition receipt, endorsement, and a negotiation of a check drawn on debtor were sufficient to support an indictment under seventh paragraph); *United States v. Switzer*, 252 F.2d 139 (2d Cir. 1958) (transfer of assets from troubled company who eventually became debtor to another, newer concern), *cert. denied*, 357 U.S. 922 (1958).

113. See *infra* Appendix B (comparing the relevant portions of each statute).

114. 11 U.S.C. § 727(a).

115. *Id.* §§ 727(b) (scope of discharge), 524 (permanent injunction protecting discharge).

116. *Id.*

117. *Id.* § 726(b).

118. *Gleason v. Thaw*, 236 U.S. 558, 562 (1915) ("In view of the well-known purposes of the Bankrupt Law exceptions to the operation of a discharge thereunder should be confined to those plainly expressed; and while much might be said in favor of extending these to liabilities incurred for services obtained by fraud the language of the act does not go so far."); see also *Lines v. Frederick*, 400 U.S. 18, 20 (1970); *Murphy & Robinson Inv. Co. v. Cross (In re Cross)*, 666 F.2d 873, 879-80 (Former 5th Cir. 1982).

Indeed, Congress made a conscious choice in the original text of the 1898 Act to distinguish the types of disfavored acts. Earlier versions of the statute "eliminated . . . and have transferred [several criminal offenses] to another part of the bill, making them grounds for refusing a discharge to the bankrupt." H.R. REP. NO. 65, 55th Cong., 2d Sess. 12 (1897) (reporting on section 29 of S. 1035, 55th Cong., 2d Sess. (1897)).

for denial of the discharge. When the 1978 Code was proposed, this was changed and the discharge section paraphrased the relevant provisions of § 152. The apparent purpose of this change was to preserve the acts and mental states required for bankruptcy crimes, but to allow them to be shown with a lesser burden of proof.¹¹⁹ Although commission of a bankruptcy crime is not the only basis for denial of a discharge, it remains a central one.

2. Fraudulent Transfers

Both civil and criminal bankruptcy seek to regulate fraudulent transfers. In civil bankruptcy, these are transactions undertaken with the intent to hinder, delay, or defraud creditors.¹²⁰ Such transactions can be avoided if they occur within one year of bankruptcy.¹²¹

The seventh paragraph of § 152 of the Criminal Code also covers such transfers. It states that a crime is committed by “[w]hoever . . . in contemplation of a case under title 11 by or against him . . . knowingly and fraudulently transfers or conceals any of his property”¹²² Thus, the two sections cover some common ground, as in the case where a transaction is made prepetition with the intent to defraud another.¹²³

119. “The fourth ground for denial of discharge is the commission of a bankruptcy crime, although the standard of proof is preponderance of the evidence rather than proof beyond a reasonable doubt.” S. REP. NO. 989, 95th Cong., 2d Sess. 98 (1978); H.R. REP. NO. 595, *supra* note 5, at 384.

120. State law also regulates such transfers. See UNIFORM FRAUDULENT TRANSFER ACT § 4(a); 7A U.L.A. 205 (1984). The lineage of such regulation runs deep. See An Acte Touchyng Orders for Bankruptes, 13 Eliz., ch. 7 (1571) (Eng.); 50 Edw. 3, ch. 4 (1376-77) (Eng.).

121. 11 U.S.C. § 548(a). The representative of the estate also has standing to pursue causes of actions that unsecured creditors of the debtors may have against others. *Id.* § 544(b). To the extent this includes actions under the UNIFORM FRAUDULENT TRANSFER ACT, the reach back period could be as long as four years. U.F.T.A. § 9.

122. 18 U.S.C. § 152, para. 7.

123. Another common concept is one of administration by disinterested professionals. Criminal bankruptcy, for example, has always been concerned with the potential for conflict of interest among bankruptcy officials. Three of the eight original sections dealt directly with such officials, and §§ 153 to 155 of the current Criminal Code are their direct descendants.

Sections 153 and 154 of the Criminal Code deal, respectively, with the unauthorized use of estate property by officers of the court and with the acquisition by such officers of estate property. Both sections also deal with the hiding or destruction of documents related to or belonging to the estate. *Id.* §§ 153, 154. In addition to prohibiting embezzlement, § 153 also prohibits unauthorized use or transfer of estate property. Section 154 contains a flat prohibition on any officer of the estate purchasing, “directly or indirectly,” any property of the estate.

The civil analogues do not incorporate these terms. An officer of the court, such as a trustee or examiner, can be removed “for cause.” 11 U.S.C. § 324(a). To be employed or to be paid, these officers and their professionals must be and must remain disinterested. *Id.* § 327. Unlike denial of discharge, the civil and criminal regulation of professionals seem to be hierarchical; that is, the Bankruptcy Code permits broad regulation of professionals through the ability to dismiss for cause, and through the regulation of compensation, while the Criminal Code regulates only the most extreme cases.

III. FALSE AND TRUE SYNTHESSES

As indicated in the previous section, the number and nature of common terms and concepts is significant. The temptation is to find, or devise, some interpretive scheme to mediate between the two. Lenity, given its prominence and accessibility, is a prime candidate for this task. This section first attempts to assess the applicability of the Court's recent decisions extending lenity into the civil sphere to a hypothetical bankruptcy problem. This effort proves both fairly easy and eminently plausible.

The next section explores the ramifications of this extension for administration of both civil and criminal bankruptcy. They are severe and adverse, leading to a discussion of the ways in which the extension can and should be prevented. After analyzing and dismissing several intermediate methods for harmonizing administration of the two systems, the section next examines the main cause of the problem: an attempt to construe common terms identically. Although seemingly counterintuitive, I argue that courts must reject this premise. I argue that from a historical, practical, and analytical perspective, nothing compels identical construction, and that much mischief attends it.

The final section sorts out what doctrines and rules might be appropriate for discrete points of intersection between civil and criminal bankruptcy.

A. The Argument for Extending Lenity to the Bankruptcy Code

The similarities between civil and criminal bankruptcy provide at least a plausible basis for the extension of lenity to the interpretation of the Bankruptcy Code. Take, for example, the purchase by a business of the unincorporated division of another company. Part of the consideration is the acquirer's assumption of the unpaid debts related to the division; these constitute some, but not all, of the seller's debts. After the transaction, the buyer pays the assumed debts as they come due. The seller, however, falls on hard times. It files for bankruptcy relief. Can the seller's bankruptcy trustee recover as preferences payments made within ninety days of bankruptcy from the holders of the assumed debt?

Most courts would allow recovery. Although no funds were transferred from the debtor/seller to the creditors, many courts would find an "indirect transfer."¹²⁴ This entails recasting each payment into two transactions: payments made first to the seller and then repayments to the creditors. So reconstituted, there is the requisite "transfer" for preference law to apply.¹²⁵

May counsel for the creditors invoke lenity to avoid this result? The key issue will be whether the transactions can be reshuffled to create a transfer of

124. See, e.g., *Conrad Corp. v. Burton (In re Conrad Corp.)*, 806 F.2d 610 (5th Cir. 1986); *Palmer v. Radio Corp. of Am.*, 453 F.2d 1133 (5th Cir. 1971); *Aulick v. Largent*, 295 F.2d 41 (4th Cir. 1961).

125. Alternatively, the court could construe the buyer's intangible obligation to pay the amounts of the assumed debt to be property of the seller, and each payment made on account of that obligation a transfer of that obligation from the seller to the creditor.

the property of the debtor. The Bankruptcy Code adopts a broad definition of transfer,¹²⁶ but recent cases suggest that this breadth may not be unlimited. In *Barnhill v. Johnson*,¹²⁷ for example, the Court decided that a transfer initiated by check occurs when the check is honored, not when the check is delivered.¹²⁸ Part of the Court's reasoning in *Barnhill* is that many events can occur between delivery and honor which would prevent the transfer of funds. *Barnhill* also relies on state law to the effect that a check, by itself, does not transfer funds.¹²⁹ But these can arguably be made applicable to the hypothetical. If buyer's counsel makes explicit that the creditors are not intended beneficiaries of the sale contract, they gain nothing upon its execution. Further, many things can happen between assumption and payment; say, for example, a reduction of the purchase price attributable to a breach of various warranties which would lead to the contractual cessation of the buyer's obligation to pay all of the debts assumed.

To the extent that *Barnhill* reveals ambiguity in the scope of the term "transfer," lenity could resolve the dispute. *Crandon* states that "it is appropriate to apply the rule of lenity in resolving any ambiguity in the ambit of the statute's coverage" if "the governing standard is set forth in a criminal statute."¹³⁰ Here, the same operative word is used in both statutes—transfer. Moreover, the words were, at least from 1898 to 1948, part of the same statute covering the same general topic of bankruptcy.¹³¹ It is thus not much of a stretch to say that the criminal statute's text sets forth the "governing standard."¹³²

Thompson/Center supports this extension. There, a plurality of the Court noted that "[t]he key to resolving the ambiguity lies in recognizing that although it is a tax statute that we construe now in a civil setting, the [statute in question] has criminal applications that carry no additional requirements of willfulness."¹³³ In the hypothetical above, any determination in a civil

126. 11 U.S.C. § 101(54) ("['T]ransfer' means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property . . .").

127. *Barnhill*, 112 S. Ct. 1386 (1992).

128. *Id.* at 1390. As noted by Justice Stevens in dissent, this treatment is contrary to the treatment of similar transactions under tax law. *Id.* at 1392 (Stevens, J., dissenting).

129. *Id.* at 1389.

130. *Crandon v. United States*, 494 U.S. 152, 158 (1990); *cf. id.* at 168 ("We are construing a criminal statute and are therefore bound to consider application of the rule of lenity").

131. *See supra* notes 96-97 and accompanying text.

132. At least two judges believe that *Crandon* can be extended to other civil cases. *See United States v. Chestman*, 947 F.2d 551, 588 (2d Cir. 1991) (arguing that the fact that there are criminal applications in definitions of securities laws is relevant to whether the SEC exceeded authority in promulgating Rule 14e-3(a)) (Mahoney, J., concurring in part and dissenting in part), *cert. denied*, 112 S. Ct. 1759 (1992); *New Mexico v. Roswell Indep. Sch.*, 806 P.2d 1085, 1103 (N.M. Ct. App. 1991) ("Because [the statute at issue] provides criminal penalties for violation of [other sections of the same statute], they are to be strictly construed, even when applied in a civil context.") (citation omitted) (Hartz, J., specially concurring).

133. *United States v. Thompson/Center Arms Co.*, 112 S. Ct. 2102, 2109 (1992). Justices Scalia and Thomas joined the plurality on the lenity issue, and presumably concur with this standard. *Id.* at 2110 (Scalia & Thomas, JJ., concurring in the judgment).

setting of when a transfer occurs has “criminal applications” that do not implicate an additional mental state. To see this, imagine the consequences in the hypothetical above if a civil court had previously ruled, on the same evidence, that a transfer had not occurred. That ruling could then be precedent, in the sense anticipated by *Crandon* and *Thompson/Center*, binding in the criminal trial.

Further, in response to criticism by Justice Stevens that lenity was inapplicable to a tax statute, the *Thompson/Center* plurality stated that other than the focus on “criminal applications,” they “kn[ew] of no other basis for determining when the essential nature of a statute is ‘criminal.’ . . . The rule of lenity, however, is a rule of statutory construction whose purpose is to help give authoritative meaning to statutory language.”¹³⁴

Again, this rationale can be transported to the hypothetical. The assumed facts could present criminal issues if the seller (now debtor) refused to disclose the payments in its bankruptcy on the grounds that there was no transfer made within the meaning of § 152 of the Criminal Code. With such a transformation, the issue becomes one in which *Barnhill* might create sufficient ambiguity—that is, make it “plausible” or “eminently debatable” that a transfer of the debtor’s property did not occur—to invoke lenity. The “criminal applications” and attractiveness of a single construction become apparent. Construction of “transfer” in the civil case thus has clear “criminal applications,” and it would be appropriate to use lenity in that civil setting to give “authoritative meaning to statutory language.”

B. Evaluating Extension

If the use of lenity to interpret civil bankruptcy statutes is plausible, it is then appropriate to ask whether it is wise. On the positive side, such an extension would provide a valuable tool—or at least a mechanical tie-breaker—for the construction of the Bankruptcy Code. It could also regularize the interpretation of common concepts and terms, thus reducing confusion in cognate cases.

While these benefits are not trivial, they do not overcome serious problems attendant to any extension of a criminal concept such as lenity into a civil regulatory system. Among these problems is the thwarting of basic civil bankruptcy policies such as maximum distribution to creditors and of the equitable allocation of losses among creditors. Criminal bankruptcy could suffer as well; the sheer volume of civil bankruptcy cases, if relevant to criminal bankruptcy prosecutions, could overwhelm the development of a consistent bankruptcy crimes doctrine.

134. *Id.* at 2110 n.10. The Court also states that lenity “is not a rule of administration calling for courts to refrain in criminal cases from applying statutory language that would have been held to apply if challenged in civil litigation.” *Id.* What the Court must assume here is that the same word should mean the same thing regardless of its placement in a civil or criminal statute. Otherwise, the issue of different treatment—of administrative regulation—would not arise.

The best solution to this problem is also the simplest: do not apply lenity in civil bankruptcy cases. This simple solution has hard consequences, not the least of which is that embracing it commits one to the position that the same word will have different applications depending on which code contains it.¹³⁵

To support this rejection of lenity, I first show that the policy implications of acceptance are untenable. But policies are malleable, and the most this argument will support is rejection of a pervasive acceptance of the doctrine; periodic applications may still be shown to be consonant with particular statements of these policies. Indeed, courts currently use an array of doctrines and devices for distinguishing between criminal and civil bankruptcy. These doctrines and devices, however, share a common flaw; they each assume that the shared terms and concepts of civil and criminal bankruptcy do not have different meanings depending on the code in which they are placed. While this assumption holds, arguments for the application of lenity retain some attractiveness, if not validity.

Elimination of the potential problem thus calls for rejection of *Crandon's* and *Thompson/Center's* implicit assumption: that words used in similar statutes must have the same meaning in each place in which they appear. In short, I reject the notion that a word must have a uniform meaning and application regardless of its context. Only if this notion is rejected can civil and criminal bankruptcy evolve within their own particular contexts and best serve their own particular policies. Moreover, the position that a word may mean one thing in one statute and another in a second is supported by history, practice, and reason. After first examining the adverse consequences of extending lenity, I illustrate the application of these points.

C. False Readings

1. The Withering Array of Potential Interpretations

As indicated above, ten thousand civil bankruptcy cases are filed for each criminal bankruptcy indictment that is commenced.¹³⁶ The disproportionate ratio indicates a greater likelihood that the shared concepts and terms are more likely to receive scrutiny in civil contexts than in criminal ones. It also correlates with a higher gross number of misconstructions, however defined, of the shared concepts. But if each of these interpretations is plausible or

135. We already tolerate this with respect to civil and criminal definitions of negligence. The Restatement (Second) of Torts and the Model Penal Code, for example, each adopt different definitions of negligence, each appropriate to their respective civil and criminal application. *Compare* RESTATEMENT (SECOND) OF TORTS § 284 (defining negligence as "an act which the actor as a reasonable man should recognize as involving an unreasonable risk of causing an invasion of an interest of another") with MODEL PENAL CODE § 2.02(d) (defining negligence as: "A person acts negligently . . . when he should be aware of a substantial and unjustifiable risk [and acts anyway]. The risk must be of such a nature and degree that the actor's failure to perceive it . . . involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.").

136. See *supra* note 10.

eminently debatable,¹³⁷ there may be an argument that the statute is sufficiently ambiguous to invoke lenity.

As a consequence, every circuit split or other disagreement over the scope of estate property or other common terms and concepts contains potential defenses to criminal proceedings. These disparate readings provide a basis for the existence of ambiguity, and ambiguity in the criminal context is a predicate for lenity, especially since criminal cases—due to their relative rarity and higher stakes—invite greater scrutiny of the statute's text. Were there an understandable or principled test for determining ambiguity, this problem might not exist. But no such test meets that standard, and thus the potential for mischief is high.

There is another problem. The United States is often a creditor in civil bankruptcies. It takes positions in these cases which affect its pecuniary interests. These positions, however, may not be the same positions taken by the government when exercising its discretion as to whether to seek an indictment in similar situations. The issue can be illustrated by a Supreme Court case, *United States v. Whiting Pools, Inc.*¹³⁸ There, the IRS seized a business' assets pursuant to a tax lien. It sought to foreclose on the assets seized to satisfy the debt secured. Before foreclosure, however, the debtor commenced a bankruptcy case and immediately sought a turnover order under § 542 of the Bankruptcy Code, claiming that until foreclosure it had a right of redemption in the assets. This redemption right was property of the estate, and thus the debtor argued it should have the assets back.

The Court agreed, and forced the IRS to return the assets. While this ruling potentially enlarges the assets available for creditors, it raises issues on the criminal side. Say, for example, that prior to the decision in *Whiting Pools* a secured creditor and a debtor colluded to keep certain assets from the reach of creditors by a collusive repossession and foreclosure.¹³⁹ A bankruptcy is filed prior to foreclosure and the debtor knowingly and fraudulently declines to disclose the repossessed assets. If a criminal prosecution is later initiated, could not the debtor invoke lenity? After all, the argument that the repossessed assets were not property of the estate was the position of the United States Government. Almost by definition, there are two plausible readings of the statute.

The Court might address these concerns with its standard response: difference among judges does not, by itself, create ambiguity. The problem is that the Court has yet to articulate a reasoned fallback position; that is, one that distinguishes genuine from false ambiguity. The problem endures.

137. See *supra* note 50 and accompanying text.

138. *Whiting Pools*, 462 U.S. 198 (1983).

139. For a recent example of such a foreclosure, see *Voest-Alpine Trading USA Corp. v. Vantage Steel Corp.*, 919 F.2d 206 (3d Cir. 1990).

2. The Downward Spiral of Narrow Interpretation

Even if the Court develops a workable or principled standard for ambiguity, there still are problems with extending lenity to civil bankruptcy. As indicated above, lenity directs a court to adopt the narrower of two competing readings of a statute.¹⁴⁰ If lenity applies to the interpretation of various Bankruptcy Code terms or concepts, its application will inevitably result in a progression of narrower and narrower readings of the Code. As each new conflict appears, the result is pre-ordained, and pre-ordained in the direction of a constricted construction. Especially in areas in which a broad reading is appropriate—such as in the definition of estate property or in determining what constitutes a transfer in civil bankruptcy—this sets up inevitable clashes of policy.

Whiting Pools is again illustrative. It is easy and perhaps appropriate to imagine the opposite outcome if the matter had arisen in a criminal context. Assume, for example, that before the decision in *Whiting Pools* a private secured party properly repossessed assets and then, in a subsequent bankruptcy, refused to reveal their whereabouts to the trustee unless paid in full.¹⁴¹ If a subsequent criminal prosecution were initiated for concealment of estate property,¹⁴² attorneys for the secured party could very well argue that the assets were not estate property. After all, under non-bankruptcy law the debtor's right of possession, and hence the trustee's, was contingent upon satisfaction of the full amount of the secured obligation.¹⁴³ The trustee would have responded with the argument adopted in *Whiting Pools*. In the face of these two plausible readings, and in a criminal context, a court would likely invoke lenity and hold that no estate property was concealed, and that no crime was committed. Thereafter, the symmetrical logic of *Crandon* and *Thompson/Center*, would influence, and probably change, the result in *Whiting Pools*.

This problem of an increasing number of restrictive interpretations, and thus the increasing number of potential policy clashes, exists even if the Court develops a principled standard for ambiguity. So long as the common terms and concepts can fit within any zone of ambiguity constructed, possibilities for cross-influence exist. Given the centrality of the terms "estate property" and "transfer," which affect each of the one million bankruptcies filed annually, cases falling within the new zone of ambiguity will likely occur. They will only need the concordance of a sufficient financial stake to be litigated.

140. See *supra* note 11 and accompanying text.

141. To avoid possible mens rea problems, assume that the secured party's position is that regardless of the status of the assets as estate property, she will not turn over the assets until paid in full. This state of mind will typically satisfy the mens rea requirement of § 152. COLLIER, *supra* note 3, ¶ 7A.02[1][a][iv].

142. 18 U.S.C. § 152, paras. 1, 7.

143. See U.C.C. § 9-506 (1991).

Cases within the zone of ambiguity, however defined, sharpen the conflict inherent in any extension of lenity to civil cases. Since the breadth of relief in civil bankruptcy turns generally on an expansive reading of estate property and the definition of transfer, and since lenity, if applicable, will direct a court to adopt a restrictive approach, courts will increasingly find themselves in the midst of dueling policies—one civil; the other criminal. The vice here is that the criminal rule carries with it mechanical directions as to which of the two competing readings to adopt. Consequently, if carried to its logical extreme, this conflict will reduce all policy arguments to a single imperative: adopt the narrower construction, regardless of the civil or criminal nature of the suit in which the dispute occurs.

3. Smoke Screens

Courts are not unaware of these policy clashes. Indeed, the use of lenity as a tie-breaker instead of a primary tool in the construction of statutes belies lenity's somewhat mechanical application. To the extent, however, that courts assume that words and concepts appearing in both the Bankruptcy and Criminal Codes should mean the same, the problem is intractable. If the same or similar words are given a uniform reading, lenity calls for the narrower reading in case of ambiguity. One possible reason that this intractability has not produced more discussion is that courts have employed a variety of devices to avoid addressing the issue directly. They have distinguished cases based upon a lack of sufficient disagreement, upon different burdens of proof, and upon different requirements as to the mental state of the actors. As shown below, none of these methods alters the basic assumption of identity of construction. Thus each of them fails to be a compelling reason for not applying lenity.

a. Disparate Opinions

Courts often assume that lenity is applicable, yet decline to employ it because of a lack of true ambiguity. It has long been the position of the Court that mere disagreement, by itself, is insufficient to invoke lenity.¹⁴⁴ Thus, to the extent that a lawyer argues for application of lenity in a criminal context solely on the basis of divergent bankruptcy court opinions, that lawyer has failed to make a sufficient showing that the court should use lenity.

If the Court had adopted a principled threshold for invocation of lenity, the argument for rejection based upon insufficient indicia of ambiguity might be persuasive. Yet, as indicated above,¹⁴⁵ no such threshold exists. Worse still, it appears that a majority of the current Court would settle for a standard as loose as plausibility or eminent debatability of construction.¹⁴⁶ Given the

144. See *supra* note 91 and accompanying text.

145. See *supra* note 91 and accompanying text.

146. See *supra* note 50 and accompanying text.

explosion of reported bankruptcy cases, adroit counsel can often create a plausible debate from advance sheets alone.

At most, the argument that text is insufficiently ambiguous is a cover for other, unarticulated reasons for declining to use lenity. This argument is as unprincipled as the method currently used to invoke lenity, and should be rejected if other, principled, avenues exist.

b. Different Burdens of Proof

On occasion, courts will attempt to avoid the application of lenity in a civil case by referring to the fact that establishment of facts in criminal cases requires a higher standard of proof. The interpretive issue is thought not to arise in a civil context because civil courts will accept evidence as establishing a fact—say a transfer or that certain assets are property of the estate—that would be insufficient to establish those facts in a criminal trial. Again, this does not avoid the ultimate issue of parallel construction; it simply accepts that the words still mean the same thing, but asserts that the facts they represent can be established by lesser or different evidence.

An example is *United States v. Robbins*.¹⁴⁷ There, an involuntary petition had been filed against Robbins, a wheeler-dealer extraordinaire, in 1981. After a protracted court battle, an order for relief was entered in 1983, but Robbins still refused to cooperate. This caused confusion over what assets Robbins held on the relevant date in 1981, and led to a turnover action, filed in 1986 but tried in 1988. Between 1986 and 1988, the bankruptcy court enjoined Robbins from transferring any property at issue in the turnover action.¹⁴⁸

At the trial in 1988, the critical issue was whether the property Robbins then held was "property of the estate." Robbins contended that it was the trustee's burden "to show that each or any of defendants' present assets came from assets [that] debtor had at the time of the bankruptcy before defendants can be compelled to disgorge same."¹⁴⁹ The court agreed, but allowed the trustee to rely upon the doctrine of confusion of assets. Under this doctrine, the trustee was entitled to rely upon a presumption, rebuttable by Robbins, that all property held by Robbins was property of the estate. Robbins was unable to rebut this presumption, and was ordered to turn over his assets.¹⁵⁰ Ultimately these assets proved sufficient to pay all pre-petition creditors in full.¹⁵¹

The government then sought an indictment against Robbins for concealing assets during the bankruptcy. In particular, it focused on assets transferred in violation of the interim injunction. At the criminal trial, the government's sole

147. *Robbins*, 997 F.2d 390 (8th Cir. 1993). The facts are set forth in more detail in *Evans v. Robbins (In re Robbins)*, 83 B.R. 688 (Bankr. W.D. Mo. 1988).

148. *Robbins*, 997 F.2d at 391-92.

149. *In re Robbins*, 83 B.R. at 692.

150. *Id.* at 693.

151. *Id.*

evidence on whether these assets were "property of the estate" was the testimony of the bankruptcy judge who had heard the turnover trial.¹⁵²

The Eighth Circuit held that this was insufficient.¹⁵³ In particular, it held that: "when the doctrine of confusion of assets is relied upon in the underlying adversary bankruptcy proceeding to prove the property in issue is part of the bankruptcy estate, the doctrine is not admissible in a subsequent criminal prosecution to prove the same."¹⁵⁴ Its justification was that the different burden of proof in the civil case made the findings from that case non-transportable into the criminal trial.¹⁵⁵

This reasoning rings hollow for reasons which are explored in more detail below. Its result, however, is inconsistent with its unarticulated main premise—that "property of the estate" means the same thing in civil and in criminal cases. Robbins had property taken from him and paid to his creditors on the civil side. His concealment of that same property, however, did not give rise to criminal liability, even though it would seem that once the property was found to be "property of the estate" for one purpose, it should be property of the estate for all purposes, including criminal liability.

In spite of their results, cases like *Robbins* still pursue the fiction that the term "property of the estate" means the same thing in both statutes. They do so under the guise of different burdens of proof. As stated in *Robbins*:

The quantum of proof necessary to sustain the bankruptcy court's finding is less than that required for a criminal conviction . . . [and] [b]ecause of the different degrees of proof in civil and criminal cases, "findings of the bankruptcy court that the assets were part of bankruptcy estate are [not] controlling in the criminal case."¹⁵⁶

This reasoning has a long and respected pedigree, although the Eighth Circuit did not recognize it. Justice Jackson, in *SEC v. C.M. Joiner Leasing Corp.*,¹⁵⁷ had given much the same response in the securities context. There, the issue was whether a particular set of contractual arrangements were "securities." If so, the SEC had regulatory power over their exchange, and unregulated exchange was criminal. The added fact of criminal liability did not constrain Justice Jackson from adopting a broad construction of the definition. As he stated:

152. *Robbins*, 997 F.2d at 393.

153. *Id.*

154. *Id.*

155. *Id.* at 393-94.

156. *Id.* (alterations in original) (citations omitted) (quoting *United States v. Berry*, 678 F.2d 856, 868 n.10 (10th Cir. 1982), cert. denied, 471 U.S. 1066 (1985)). The court continued:

Finally, under the confusion of assets doctrine, the burden of proof is at all times on the trustee; however, once a *prima facie* case is established, the burden of going forward is on the bankrupt to desegregate the assets. If the bankrupt fails to refute the evidence, the confused assets become assets of the bankruptcy estate. This is a far cry from requiring the Government to prove beyond a reasonable doubt in a criminal prosecution that the postpetition property was acquired with prepetition assets or proceeds therefrom.

Id. at 394 (citations omitted).

157. *Joiner*, 320 U.S. 344 (1943).

In the present ease we do nothing to the words of the Act; we merely accept them. It would be necessary in any case for any kind of relief to prove that documents being sold were securities under the Act. In some eases it might be [proved from the face of the document itself]. In others proof must go outside the instrument itself as we do here. Where this proof is offered in a civil action, as here, a preponderance of the evidence will establish the case; if it were offered in a criminal case, it would have to meet the strieter requirement of satisfying the jury beyond reasonable doubt.¹⁵⁸

This reasoning does not wash. It assumes that the term at issue—"securities" in *Joiner* and "property of the estate" or "transfer" in bankruptcy—has the same application in both contexts, and that what protects criminal defendants is not the rule of lenity, but the difficulties in building a case that will withstand the burden of proof in criminal cases.

This argument turns the considerations underlying lenity on their head. It assumes, without discussion, that both statutes have the same or similar purpose, which, as shown below,¹⁵⁹ is not the case with bankruptcy. While the legislative purpose behind criminal bankruptcy is complementary to civil bankruptcy, it is certainly not the same. This argument also muddles lenity's policy of notice. If notice to potential criminal defendants is the touchstone of lenity, cases such as *Robbins* which give common terms a Janus-like character confuse rather than clarify—in essence, they assume that identical words mean the same thing regardless of context, but then reach different results anyway.

c. Different Mental State Requirements

Recent lenity cases have focused on an aligned but distinct point. In *Thompson/Center*, the Court relied in part on the absence of a culpable mental state as a factor in exercising lenity.¹⁶⁰ In brief, the argument is that because the defendant does not have the added protection of a good faith or a pure motive type of defense, there is more reason to opt for a strict construction.¹⁶¹

This argument, however, begins with the premise that equal construction is the rule. If not, a crime's mens rea element could be viewed as a distinguishing characteristic between the civil and criminal statutes; one would need a strict construction of a civil statute only if the mens rea requirement did not adequately sort conduct deemed criminal from legitimate activity. Moreover, the notice requirement is lacking as well; *Thompson/Center's* procedural context is testament to the availability of declaratory and other interpretive relief. And with respect to bankruptcy crimes, this issue is a false one. Many

158. *Id.* at 355.

159. See *infra* notes 170-76 and accompanying text.

160. *United States v. Thompson/Center Arms Co.*, 112 S. Ct. 2102, 2109 (1992).

161. Indeed, the Court has stated that in the absence of Congressional guidance, it will infer a mens rea requirement if none is stated. *United States v. United States Gypsum Co.*, 438 U.S. 422, 437 (1978).

cases have held that not only must the property concealed or transferred be estate property, but the defendant must have known of its character and of the wrongful nature of his or her actions.¹⁶² As a consequence, a lack of knowledge on the part of the defendant distinguishes many cases. But a significant number remain. Participants in schemes to hide or conceal assets often undertake such actions without regard to the legal status of the property concealed or transferred.¹⁶³

In this sense, both *Crandon* and *Thompson/Center* reflect an awareness of Congress' ability to create crimes that do not incorporate traditional notions of mens rea.¹⁶⁴ In *Crandon*, the statute made payment and receipt of supplemental pay the crime; the defendant's mental state was irrelevant.¹⁶⁵ So too in *Thompson/Center*; simply "mak[ing]" the regulated rifle without registration would have been sufficient to impose criminal liability, regardless of any good faith or lack of knowledge of the criminality of the act.¹⁶⁶

All this means, however, is that the Court was directly confronted with the need to resolve an ambiguity, and could not rely on the defendant's ability to defeat a prosecution based upon a showing of a lack of specific intent. Its response was indirect. In order to determine what the statute meant in a civil context, it looked to what a person would have to know to be convicted in a criminal context. It then reasoned back from what a person would have to do to be convicted of a similar statute in order to set the boundaries of the term at issue in the civil case. By so reaching out to apply lenity, the Court was simply addressing the mental state issue before it was strictly necessary to do so.

D. True Views

1. Lenity Inapplicable to Civil Bankruptcy

One way to address the potential problems is simply to deny that lenity has anything to do with interpretation of the Bankruptcy Code. This has the salutary benefit of avoiding all dispute about the issue. It also has some basis in reason. The Bankruptcy Code is a civil regulatory system, not a criminal statute. Almost by definition, lenity is not applicable since, strictly speaking, no court interpreting the provisions of the Bankruptcy Code would be construing a penal statute.

Crandon and *Thompson/Center*, however, seem to relax this requirement. They do so, however, only because they proceed upon an unarticulated premise that is suspect. That premise may be that terms common to civil and criminal regulation should have exactly the same meaning in each; that is, they should be read to cover exactly the same activities. In the traditional

162. COLLIER, *supra* note 3, ¶ 7A.02[1][a][iii], at 7A-32.

163. This mental state is sufficient for § 152. *Id.* at ¶ 7A.02[1][a][iv].

164. On this tendency, see *Gypsum*, 438 U.S. at 437-38.

165. *Crandon v. United States*, 494 U.S. 152, 154 n.1 (1990).

166. *United States v. Thompson/Center Arms Co.*, 112 S. Ct. 2102, 2109 (1992).

jargon of statutory construction, the two statutes should be construed *in pari materia*. I question the accuracy and necessity of this premise, especially in the context of bankruptcy. A review of the history and purpose of the doctrine of *in pari materia* shows that such a result is not compelled, or appropriate, in the case of bankruptcy.

a. Consistent with *In Pari Materia*

It is a feature of statutory construction that courts give effect to the intent of the legislature as expressed in its words.¹⁶⁷ Interpretive guidance is provided by other statutes only if they are connected in some way.¹⁶⁸ The doctrine of *in pari materia* attempts to capture this insight. A thesis of this Article, however, is that words common to the Criminal and the Bankruptcy Codes should receive different interpretations depending on the nature of the case. One could even say that the words will “mean” different things or have different definitions. In concrete terms, a particular asset may be “property of the estate” and administered accordingly in a civil bankruptcy, yet not be “estate property” and provide the jurisdictional basis for a criminal case.

Some may object that this violates the interpretive maxim that statutes *in pari materia* should be construed together. But as Karl Llewellyn once demonstrated, every interpretive maxim has its limiting maxim.¹⁶⁹ And it is a limitation on the doctrine of *in pari materia* that statutes that do not share a common scope or purpose, or that evince a legislative design to depart from one another, are not to be construed together.

Criminal and civil bankruptcy, while sharing a common subject, do not share common goals and have a different legislative design. Civil bankruptcy promotes creditor recovery, a fresh start for worthy debtors, and reorganizations for deserving businesses.¹⁷⁰ Criminal bankruptcy, in contrast, is not concerned with individual loss or even whether certain acts caused anyone particularized harm.¹⁷¹ Instead, the statutes establishing federal bankruptcy crimes seek to prevent and redress abuses of the bankruptcy system.¹⁷²

167. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rule or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 400 (1950) (listing 28 canons of statutory construction and an equal number of exceptions).

168. *Id.* at 402.

169. *See id.* at 401-06 & nn.13-14.

170. *See supra* notes 5-7 and accompanying text.

171. *See, e.g.,* Stegeman v. United States, 425 F.2d 984, 986 (9th Cir. 1970) (en banc), cert. denied, 400 U.S. 837 (1970) (“[Section 152] was enacted to serve important interests of government, not merely to protect individuals who might be harmed by the prohibited conduct.”).

172. United States v. Grant, 971 F.2d 799, 805 (1st Cir. 1992) (“Section 152 promotes efficient bankruptcy administration and an equitable allocation of the assets of debtor estates by criminalizing efforts to preempt a neutral and informed assessment by the trustee as to the status and the value of the debtor’s legal, equitable and possessory interests in property at the commencement of the case.”) (emphasis in original); Stuhley v. Hyatt, 667 F.2d 807, 809 n.3 (9th Cir. 1982) (“[T]he principle objectives of the provisions are to prevent and punish efforts by a bankrupt to avoid the distribution of any part of a liable bankrupt estate.”); United States v. Shapiro, 101 F.2d 375, 379 (7th Cir. 1939), cert. denied, 306 U.S. 657 (1939) (“The object of Congress in passing this criminal statute was to punish those debtors who, although wanting relief from their debts, did not want to surrender what property

Thus, most bankruptcy crimes do not require the acts proscribed to be material,¹⁷³ do not require that the defendant benefit in any way,¹⁷⁴ and do not require that any creditor be injured.¹⁷⁵ In short, criminal bankruptcy does not seek to regulate any particular debtor/creditor relationship; instead, it sets basic rules for participation in the bankruptcy process generally.

It might be objected that while there are different goals, they are complementary; if criminal bankruptcy's concern is the protection of the civil system's integrity, should not the interpretation of similar terms be given the same extension so as to mutually reinforce each other? So stated, the objection appears strong. But the objection is overstated. To the extent criminal bankruptcy protects civil bankruptcy, it protects excesses and abuses of that system, a function which can be performed without invoking lenity. Indeed, civil bankruptcy as a regulatory system should be free to seek expansive remedies aimed at each individual state of affairs. And there are some acts which are offensive to the civil system, but which are not criminal; this was recognized by Congress in 1898 when it apportioned acts between crimes and grounds for denial of discharge.¹⁷⁶

The departure from *in pari materia* may seem radical. But it is not. It is supported not only by common sense, but by history. Take, for example, the case of *Bones v. Booth*.¹⁷⁷ Bones and Booth had been engaged in playing "all-fours for two guineas a game, from Monday evening to Tuesday evening, without any interruption, except for an hour or two at dinner [they] never parted company."¹⁷⁸ At the end of the game, Bones owed Booth seventeen guineas.¹⁷⁹ Bones paid, and then sued to recover part of it, relying upon a criminal statute which made illegal the loss at gambling of ten pounds or more "at one time or sitting."¹⁸⁰ The issue was whether dinner had intervened sufficiently so as to say that the loss was not all at one time. The court noted the dual nature of the statute; penal when "brought by a common informer," but remedial when brought by the party injured.¹⁸¹ To give effect to the remedial nature of the statute, the court found that dinner did not constitute sufficient intervention, but noted that it might come to a different result if a "common informer" had brought the action seeking to impose the criminal penalty, which was to be put in a pillory for a stated time.¹⁸²

there was to creditors.").

173. *Grant*, 971 F.2d at 809 & n.3.

174. *United States v. Weinstein*, 834 F.2d 1454, 1462 (9th Cir. 1987).

175. *United States v. O'Donnell*, 539 F.2d 1233, 1237 (9th Cir. 1976), *cert. denied*, 429 U.S. 960 (1976); *United States v. Klupt*, 475 F.2d 1015, 1018-19 (2d Cir. 1973); *United States v. Mathies*, 350 F.2d 963 (3d Cir. 1965).

176. *See supra* note 96, and accompanying text.

177. *Bones*, 96 Eng. Rep. 721 (C.P. 1788).

178. *Id.*

179. A guinea is one pound and a shilling.

180. An Act for the Better Preventing of Ecessive and Deceitful Gaming, 1709, 9 Anne, ch. 14 (Eng.) (providing for punishment by pillory).

181. *Bones*, 96 Eng. Rep. at 722 (Nares, J.).

182. *Id.* (Gould & Blackstone, JJ., concurring).

Other cases were similar, holding in effect that "there is no impropriety in putting a strict construction on a penal clause, and a liberal construction on a remedial clause, in the same act."¹⁸³ This approach continues to be used by American common law courts,¹⁸⁴ by United States federal courts construing non-criminal federal statutes,¹⁸⁵ and on occasion by the Supreme Court itself.¹⁸⁶

Giving the same term different constructions in different settings also better describes what courts are already doing, albeit under different names. *Robbins* is a good example of a court's reliance on procedural justifications to avoid the more basic issue: that it makes sense to have the terms take different meanings in each statute. Each time a court invokes one of these procedural devices, it accomplishes the same result as if the terms were construed differently, but leaves open the possibility of a different construction at a later time. This seems at odds with one of lenity's main justifications—that of providing notice to citizens of what acts Congress has prohibited. In a

183. *Short v. Hubbard*, 130 Eng. Rep. 340, 344 (C.P. 1824); see also *DWARRIS*, *supra* note 30 at 262; *ENDLICH*, *supra* note 12, § 322.

184. Compare *State v. Simmons*, 327 A.2d 843, 844 (R.I. 1974) (stating that the phrase "any injury to the person . . . of another" in criminal statute refers only to actual bodily harm and not to injury to reputation alone) with *McDonald v. Brown*, 51 A. 213, 214 (R.I. 1902) (finding that libel judgment was nondischargeable because "[w]ounded feelings, mental anguish, loss of social position and standing, personal mortification and dishonor, are clearly injuries that pertain to the person."); see also *City of Madison v. Hyland, Hall & Co.*, 243 N.W.2d 422 (Wis. 1976) (stating that antitrust laws are to be construed broadly when considering standing to redress restraint of trade; narrowly when applying penal consequences), *appeal dismissed*, 429 U.S. 953 (1976); *People v. Vetri*, 131 N.E.2d 568, 571 (N.Y. 1955) (holding that an accrued vacation is pay, not "wages" within meaning of statute making the payment of wages more than one week after earned, but wages for other purposes, including workers' compensation and bankruptcy); *State v. Meinken*, 91 A.2d 721 (N.J. 1952) (finding that fish and game laws are to be construed liberally when in furtherance of policy and regulatory power; narrowly when criminal action is involved); see also *supra* note 135.

185. See *Georgetown University Hospital v. Sullivan*, 934 F.2d 1280, 1284-85 (D.C. Cir. 1991) (holding that the phrase "amount in controversy" has different meaning in different parts of the Medicare statute depending upon the purpose served); *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*, 673 F.2d 400, 403 n.10 (D.C. Cir. 1982) (holding that the phrase "effluent limitation or other limitation" may have a different meaning in the section of the Clean Water Act dealing with judicial review of the Administrator's action than they do in the section dealing with citizen suits because of the "very different purposes served" by the two sections), *cert. denied*, 459 U.S. 879 (1982); *McCord v. Bailey*, 636 F.2d 606, 617 n.15 (D.C. Cir. 1980) (holding that although the words "any State or Territory" do not include the District of Columbia for purposes of defining whose officials will have liability under 42 U.S.C. § 1983, they do include the District of Columbia for purposes of defining what conspiracies will be covered by 42 U.S.C. § 1985(2)), *cert. denied*, 451 U.S. 983 (1981). Compare *Domanus v. United States*, 961 F.2d 1323 (7th Cir. 1992) (holding that "willfully" has different meanings in civil and criminal tax proceedings) with *Malouche v. JH Mgmt. Co., Inc.*, 839 F.2d 1024 (4th Cir. 1988) (holding that "willfully" has the same meaning in criminal and civil wiretapping statute).

186. See *United States v. Kozminski*, 487 U.S. 931, 962 n.8 (1988); *United States v. United States Gypsum Co.*, 438 U.S. 442, 443 n.19 (1978), (quoting Senator Sherman's comments regarding construction of remedial statutes broadly and of penal statutes narrowly in context of penal laws); *United States v. Raynor*, 302 U.S. 540, 547-48 (1939); *Atlantic Cleaners & Dyers v. United States*, 286 U.S. 427, 433 (1932); *Lamar v. United States*, 240 U.S. 60, 65 (1916) ("The same words may have different meanings in different parts of the same act, and of course words may be used in a statute in a different sense from that in which they are used in the Constitution.") (Holmes, J.); *American Security & Trust Co. v. Commissioners of the District of Columbia*, 224 U.S. 491, 494 (1912) ("But it needs no authority to show that the same phrase may have different meanings in different connections.") (Holmes, J.).

perverse way, the failure to admit different interpretations perpetuates ambiguity in a way that adopting different meanings would not.

A more natural construction would be to give each statute a similar, but separate reading; in formal terms, the criminal interpretations would be subsets of the larger interpretations applicable in civil cases. This may be another way of saying that in criminal matters statutes should be construed strictly, and in civil matters statutes should be construed liberally. This being said, however, one must also accept that the product of such construction is different meanings for the same words.

b. Lenity's Concerns Not Implicated

The different functions Congress accorded civil and criminal bankruptcy is also consistent with the two policies underlying lenity. It is part of Congress' function to select carefully those acts which will result in a denial to the debtor of the benefits of the civil system—that is, a denial of discharge—and those acts which are criminal.¹⁸⁷ Giving full effect to both systems by declining to impose upon one the policies of another as expressed in the similar terms they use thus gives effect to the separation of powers concern by fully implementing Congress' design.

The notice function is served as well. By leaving courts free to construe common and similar terms and concepts narrowly in criminal cases, no defendant can claim a lack of notice to the extent that courts consistently interpret the bankruptcy crime statutes. Indeed, to the extent that civil bankruptcy is free to produce expansive interpretations of common terms, there will be outer guideposts as to conduct. In addition, lenity's notice function is not as important in civil bankruptcy. Bankruptcy relief can be viewed as an act of legislative grace. The denial of discharge due a broad interpretation simply returns the parties to nonbankruptcy law, a state that existed for most of the nineteenth century in this country.¹⁸⁸ This consequence is unlike broad interpretation in criminal cases where the result would be the imposition of criminal penalties.

Finally, to the extent that lenity incorporates notions of gingerly labelling conduct as socially inappropriate, these concerns are not present in bankruptcy. Filing bankruptcy is, in the vast majority of cases, a voluntary act.¹⁸⁹ Social opprobrium, to the extent that it exists, vests primarily in the filing and discharge; indeed, denial of a discharge simply means that creditors may continue to pursue the debtor until they are paid in full.

Dissimilar interpretation would not cause great disruption in the areas of intersection between the two systems. Take, for example, the denial of a discharge. While it is true that the text which states conditions for denial is

187. Congress made this distinction when enacting the current bankruptcy crimes statute. *See supra* note 118.

188. There was no federal bankruptcy legislation from 1804 to 1841, from 1843 to 1867, and from 1878 to 1898. COLLIER, *supra* note 3, ¶ 7A.01[1][6].

189. *See supra* note 10.

almost the same as the criminal provisions,¹⁹⁰ the concerns of lenity are not met by its extension in such cases. First, the structure of discharge leads to similar interpretive strategies. Discharge is close to a right—the statute says that the debtor *shall* receive a discharge¹⁹¹—and there is a long, albeit not very well articulated, history of narrowly construing exceptions to discharge.¹⁹² While this may seem at first blush to be the same as lenity, it is not. Narrow construction is simply a factor in a balancing test; it can be outweighed by other policy considerations. Lenity, on the other hand, is a direction on the result to select after finding ambiguity. In civil bankruptcy, then, while the purpose is to achieve discharge, it does not have the blindness present in lenity. Other factors may matter.

c. Summary

The tension that exists between civil and criminal bankruptcy turns on the assumption that similar terms in each statute need to be construed the same. As noted above, I question and reject this premise. The two systems have different goals; civil bankruptcy is a collective proceeding which attempts to bring all affected parties together to solve a collective problem. While criminal bankruptcy's main goal is the protection of the integrity of this collective system, its focus is on a two party adversarial setting: the government and the individual. It may well be the case that procedures and presumptions appropriate to civil bankruptcy do not transplant well into criminal bankruptcy—both *Robbins* and *Barnhill* may be examples of this phenomena.

A consequence of the view that lenity does not apply is that, at some level and in some cases, words used in the Bankruptcy Code will have a different extension than the same words used in the Criminal Code. As in *Robbins*, concealment of assets found to be property of the estate in the civil case may not give rise to criminal liability. This certainly does not work to the civil system's disadvantage—it preserves the ability to broadly construe the Bankruptcy Code to achieve its goals. It potentially constricts criminal prosecutions, but given the general mental state requirements for bankruptcy fraud, it would be hard to establish this as an empirical fact.

2. Civil Bankruptcy Largely Irrelevant to Lenity

Even if lenity is not extended to interpretation of the Bankruptcy Code, the converse problem still exists: to what extent should interpretations of the Bankruptcy Code affect administration of the Criminal Code? After all, every time an issue is considered by the Supreme Court, at least several lower

190. See *infra* Appendix B for a comparison.

191. 11 U.S.C. § 727(a).

192. Since at least 1915, the Court has narrowly construed exceptions to discharge. *Gleason v. Thaw*, 236 U.S. 558 (1915); see also *supra* note 118.

courts have differed on its resolution. And as the opening example of *Barnhill* shows, if the question revolves around a common concept, there can be significant implications.

Phrased in the argot of lenity, the issue is whether disparate interpretations of the Bankruptcy Code create the ambiguity necessary to invoke lenity. Most lenity cases dismiss the automatic invocation of lenity upon such a showing, and appropriately so. But can such interpretations be factors in a finding of lenity? Here, the two functions of lenity split. The notice function, for example, calls strongly for application—how can a term be said to be clear and easy to follow if several federal judges disagree over its scope?

But the separation of powers issue cuts the other way. To the extent that the construction of the Bankruptcy Code is motivated by differing degrees of intent to further the collective goals of bankruptcy, the dispute is on grounds largely irrelevant to criminal administration. *Whiting Pools* may present one such case; *Robbins* another.

In the final analysis, differing interpretations cannot be ignored, but they cannot be given great weight either. If someone had attempted to conceal a repossessed asset prior to *Whiting Pools*, an argument could exist that a crime had been committed, since at that point courts had not resolved whether such pensions were estate property. But any criminal prosecution would focus on the defendant's mental state—what did she know, and when did she know it—to see if there was a knowing and fraudulent concealment. This would, without affecting what property of the estate covered, accomplish the same goals as an application of lenity, but would confine the result to the individual case, rather than setting precedent for all future cases.¹⁹³

CONCLUSION

The Court's recent extension of lenity into areas of law with both civil and criminal components has potentially grave implications for bankruptcy. Given the number and nature of concepts and terms shared by civil and criminal bankruptcy, inappropriate or unduly restrictive construction of these items can lessen the efficacy of both systems.

The different aims of civil and criminal bankruptcy provide a basis for courts to resist extending lenity principles to the interpretation of the Bankruptcy Code. The cost of this is that courts will have to recall that words used in one code will have different coverage in another, but this is a small price to pay for an effective civil system, on the one hand, and a fair criminal system, on the other.

Moreover, courts should also resist invoking lenity in criminal bankruptcy cases based solely upon differing construction by civil courts. Although such disagreement can undeniably be a factor in some cases, disagreement over the scope of terms in the Bankruptcy Code may be caused by consideration

193. The current relationship between civil and criminal bankruptcy is set forth in COLLIER, *supra* note 3, ¶ 7A.05[3][c].

irrelevant to criminal administration. Also, given the number of bankruptcy cases, some of the interpretations may just be wrong.

Although prior in time and function to the current civil bankruptcy system, criminal bankruptcy has now receded in its day-to-day significance. To allow results from the handful of criminal cases to affect and constrict the civil relief available under the Bankruptcy Code would be both bad doctrine and bad policy. There are better ways to interpret statutes.

APPENDIX A

18 U.S.C. § 152, PARA. 1 (CONCEALMENT) Whoever knowingly and fraudulently conceals from a custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or from creditors in any case under title 11, any property belonging to the estate of a debtor; 18 U.S.C. § 152, PARA. 2 (FALSE OATHS AND ACCOUNTS) Whoever knowingly and fraudulently makes a false oath or account in or in relation to any case under title 11;

18 U.S.C. § 152, PARA. 3 (FALSE DECLARATIONS AND VERIFICATIONS) Whoever knowingly and fraudulently makes a false declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code, in or in relation to any case under title 11;

18 U.S.C. § 152, PARA. 4 (PRESENTING OR USING FALSE CLAIMS) Whoever knowingly and fraudulently presents any false claim for proof against the estate of a debtor, or uses any such claim in any case under title 11, personally, or by agent, proxy, or attorney, or as agent, proxy, or attorney; 18 U.S.C. § 152, PARA. 5 (RECEIVING MATERIAL AMOUNTS OF PROPERTY FROM A DEBTOR WITH INTENT TO DEFEAT PROVISIONS OF TITLE 11) Whoever knowingly and fraudulently receives any material amount of property from a debtor after the filing of a case under title 11, with intent to defeat the provisions of title 11;

18 U.S.C. § 152, PARA. 6 (BRIBERY) Whoever knowingly and fraudulently gives, offers, receives or attempts to obtain any money or property, remuneration, compensation, reward, advantage, or promise thereof, for acting or forbearing to act in any case under title 11;

11 U.S.C. § 152, PARA. 7 (TRANSFER OR CONCEALMENT OF PROPERTY TO DEFEAT PROVISIONS OF TITLE 11) Whoever, either individually or as an agent or officer of any person or corporation, in contemplation of a case under title 11 by or against him or any other person or corporation, or with intent to defeat the provisions of title 11, knowingly and fraudulently transfers or conceals any of his property or the property of such other person or corporation;

18 U.S.C. § 152, PARA. 8 (POST-PETITION TAMPERING WITH RECORDED INFORMATION) Whoever, after the filing of a case under title 11 or in contemplation thereof, knowingly and fraudulently conceals, destroys, mutilates, falsifies, or makes a false entry in any recorded information, including books, documents, records, and papers, relating to the property or financial affairs of a debtor;

18 U.S.C. § 152, PARA. 9 (POST-PETITION WITHHOLDING OF RECORDED INFORMATION) Whoever, after the filing of a case under title 11, knowingly and fraudulently withholds from a custodian, trustee, marshal, or other officer of the court entitled to its possession, any recorded information, including books, documents, records, and papers, relating to the property or financial affairs of a debtor.

Section 152 of title 18 provides a five-year maximum term of imprisonment.¹⁹⁴ While § 152 also provides for a fine of only \$5000, other legislation has increased that amount to \$250,000.¹⁹⁵ The amount may be

194. 18 U.S.C. § 152.

195. *Id.* § 3571(b)(3).

increased to \$500,000 if the defendant is an organization,¹⁹⁶ and may also be increased depending upon pecuniary gain or loss from the crime.¹⁹⁷ The actual penalty imposed is determined in accordance with the Sentencing Guidelines promulgated by the United States Sentencing Commission.¹⁹⁸

Other bankruptcy crime statutes include:

18 U.S.C. § 153 (EMBEZZLEMENT BY OFFICER OF COURT) Whoever knowingly and fraudulently appropriates to his own use, embezzles, spends, or transfers any property or secretes or destroys any document belonging to the estate of a debtor which came into his charge as trustee, custodian, marshal, or other officer of the court, shall be fined not more than \$5000 or imprisoned not more than five years, or both.

18 U.S.C. § 154 (PURCHASE OF ESTATE PROPERTY BY OFFICER OR REFUSAL OF PERMISSION TO INSPECT) Whoever, being a custodian, trustee, marshal, or other officer of the court, knowingly purchases, directly or indirectly, any property of the estate of which he is such officer in a case under title 11; or

Whoever being such officer, knowingly refuses to permit a reasonable opportunity for the inspection of the documents and accounts relating to the affairs of estates in his charge by parties in interest when directed by the court to do so—

Shall be fined not more than \$500, and shall forfeit his office, which shall thereupon become vacant.

18 U.S.C. § 155 (AGREEMENTS FIXING FEES OR COMPENSATION TO BE PAID TO ATTORNEYS OR OTHER PARTIES IN INTEREST) Whoever, being a party in interest, whether as a debtor, creditor, receiver, trustee or representative of any of them, or attorney for any such party in interest, in any receivership or case under title 11 in any United States court or under its supervision, knowingly and fraudulently enters into any agreement, express or implied, with another such party in interest or attorney for another such party in interest, for the purpose of fixing the fees or other compensation to be paid to any party in interest or to any attorney for any party in interest for services rendered in connection therewith, from the assets of the estate, shall be fined not more than \$5000 or imprisoned not more than one year, or both.

196. *Id.* § 3571(c)(3).

197. *Id.* § 3571(d) (providing for a maximum fine equal to twice the pecuniary gain or loss involved in a crime if the calculation of such gain or loss "would [not] unduly complicate or prolong the sentencing process").

198. COLLIER, *supra* note 3, ¶ 7A.05[4].

APPENDIX B
COMPARISON OF SECTION 727 OF THE BANKRUPTCY CODE
AND SECTION 152 OF THE CRIMINAL CODE

PROVISION OF SECTION 152 (Grounds for conviction of crime)	PROVISION OF SECTION 727 (Grounds for denial of discharge)
<p>18 U.S.C. § 152, PARA. 1 Whoever knowingly and fraudulently conceals from a custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or from creditors in any case under title 11, any property belonging to the estate of a debtor;</p> <p>18 U.S.C. § 152, PARA. 7 Whoever, either individually or as an agent or officer of any person or corporation, in contemplation of a case under title 11 by or against him or any other person or corporation, or with intent to defeat the provisions of title 11, knowingly and fraudulently transfers or conceals any of his property or the property of such other person or corporation;</p>	<p>11 U.S.C. § 727(a)(2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed—(A) property of the debtor, within one year before the date of the filing of the petition; or (B) property of the estate, after the date of the filing of the petition;</p>
<p>18 U.S.C. § 152, PARA. 2 Whoever knowingly and fraudulently makes a false oath or account in or in relation to any case under title 11;</p> <p>18 U.S.C. § 152, PARA. 3 Whoever knowingly and fraudulently makes a false declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code, in or in relation to any case under title 11;</p>	<p>11 U.S.C. § 727(a)(4)(A) the debtor knowingly and fraudulently, in or in connection with the case—(A) made a false oath or account;</p>

<p>18 U.S.C. § 152, PARA. 4 Whoever knowingly and fraudulently presents any false claim for proof against the estate of a debtor, or uses any such claim in any case under title 11, personally, or by agent, proxy, or attorney, or as agent, proxy, or attorney;</p>	<p>11 U.S.C. § 727(a)(4)(B) the debtor knowingly and fraudulently, in or in connection with the case—(B) presented or used a false claim;</p>
<p>18 U.S.C. § 152, PARA. 6 Whoever knowingly and fraudulently gives, offers, receives or attempts to obtain any money or property, remuneration, compensation, reward, advantage, or promise thereof, for acting or forbearing to act in any case under title 11;</p>	<p>11 U.S.C. § 727(a)(4)(C) the debtor knowingly and fraudulently, in or in connection with the case—(C) gave, offered, received, or attempted to obtain money, property, or advantage, or a promise of money, property, or advantage, for acting or forbearing to act;</p>
<p>18 U.S.C. § 152, PARA. 8 Whoever, after the filing of a case under title 11 or in contemplation thereof, knowingly and fraudulently conceals, destroys, mutilates, falsifies, or makes a false entry in any recorded information, including books, documents, records, and papers, relating to the property or financial affairs of a debtor;</p> <p>18 U.S.C. § 152, PARA. 9. Whoever, after the filing of a case under title 11, knowingly and fraudulently withholds from a custodian, trustee, marshal, or other officer of the court entitled to its possession, any recorded information, including books, documents, records, and papers, relating to the property or financial affairs of a debtor.</p>	<p>11 U.S.C. § 727(a)(4)(D) the debtor knowingly and fraudulently, in or in connection with the case—(D) withheld from an officer of the estate entitled to possession under this title, any recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs;</p>