THE RULE OF LENITY AND HYBRID STATUTES: *WEC CAROLINA ENERGY SOLUTIONS LLC V. MILLER*

Stephen Wills Murphy*

Congress and state legislatures regularly create statutes with both civil and criminal punishments for certain violations. The application of principles of statutory interpretation to those "hybrid" statutes can lead to unintended results. Under the rule of lenity, an ambiguity in a criminal statute is resolved in favor of the defendant, thereby narrowing potential criminal liability and giving fair warning to potential defendants.[1] But the application of the rule of lenity to an ambiguity in a hybrid statute is unclear; courts and commentators have recently debated whether the rule of lenity should apply only to criminal applications of hybrid statutes, to criminal and civil applications, or to neither. Although the Supreme Court has suggested that the rule of lenity might apply categorically to all applications of a hybrid statute, whether civil or criminal,[2] one scholar has noted that this use of the rule "creates the paradox that, although Congress would probably imagine itself to be *strengthening* a statute by adding criminal penalties to it, . . . the addition of such penalties has the effect of *weakening* the statute, because courts may then feel obliged to apply the rule of lenity . . . in civil cases."[3]

Despite the concerns of courts and commentators, in *WEC Carolina Energy Solutions LLC v. Miller*,[4] the Fourth Circuit held that the rule of lenity applies categorically to both civil and criminal provisions in a hybrid statute.[5] The court's conclusions, and the apparent ease with which it reached those conclusions, implicates significant policy considerations for the interpretation of future hybrid statutes.

The rule of lenity is a well-established interpretative principle that resolves ambiguities in criminal statutes in favor of the defendant.[6] That is, if a court finds that an ambiguity in a penal statute persists after it has employed all other

---

*J.D., Ph.D., University of Virginia; Associate, McGuireWoods LLP, Charlottesville, Virginia; Adjunct Professor of Law, Washington & Lee University School of Law.

I would especially like to thank Caleb Nelson of the University of Virginia School of Law, my first and constant professor of Statutory Interpretation, and to thank the faculty of the Washington & Lee University School of Law, who have given me the privilege of teaching their Statutory Interpretation Seminar. My professors and students have helped shape my understanding of the subject of this Comment, but all the errors in execution are my own. I am also sincerely grateful to my wife, whose support has made all of this possible.

1. *See* Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 FORDHAM L. REV. 885, 885 (2004).

2. *See* Leocal v. Ashcroft, 543 U.S. 1, 12 n.8 (2004).

3. Jonathan R. Siegel, *The Polymorphic Principle and the Judicial Role in Statutory Interpretation*, 84 TEX. L. REV. 339, 392 (2005).

4. 687 F.3d 199 (4th Cir. 2012).

5. *Id.* at 204.

6. *See* Price, *supra* note 1, at 886–89 (describing the classic rationales for applying the rule of lenity in statutory construction).

means of statutory interpretation, it must resolve the ambiguity in a way that narrows or reduces the potential criminal liability.[7] The rule of lenity only applies to penal statutes, and it is grounded in principles of fair warning and legislative supremacy that are unique to the criminal context.[8]

A problem arises, however, when the statutory ambiguity occurs in a statute with both penal and civil provisions. The typical "hybrid" scheme is as follows: Section One prohibits certain conduct; Section Two creates a private cause for damages for such conduct; and Section Three makes a particular subclass of conduct—such as a willful or knowing violation—a crime.[9] Such "hybrid" statutes are commonplace; examples include the Sherman Act,[10] the Racketeer Influenced and Corrupt Organizations Act,[11] the Bankruptcy Code,[12] and even the Clean Water Act.[13] These statutes are predominantly enforced through their civil components.[14] Other statutes, such as the Computer Fraud and Abuse Act (CFAA),[15] which is the subject of *Miller*, is predominantly enforced through its criminal provisions.[16]

A question arises when the hybrid statute contains an ambiguity that can apply to both the civil and the criminal provisions. This presents a persistent problem that scholars have called "intractable"[17] and "a difficult question" for courts.[18]

Courts and commentators have disagreed about whether the rule of lenity should categorically apply to both criminal and civil applications of the ambiguity, should categorically apply to neither, should categorically apply to one but not the other, or should apply based on a case-by-case analysis of the contours of the statute.[19] Such a case-by-case determination would depend on whether the statute is more "civil" or "criminal" in nature; for example, many hybrid statutes include a criminal provision that appears to be an "afterthought" to an otherwise straightforward statutory regime that provides for civil penalties.[20]

In *Miller*, the Fourth Circuit confronted an ambiguity in a civil proceeding under the CFAA, which has both civil and criminal provisions.[21] The case arose

---

7. *See id.* at 885.
8. CALEB NELSON, STATUTORY INTERPRETATION 108–12 (2011).
9. Jonathan Marx, *How to Construe a Hybrid Statute*, 93 VA. L. REV. 235, 235 (2007).
10. *See* 15 U.S.C. §§ 1–7 (2006).
11. *See* 18 U.S.C. §§ 1961–1968 (2006).
12. *See* 11 U.S.C. §§ 101–1532 (2006).
13. *See* 33 U.S.C. §§ 1251–1387 (2006).
14. *See, e.g.*, Marx, *supra* note 9, at 238, 281–82 & n.138 (discussing the infrequent application of the Bankruptcy Code provisions in a penal context).
15. 18 U.S.C § 1030 (2006).
16. WEC Carolina Energy Solutions LLC v. Miller, 687 F.3d 199, 201 (4th Cir. 2012).
17. Marx, *supra* note 9, at 235.
18. NELSON, *supra* note 8, at 136.
19. *Id.* at 136–37.
20. *Id.* at 137 (citing Marx, *supra* note 9, at 282).
21. 687 F.3d at 201.

out of a dispute between industry competitors based in the same county in South Carolina, in which one company accused a former employee of misappropriation of confidential information.[22] The principal defendant, Mike Miller, was a Project Director for WEC Carolina Energy Solutions, Inc. (WEC), which provided specialized welding services to the power industry.[23] Miller resigned on April 30, 2010.[24] WEC later alleged that prior to resigning, Miller "downloaded a substantial number of [its] confidential documents" to his personal computer and email address.[25] Less than a month later, Miller went to work for WEC's competitor, Arc Energy Services, Inc. (Arc).[26] Miller soon made a presentation to a potential client using WEC's proprietary information, and he won the contract for Arc.[27]

WEC was not shy about its response. It brought suit in federal court against Miller, his assistant Emily Kelley, and Arc, with nine state law causes of action and one claim under the federal CFAA.[28]

Miller filed a motion to dismiss the count under the CFAA, alleging that WEC had failed to state a claim.[29] At stake was federal court jurisdiction over the case—the alleged violation under the CFAA was the plaintiff's sole federal claim, and it gave the federal court subject matter jurisdiction over the entire matter.[30] Through the motion to dismiss, Miller sought to require Arc to bring the action in state court.

The CFAA penalizes any individual who "accesse[s] a computer without authorization or exceed[s] authorized access" and obtains protected information.[31] Although the Act criminalizes various forms of improper access to electronic information, it seems focused on computer hackers; as the Fourth Circuit summarized, the CFAA is "primarily a criminal statute designed to combat hacking."[32]

Miller's motion to dismiss turned on whether WEC had sufficiently alleged that Miller had violated the CFAA when he downloaded files from his work computer to his personal computer.[33] Under WEC policies, Miller was permitted to work with certain files on his work computer, but he was prohibited from downloading that information to a personal computer.[34] Miller argued, however,

---

22. *Id.* at 201–02.
23. *Id.*
24. *Id.* at 202.
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *See id.*
31. 18 U.S.C. § 1030(a)(1); *see also id.* § 1030(a)(2)(C), (a)(4), (a)(5)(B) (describing similar conduct deemed culpable under the CFAA).
32. *Miller*, 687 F.3d at 201 (citing A.V. *ex rel.* Vanderhye v. iParadigms, LLC, 562 F.3d 630, 645 (4th Cir. 2009)).
33. *See id.* at 202–03.
34. *Id.* at 202.

that WEC's policies were about "use" of information, whereas the CFAA penalized only improper "access."[35]

The district court held that WEC had failed to state a claim under the CFAA.[36] The court reasoned that under WEC policies, Miller was permitted to have "access" to the files, and even though WEC alleged that he improperly downloaded those files, such an action was only improper "use" of the files to which he had rightful access.[37] The district court further found that even if his "purpose in accessing the information was contrary to company policies regulating use, it would not establish a violation of company policies relevant to access and, consequently, would not support liability under the CFAA."[38]

On appeal, the Fourth Circuit examined the key phrases—access "without authorization" and "exceeds authorized access"—in the CFAA.[39] In particular, the Fourth Circuit set out to "examine whether these terms extend to violations of policies regarding the use of a computer or information on a computer to which a defendant otherwise has access."[40]

There was a lack of case law on the issue, but the Fourth Circuit at least noted that the Ninth Circuit, on a rehearing en banc, had recently interpreted these phrases narrowly, in a way that favored the defendant and limited CFAA liability only to situations in which an employee was prohibited from accessing the files in the first instance.[41] In that case, *United States v. Nosal*,[42] the Ninth Circuit reversed a panel's decision and held that the defendants did not violate the CFAA when they accessed confidential information of their employer using their own valid user accounts and then subsequently transferred that information to a competitor.[43]

With this case law in mind, the Fourth Circuit in *Miller* focused its analysis on the definitions of "access" and "authorization" to determine whether such words should be limited to improper access in the first place, or whether they

---

35. Brief of Appellees at 12–19, WEC Carolina Energy Solutions LLC v. Miller, 687 F.3d 199 (2012) (No. 11-2101), 2011 WL 2619514, at *12–19.

36. *See* WEC Carolina Energy Solutions LLC v. Miller, No. 0:10-cv-2775-CMC, 2011 WL 379458, at *7 (D.S.C. Feb. 3, 2011).

37. *Id.* at *5.

38. *Id.*

39. *Miller*, 687 F.3d at 203 (referring to 18 U.S.C. § 1030(a)(2)(C), (a)(4), (a)(5)(B), (a)(5)(C) (2006)).

40. *Id.*

41. *Id.* The Fourth Circuit also discussed, and declined to follow, the reasoning of the Seventh Circuit, which had held that a breach of the duty of loyalty destroys the agency relationship that enables an employee to access confidential files; the Seventh Circuit thus held that an employee violated the CFAA by erasing crucial data on his company laptop prior to turning it in at the end of his employment. *Id.* at 203. (discussing and declining to follow Int'l Airport Ctrs., LLC v. Citrin, 440 F.3d 418 (7th Cir. 2006)). The Fourth Circuit concluded that the Seventh Circuit's holding would have "far-reaching effects unintended by Congress," by subjecting to liability under the CFAA any employee who breached a minor duty to his employer and then accessed files on the computer network for any purpose. *Id.* at 206.

42. 676 F.3d 854 (9th Cir. 2012) (en banc).

43. *Id.* at 856, 863–64.

could be construed to also include misuse of information that was properly obtained.[44]

The court then fell back on the "ordinary, contemporary, common meaning"[45] of the term "authorization"—"that an employee is authorized to access a computer when his employer approves or sanctions his admission to that computer."[46] The court further reasoned that under the ordinary meaning, an employee "exceeds authorization" when he has authorization to access the computer but does not have authorization to access certain information on that computer.[47] The court concluded that in sum, "[n]otably, neither of these definitions extends to the improper *use* of information validly accessed."[48]

Nevertheless, the court found some potential ambiguity in the statutory terms—particularly in one potential reading endorsed by the Ninth Circuit panel in *Nosal*.[49] In its opinion, the panel noted that in the definitions section, the CFAA defined "exceeds authorized access" to mean "to access a computer with authorization and to use such access to obtain or alter information in the computer that the accesser is not entitled so to obtain or alter."[50] In an interesting read of the statute, the Ninth Circuit reasoned that in the phrase "not entitled *so* to obtain or alter," the "so" should be read as "in that manner," thus penalizing access to information that the employee "is not entitled [in that manner] to obtain or alter."[51] The Ninth Circuit panel thus concluded that the CFAA's reference to an employee who "exceeds authorized access" introduced the idea of use and authorized use, and was not simply referring to authorized access.[52]

The Fourth Circuit did not find this reading of "so" to be compelling; even granting that "so" could mean "in that manner," the Fourth Circuit concluded that the statute referred only to unauthorized access, not unauthorized use.[53]

But perhaps to remove any doubt, or to remove the necessity of reaching a final and binding decision on that issue, the Fourth Circuit applied the rule of

---

44. *Miller*, 687 F.3d at 204.

45. *Id.* (quoting Perrin v. United States, 444 U.S. 37, 42 (1979)).

46. *Id.* The Court also briefly noted the definitions from the *Oxford English Dictionary*, which defined "access" as "'[t]o obtain, acquire,' or '[t]o gain admission to,'" *id.* (quoting OXFORD ENGLISH DICTIONARY (3d ed. 2011) (alteration in original)), and defines "authorization" as "formal warrant, or sanction," *id.* (quoting OXFORD ENGLISH DICTIONARY (2d ed. 1989)) (internal quotation marks omitted). The Fourth Circuit quickly discussed the "ordinary" meaning of the phrase, and the place of the *Oxford English Dictionary* in its reasoning is not clear. *See id.*

47. *Id.*

48. *Id.*

49. *See id.* at 205.

50. United States v. Nosal, 642 F.3d 781, 785 (9th Cir. 2011), *rev'd en banc*, 676 F.3d 854 (9th Cir. 2012) (quoting 18 U.S.C. § 1030(e)(6)) (internal quotation marks omitted).

51. *Id.* at 785–86 (quoting 18 U.S.C. § 1030(e)(6)).

52. *See id.*

53. *Miller*, 687 F.3d at 205.

lenity to conclude that any ambiguity, such as it was, must be resolved to render the statute narrower in application.[54]

The court's reasoning consisted of two parts. First, the court found that the principle of consistency required application of the rule of lenity to the civil and criminal application of the statute.[55] The court reasoned, "Where, as here, our analysis involves a statute whose provisions have both civil and criminal application, our task merits special attention because our interpretation applies uniformly in both contexts."[56]

Second, the Fourth Circuit noted that the criminal provision must be read narrowly, under the rule of lenity. The court reasoned, "[I]n the interest of providing fair warning 'of what the law intends to do if a certain line is passed,' . . . we will construe this criminal statute strictly and avoid interpretations not 'clearly warranted by the text.'"[57]

The Fourth Circuit concluded that, even granting the Ninth Circuit panel's potential reading of the statute, "[F]aced with the option of two interpretations, we yield to the rule of lenity and choose the more obliging route."[58]

In addressing the motion to dismiss, the Fourth Circuit noted that the complaint itself alleged that WEC gave Miller access to the confidential information.[59] The complaint did allege wrongdoing on the part of Miller, but only improper use of that information—not improper access in the first instance.[60] Because improper use falls outside of the scope of the CFAA as interpreted by the Fourth Circuit, the court upheld the dismissal of the civil claims under the CFAA.[61]

Commentators had expressed concern that the application of the rule of lenity to hybrid statutes "presents courts with a difficult question."[62] Especially in light of such concerns, the simplicity with which the Fourth Circuit approached the case is refreshing. Nevertheless, the Fourth Circuit's reasoning requires certain implicit assumptions about the operation of the rule of lenity and other interpretive principles, which are worthy of further analysis.

---

54. *See id.* at 205–06.

55. *Id.* at 204.

56. *Id.*

57. *Id.* (quoting Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 704 n.18 (1995); Crandon v. United States, 494 U.S. 152, 160 (1990)).

58. *Id.* at 205–06. The Fourth Circuit also noted that the Ninth Circuit panel's opinion, like the Seventh Circuit's reading, discussed *supra* note 41, would radically expand the reach of the statute. *Id.* at 206. The court noted that the Ninth Circuit panel's reading would criminalize an employee violating the company's downloading policy to download to a personal computer so he can work after hours and added, "we are unwilling to contravene Congress's intent by transforming a statute meant to target hackers into a vehicle for imputing liability to workers who access computers or information in bad faith, or who disregard a use policy." *Id.* at 206–07.

59. *Id.* at 207.

60. *Id.*

61. *See id.*

62. NELSON, *supra* note 8, at 136.

The Fourth Circuit suggested that its outcome was required by the doctrines of consistency.[63] They were following a footnote in a prior Supreme Court opinion, *Leocal v. Ashcroft*,[64] in which the Court noted, "Because we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies."[65]

But an emphasis on consistency, either within a given hybrid statute or across all hybrid statutes, does not dictate the result reached by the Fourth Circuit in *Miller*. This consistency only requires that a given principle be applied uniformly; it does not provide any requirement for what that substantive principle would be. In fact, consistency could also be attained through a categorical refusal to apply the rule of lenity in any hybrid statute.

Moreover, the goal of consistency can still be met if the provisions are interpreted on a case-by-case basis, as commentator Jonathan Marx would advocate.[66] So long as the civil and criminal applications of a given statute are interpreted under the same principles, it does not affect intrastatutory consistency to have one predominantly criminal statute, such as the CFAA, apply the rule of lenity, while a predominantly civil statute, such as the Bankruptcy Code, does not.

In fact, consistency is a goal that is separate and distinct from the rule of lenity. The rule of lenity has a number of justifications, including fair warning to potential criminal defendants, and a value judgment that the legislature, not courts, should define the bounds of criminal infractions.[67] None of its various justifications, however, are grounded in consistency of application.[68] To the contrary, doctrines grounded in consistency, such as the presumption of consistent usage, are predominantly descriptive in nature, in that they are justified in large part because they accurately reflect default rules about what a legislature would intend.[69] Meanwhile, the rule of lenity is principally a normative canon in that it reflects a judicial judgment of how a statute should be read and is not justified based on any claim that legislatures endorse it.[70]

Of course, although the goal of consistency and the rule of lenity do not necessarily follow one another, a coordination of such doctrines is not laudable. There is some merit to having a rule of how to read these provisions together before reading either. In particular, if a statute's civil and criminal provisions are interpreted without regard to one another, the statute's meaning might fall into "path dependence."[71] That is, if a court interprets the ambiguity in a criminal

---

63. *See Miller*, 687 F.3d at 204.
64. 543 U.S. 1 (2004).
65. *Id.* at 12 n.8.
66. *See* Marx, *supra* note 9, at 286.
67. *See* NELSON, *supra* note 8, at 108–12.
68. *See id.*
69. *See id.* at 113.
70. *See id.* at 108–12.
71. Marx, *supra* note 9, at 236–38.

context first, as a matter of first impression, the court would be likely to apply the rule of lenity—thus developing precedent that is more lenient in later civil applications.[72] Meanwhile, if a court interprets the ambiguity under a civil application of the statute, it would develop precedent that does not reflect such leniency, but rules of stare decisis would lead a court to adopt that reading in criminal cases.[73]

But again, this aversion to the accidental outcomes of path dependence would encourage a court to adopt some consistent, unitary interpretation of both the civil and criminal applications of the statute, but it would not require the court to apply the rule of lenity.

Thus, despite the ease with which the Fourth Circuit in *Miller* moved from the goal of consistency to the rule of lenity, these two principles are actually separate and distinct. Instead, the Fourth Circuit's conclusion involves two parallel, discrete steps.

First, the Fourth Circuit concluded that the rule of lenity is a sufficiently strong doctrine such that it should be applied to any criminal statute, no matter how minor; indeed, the Fourth Circuit noted that the CFAA is "primarily a criminal statute,"[74] but nothing in its reasoning would limit the application of the rule of lenity to hybrid statutes that are predominantly criminal.

Second, and independent of this endorsement of the rule of lenity, the Fourth Circuit concluded that consistency is key to the interpretation of hybrid statutes.[75] That is, both the civil and criminal applications of a statute must be interpreted in the same light.[76] And because, under the Fourth Circuit's reasoning, the criminal application of the statute is necessarily pinned to the rule of lenity, the civil application must be interpreted in light of that criminal application.

In conclusion, while it may be, as Jonathan Marx has it, that hybrid statutes continue to offer "intractable" problems for courts and commentators,[77] the Fourth Circuit has cut through the tangle of policy concerns and held that the rule of lenity is categorically applicable to both the civil and criminal aspects of a hybrid statute.[78] But the ease with which the Fourth Circuit reached that holding is misleading. In making a simple and elegant decision to apply the rule of lenity categorically, the Fourth Circuit endorsed both the independent merits of the rule of lenity and the need for consistency, even to the extent that the need for consistency would require the rule of lenity to be applied in a civil context.

---

72. *See id.*

73. *See, e.g.*, United States v. Plaza Health Labs., 3 F.3d 643, 648–49 (2d Cir. 1993) (rejecting, in dicta, reasoning from prior civil suits under the Clean Water Act which would have suggested a broader reading).

74. WEC Carolina Energy Solutions LLC v. Miller, 687 F.3d 199, 201 (4th Cir. 2012).

75. *See id.* at 204.

76. *Id.*

77. Marx, *supra* note 9, at 235.

78. *See Miller*, 687 F.3d at 204.

This reasoning by the Fourth Circuit may help future courts navigate the concerns of hybrid statutes, the rule of lenity, and other principles of statutory interpretation.

*