

# CRIMINAL LAW

## COMMENTARY

### LEGALITY IN THE SECOND CIRCUIT

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In his highly regarded treatise, *The Limits of the Criminal Sanction*, the late Professor Herbert Packer reminded us that “[t]he first principle [of criminal law] is that conduct may not be treated as criminal unless it has been so defined by an authority having the institutional competence to do so before it has taken place.”<sup>1</sup> This is the principle of legality. According to Professor Packer, there is “all-but-universal compliance with it . . . in this country.”<sup>2</sup> Apart from prohibitions against retroactivity, the two doctrines by which “the courts keep the principle of legality in good repair”<sup>3</sup> are the void-for-vagueness doctrine and the doctrine requiring strict construction of penal statutes. Each is a contiguous segment of the same spectrum.<sup>4</sup>

The doctrine of strict construction, also known as the rule of lenity, is deeply rooted in the common law, “perhaps not much less old than construction itself.”<sup>5</sup> The void-for-vagueness doctrine, apparently of more recent origin,<sup>6</sup> was nonetheless a sturdy seedling at the turn of the century.<sup>7</sup> Both doctrines recently have received approving references in the Supreme Court.<sup>8</sup> In the Second Circuit, however, both doctrines are dead.

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<sup>1</sup> H.L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 79-80 (1968).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 93.

<sup>4</sup> *Id.*

<sup>5</sup> *United States v. Wiltberger*, 18 U.S. (5 Wheat) 76, 95 (1820).

<sup>6</sup> H.L. PACKER, *supra* note 1, at 93.

<sup>7</sup> *See, e.g., United States v. Brewer*, 139 U.S. 278 (1891); Aigler, *Legislation in Vague or General Terms*, 21 MICH. L. REV. 831 (1923).

<sup>8</sup> *Williams v. United States*, 102 S. Ct. 3088, 3095 (1982) (rule of lenity); *Bifulco v. United States*, 447 U.S. 381 (1980) (same); *Grayned v. Rockford*, 403 U.S. 104 (1972) (void-for-vagueness); *Rewis v. United States*, 401 U.S. 808, 812 (1971) (rule of lenity).

Several cases decided during the 1981-1982 term of the United States Court of Appeals for the Second Circuit illustrate the court's treatment of these time honored principles. It is my thesis that at least one of these doctrines — the rule of lenity — has not recieved a proper burial.

#### I. THE VALUES SERVED BY THE VOID-FOR-VAGUENESS AND RULE OF LENITY DOCTRINES

The values served by the void-for-vagueness doctrine and the rule of lenity are the same. A cluster of values, typically treated under the rubric of the requirement of "fair notice," are intimately related to the purposes and justifications of criminal punishment. Whatever other purposes or objectives we may seek in criminal punishment, e.g., deterrence, reformation, incapacitation, there is fundamental agreement that the harshest of society's sanctions — criminal punishment — can justly be visited only upon those who are morally and legally culpable. Included in the concept of culpability is the assumption of choice or free will:<sup>9</sup> we can justly punish someone only if he or she had a fair opportunity to choose to obey or to disobey the penal law.<sup>10</sup> That fair opportunity requires that the rule one is charged with violating clearly proscribed the conduct at the time it was engaged in. It is, of course, not necessary that the actor have known of the rule or that he have correctly construed it; it is necessary that he have been given the fair *opportunity* to have done so.

The second, quite distinct, set of values served by the doctrines are those values that underlie the separation of powers. It is quintessentially only for the legislature to determine what conduct shall be punished as criminal. Whatever may be said for delegation of powers in other contexts, delegation of the power to define criminal conduct to a body other than the legislature threatens the basic structure of the tripartite system and is fundamentally undemocratic. Third are the values implicit in the marginal conduct itself. Conduct that is neither clearly criminal nor clearly noncriminal, *i.e.*, that which is in the zone of uncer-

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<sup>9</sup> Whether "free will" is philosophically, psychologically, or empirically valid is all but irrelevant to the criminal law, the postulates of which require the assumption of free will regardless of its validity. See H.L. PACKER, *supra* note 1, at 74, 132.

<sup>10</sup> *Id.* at 73-87.

tainty, may be deterred or "chilled" by the uncertainty.<sup>11</sup> To the extent that such conduct is socially desirable or even constitutionally protected, vague or ambiguous criminal prohibitions will infringe upon or defeat the values served by the dissuaded conduct.

Void-for-vagueness and the rule of lenity obviously have overlapping functions. If a vague or ambiguous statute is declared void-for-vagueness, there is no need to resort to the rule of lenity. However, if strict construction can clarify and thus avoid the ambiguity, the statute can be saved and the principle of legality preserved. In short, for most purposes, either doctrine will perform the necessary function and render the other redundant.<sup>12</sup> It is only when both are disregarded that the principle of legality becomes a fiction.

## II. THE VOID-FOR-VAGUENESS DOCTRINE

Although the Supreme Court has repeatedly asserted that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law,"<sup>13</sup> it has rarely, in recent years, applied that principle to declare a statute void. Subsidiary, limiting doctrines have been developed that have virtually engulfed the rule. Thus, it is said that one whose conduct is clearly prohibited by the statute cannot complain that the application of the statute to other conduct might be unclear.<sup>14</sup> More

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<sup>11</sup> See *Broadrick v. Oklahoma*, 413 U.S. 601 (1973); *Grayned v. Rockford*, 408 U.S. 104, 109 (1972).

<sup>12</sup> An important qualification, however, is that a vague statute violates the due process clause whereas the rule of lenity is said to be merely a rule of construction. Thus, federal courts cannot impose the rule of lenity on the states, many of which have abolished it. W. LA FAVE & A. SCOTT, *CRIMINAL LAW* 72 (1972). It cannot be doubted, however, that the "fair notice" requirement is constitutional doctrine and that the states are required to respect it, whether they do so by virtue of prohibitions on vagueness or strict construction. It is therefore illogical to assume that the states are wholly free to abolish strict construction. They can do so only if a functional substitute exists. Cf. *United States v. Bass*, 404 U.S. 336, 348 (1971) (policies served by rule of lenity, virtually identical to those underlying void-for-vagueness doctrine).

<sup>13</sup> *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). Accord *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939).

<sup>14</sup> *Parker v. Levy*, 417 U.S. 733, 755 (1974); *United States v. Raines*, 362 U.S. 17, 21 (1960). Cf. *United States v. National Dairy Prod. Corp.*, 372 U.S. 29, 32 (1963) ("statutes are not automatically invalidated as vague simply because difficulty is found in deter-

recently, some Justices of the Supreme Court have invented the notion that the void-for-vagueness doctrine has no application to a statute that has *some* core meaning; it applies only to a statute that has no clear meaning *at all*.<sup>15</sup> If there is *any* conduct that is clearly proscribed by the "core" of the statute, it is not void-for-vagueness.<sup>16</sup> Now that these notions have acquired ascendancy, there is little to which the doctrine can attach, and decisions striking down statutes on vagueness grounds are limited to isolated aberrations in which the Court clearly dislikes the statute or it impinges upon or "chills" first amendment rights.<sup>17</sup>

The Second Circuit correctly analyzed the recent Supreme Court decisions in *Brache v. County of Westchester*,<sup>18</sup> in which plaintiff store owners sought to enjoin enforcement of a drug paraphernalia ordinance. The plaintiffs complained that the ordinance, which made it a misdemeanor to sell or to display "drug paraphernalia," defined as any materials "used, intended for use, or desi[gn]ed for use in . . . growing . . . preparing, testing . . . [or] ingesting . . . a controlled substance"<sup>19</sup> was unconstitutionally vague. They admitted that some of the items they had for sale were plainly "drug paraphernalia" within the ordinance,<sup>20</sup> but complained that they had many multi-use items as to which they could not know whether the ordinance was applicable.<sup>21</sup> The district court found the ordinance impermissibly

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mining whether certain marginal offenses fall within their language"). *Contra Grayned v. City of Rockford*, 408 U.S. 104, 114 (1972) (where statute covers constitutionally protected activities).

<sup>15</sup> *United States v. Powell*, 423 U.S. 87, 92-95 (1975); *Parker v. Levy*, 417 U.S. 733, 755 (1974); *Smith v. Goguen*, 415 U.S. 566, 578 (1974); *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971).

<sup>16</sup> *United States v. Powell*, 423 U.S. 87, 92-95 (1975). It is another matter, of course, if the statute infringes first amendment rights. For other limitations on the doctrine, see note 112 and accompanying text *infra*.

<sup>17</sup> See, e.g., *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972); *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676 (1968); *Winters v. New York*, 333 U.S. 507 (1948). For an interesting application of void-for-vagueness on the state level, see *State v. Young*, 62 Ohio St. 2d 370 (1980) (invalidating statute proscribing "engaging in organized crime").

<sup>18</sup> 658 F.2d 47 (2d Cir. 1981), *cert. denied*, 102 S. Ct. 1643 (1982).

<sup>19</sup> *Id.* at 49 (quoting WESTCHESTER CO., N.Y., ORDINANCES § 863.22 (1980)).

<sup>20</sup> 658 F.2d at 49. Plaintiffs conceded that such items as "marijuana test kits," "free base cocaine kits" and "coke kits" had no realistic use other than to "ingest controlled substances." *Id.* at 49 n.4. These items were characterized as single use items in both the district court and court of appeals decisions in *Brache*.

<sup>21</sup> *Id.* at 49-50.

vague and enjoined its enforcement.<sup>22</sup>

The Second Circuit reversed. Speaking through Judge Newman, the court found that the plaintiffs' "facial attack" on the ordinance necessarily failed when the district court concluded that certain single-use items were clearly within the "core" meaning of the ordinance.<sup>23</sup> Reiterating that "[one] to whom a statute may validly be applied [cannot complain] that the statute would be unconstitutional [if] applied to other persons or other situations,"<sup>24</sup> the court held the ordinance valid and enforceable as applied to the plaintiffs' sale of these items.<sup>25</sup> Regarding the plaintiffs' sale of multi-use items, the court held that the plaintiffs lacked standing to challenge the ordinance's application in the context of a pre-enforcement complaint.<sup>26</sup>

Asserted as a defense to a criminal conviction, the vagueness doctrine has repeatedly failed in the Second Circuit.<sup>27</sup> Indeed, I am not aware of its ever having succeeded. In any event, the doctrine is at least as dead in the Second Circuit as it is in the Supreme Court.

At the height of its respectability, the void-for-vagueness doctrine was honored more in its breach than its observance. Herculean, but largely unsuccessful efforts have been made to square the doctrine with the decisions purporting to apply it.<sup>28</sup>

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<sup>22</sup> After conceding that plaintiffs had demonstrated a genuine threat of prosecution to satisfy article III requirements, the district court proceeded to conduct what it described as a "facial analysis" of the statute. *Brache v. County of Westchester*, 507 F. Supp. 566, 574 (S.D.N.Y. 1981). Although the court found that the statute clearly provided notice of its application to plaintiff's sale of certain single-use items, *id.* at 573, it concluded that because the ordinance provided an inadequate basis for either a retailer or a law enforcer to determine which multi-use items fell within its enforcement, the statute was unconstitutionally vague on its face. *Id.* at 574-81.

<sup>23</sup> 658 F.2d at 51-52.

<sup>24</sup> *Id.* at 51.

<sup>25</sup> *Id.* at 51-52.

<sup>26</sup> *Id.* at 52-54. In *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982), decided several months after *Brache*, the Supreme Court rejected a similar attack on a "head shop" ordinance. The Court's decision was consistent with the Second Circuit's treatment in *Brache*.

<sup>27</sup> See, e.g., *United States v. Margiotta*, 688 F.2d 108 (2d Cir. 1982); *United States v. Persky*, 520 F.2d 283 (2d Cir. 1975). See also *United States v. Sperling*, 506 F.2d 1323 (2d Cir. 1974); *United States v. Sisca*, 503 F.2d 1337 (2d Cir. 1974); *United States v. Manfredi*, 488 F.2d 588 (2d Cir. 1973); *United States v. Schwartz*, 464 F.2d 499 (2d Cir. 1972); *United States v. Deutsch*, 451 F.2d 98 (2d Cir. 1971), *cert. denied*, 404 U.S. 1019 (1972); *United States v. Tropiano*, 418 F.2d 1069 (2d Cir. 1969).

<sup>28</sup> See generally W. LAFAVE AND A. SCOTT, *supra* note 12, at 83-89. See Amsterdam, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960);

The trouble is that most statutes are vague at their margins and the consistent application of a rule that a vague criminal statute is void would invalidate most existing statutes and give us criminal codes three or four feet thick. One cure for vagueness — overcriminalization — is worse than the evil it replaces. Most vagueness problems can be eliminated if the legislature is willing to specify that virtually everything is criminal. Thus, instead of prohibiting “loitering,” the legislature can prohibit “appearing on a public street or sidewalk unassisted by a vehicle.” Pedestrianism, in short. Such a definition could catch most loiterers and police discretion could be relied upon not to enforce the statute against “us.” Such statutes contain all the evils of a vague statute — they provide no real notice because they literally proscribе common, “innocent” conduct and essentially delegate the definitional process to the police — yet are all but impossible to invalidate.<sup>29</sup>

### III. THE RULE OF LENITY

The purposes of the rule of lenity, despite its name, is not to be lenient with criminals, but to preserve the principle of legality, *i.e.*, to provide fair notice and to assure that the decision to criminalize is made by the legislature.<sup>30</sup> There are various versions of the rule but essentially they come down to this: if the application of the statute to the conduct in question is fairly debatable, if informed people “of common intelligence” can “differ as to its application” to the conduct in question, then the issue should be resolved against coverage.<sup>31</sup> In short, borrowing the

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Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 *STAN. L. REV.* 591, 660 (1981).

<sup>29</sup> Occasionally, courts strike down statutes on vagueness grounds when the principal evil seems not to be vagueness but overreaching — criminalization of conduct that was patently not “intended” to be punished. *See, e.g.*, *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972). There is an obvious need for a concept that would limit the ability of legislatures to abdicate their responsibilities by overcriminalization, but no one has yet worked out the criteria for determining when the legislature has not really intended what it said. Moreover, the doctrine which permits invalidation of a statute that literally proscribes “innocent” but not constitutionally protected conduct is extremely fuzzy. *See id.*; *People v. Berck*, 32 N.Y.2d 567, 347 N.Y.S.2d 33, 400 N.E.2d 411 (1973). My example in the text would, of course, have constitutional problems since much pedestrianism may be a matter of constitutional right.

<sup>30</sup> *See* notes 9-11 and accompanying text *supra*.

<sup>31</sup> “[W]hen choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require

language of void-for-vagueness, the "core meaning" of the statute must apply to the conduct; if the conduct is on the periphery of that meaning, criminal punishment should not be permitted, as it is unclear both to the citizenry and to the court that the legislative body intended to punish the conduct. Herein are three cases — not meant to be an exhaustive count — in which the rule, if it is a rule, should have been applied in the Second Circuit last term.

In *United States v. Newman*,<sup>32</sup> the defendant was indicted for securities fraud, mail fraud, and conspiracy to commit such frauds.<sup>33</sup> The charges were based upon the claim that two employees of investment bankers divulged to Newman the fact that certain companies were takeover candidates of the investment bankers' corporate clients.<sup>34</sup> Newman and some foreign associates then bought stock in the target companies and sold at a profit when the takeovers became public knowledge.<sup>35</sup> District Judge Haight dismissed the indictment.<sup>36</sup> With respect to the securities fraud claim, Judge Haight held that the words of the applicable statute, the regulations, and court decisions issued prior to the conduct, singly or together, did not provide a "clear and definite statement" that the conduct of Newman, or the employees of the investment bankers, constituted violations of the securities laws.<sup>37</sup> He applied the rule of lenity.

The statute involved, section 10(b) of the Securities Exchange Act of 1934,<sup>38</sup> proscribes the use of "any manipulative or deceptive device or contrivance" in violation of the Security Exchange Commission (SEC) rules, if "in connection with the

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that Congress should have spoken in language that is clear and definite." *United States v. Bass*, 404 U.S. 336, 347 (1971). See also *Williams v. United States*, 102 S. Ct. 3088, 3095 (1982) (same); *Rewis v. United States*, 401 U.S. 808, 812 (1971) ("ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity"); *United States v. Gradwell*, 243 U.S. 476, 485 (1917) ("before a man can be punished as a criminal . . . his case must be 'plainly and unmistakably' within the province of some statute").

<sup>32</sup> 664 F.2d 12 (2d Cir. 1981).

<sup>33</sup> *Id.* at 14.

<sup>34</sup> *Id.* at 15.

<sup>35</sup> *Id.*

<sup>36</sup> *United States v. Courtois*, [1981 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,024, at 91,296 (S.D.N.Y. June 5, 1981), *rev'd sub. nom. United States v. Newman*, 664 F.2d 12 (2d Cir. 1981).

<sup>37</sup> *Id.* at 91,296.

<sup>38</sup> 15 U.S.C. § 78j(b) (1976).

purchase or sale of any security."<sup>39</sup> Rule 10b-5 of the Commission's Rules prohibits use of "any device, scheme, or artifice to defraud" or any act or practice which would "operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security."<sup>40</sup>

Judge Haight found several obstacles to applying the statute or rule 10b-5 to Newman's conduct. The language is, of course, ambiguous on the point. Moreover, the Supreme Court, in *Chiarella v. United States*,<sup>41</sup> had recently reversed the conviction of one who profited from nonpublic information. Chiarella, like Newman, had acquired nonpublic information about takeover plans, bought the stock of the target companies, and profited therefrom. Chiarella had obtained his information as an employee of a financial printer, who printed announcements of takeover bids.<sup>42</sup> The government had convicted him of violating section 10(b) on the theory that when he purchased the stock in the target companies he had an obligation to inform the sellers of the stock about the forthcoming takeover bid, and that in buying the stock without disclosing this information, he had committed a fraud under section 10(b) and rule 10b-5.<sup>43</sup> The Supreme Court acknowledged that such a disclosure obligation was imposed on a corporate insider to the shareholders of his corporation, as they provided him the opportunity to acquire the information, in a relationship of trust and confidence.<sup>44</sup> In the case before it, however, the Court declared that:

No duty could arise from [Chiarella's] relationship with the seller's or the target company's securities, for [he] had no prior dealing with them. He was not their agent, he was not a fiduciary, he was not a person in whom the sellers had placed their trust and confidence. He was, in fact, a complete stranger who dealt with the sellers only through impersonal market transactions.

We cannot affirm [his] conviction without recognizing a general duty between all participants in market transactions to forego actions based on material, nonpublic information. . . . That should not be

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<sup>39</sup> *Id.*

<sup>40</sup> 17 C.F.R. § 240.10b-5 (1981).

<sup>41</sup> 445 U.S. 222 (1980).

<sup>42</sup> *Id.* at 224.

<sup>43</sup> *Id.* at 231. The case was also apparently tried on the theory that Chiarella had a duty to "the market as a whole." *Id.*

<sup>44</sup> *Id.* at 227.

undertaken absent some explicit evidence of Congressional intent."<sup>45</sup>

The government advanced an alternative theory in *Chiarella*: as an employee of the printer, who was hired by the acquiring corporation, Chiarella had a fiduciary duty to the latter, which he had violated.<sup>46</sup> The Court declined to decide "whether this theory has merit" as the case had not been tried on such a theory.<sup>47</sup>

In *Newman*, the government sought to escape *Chiarella* with the theory left open there. It argued that Newman's cohorts, as employees of the investment bankers who were given confidential information by the acquiring corporations, violated a fiduciary duty in profiting from the nonpublic information about the takeover plans, and that Newman, as their co-conspirator, also violated their duty.<sup>48</sup> In evaluating the government's new theory in *Newman*, Judge Haight accepted without quibble the mildly debatable claim that Newman, although not a fiduciary himself, nonetheless violated a fiduciary obligation of others by acting in concert with them.<sup>49</sup> He was thus willing to treat *Newman* as the counterpart of *Chiarella*.<sup>50</sup> However, he still concluded that the charge could not stand.<sup>51</sup> Judge Haight determined that Newman had profited in transactions concerning the stock of the target companies on information acquired *elsewhere*, *i.e.*, from the acquiring companies, and that he had no fiduciary duty to the sellers of the stock he acquired, or to the target companies themselves.<sup>52</sup>

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<sup>45</sup> *Id.* at 232-33.

<sup>46</sup> *Id.* at 235.

<sup>47</sup> *Id.* at 236.

<sup>48</sup> [1981 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,024, at 91,290 (S.D.N.Y. June 5, 1981).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 91,291.

<sup>52</sup> *Id.* Judge Haight described Newman as a "peripheral figure" privy to information from outside the target company. *Id.* Judge Haight also noted that there was another practice involving corporate takeovers and nonpublic information that had bothered the SEC, *i.e.*, where an acquiring company itself leaks information about a pending takeover to obtain help in its cause. The SEC had concluded that rule 10b-5 did not apply to that situation because the disclosers and users of the nonpublic information have no fiduciary relationship to the target company. Thus, although the Commission thought the practice, called "warehousing," was problematic, it was not prohibited by the letter or purpose of rule 10b-5. *Id.* at 91,292-94. The Supreme Court also noted this inconsistency in *Chiarella*, 445 U.S. at 245-35. The Second Circuit had suggested, moreover, that rule

Judge Haight also noted that with respect to the specific misconduct involved in *Newman*, the SEC itself had recognized that it was probably not covered by rule 10b-5, and had thus promulgated a rule specifically outlawing the conduct in 1980, "several years after the acts alleged in the indictment."<sup>53</sup> Judge Haight also failed to find anything in the case law supporting the government's theory. There were simply no cases, civil or criminal, holding that such conduct was a violation of rule 10b-5 at the time the acts took place.<sup>54</sup> He concluded that, as of 1978, when the last acts alleged in the indictment occurred, "neither courts, commentators, nor the SEC . . . had stated that Rule 10b-5 extended to a noninsider's breach of a fiduciary duty owed to the acquiring corporation in a tender offer . . . [T]he indications . . . were quite to the contrary."<sup>55</sup>

The Second Circuit, in an opinion by Judge Van Graafeiland, reversed.<sup>56</sup> Judge Van Graafeiland noted that several court decisions had applied rule 10b-5 to situations in which neither a purchaser nor a seller of securities was defrauded concerning the value of the stock, *e.g.*, where a broker absconds with a customer's money.<sup>57</sup> He then concluded that *Newman* and his cohorts had defrauded the investment bankers by "sully[ing] [their] reputations."<sup>58</sup> They also had "wronged" the acquiring corporations, by using the information to buy shares in the target companies, thus possibly driving up the price and making the acquisition more difficult.<sup>59</sup> Judge Van Graafeiland reasoned that deceitful misappropriation of confidential information by a fiduciary is, in "other areas of the law," unlawful, and Congress surely did not intend "to establish a less rigorous code of con-

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10b-5 did not prohibit warehousing. *General Tire Corp. v. Talley Indus. Inc.*, 403 F.2d 159, 164-65 (2d Cir. 1968).

<sup>53</sup> [1981 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,024, at 91,292. The rule which prohibited *Newman*'s conduct was not enacted pursuant to rule 10(b), but rather under different legislation authorizing rulemaking concerning tender offers. Rule 14e-3, 17 C.F.R. § 240 (1981).

<sup>54</sup> [1981 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,024, at 91,295.

<sup>55</sup> *Id.* at 91,296.

<sup>56</sup> *Newman*, 664 F.2d at 14.

<sup>57</sup> *Id.* at 17. Judge Haight had also recognized an exception to the general rule requiring that the fraud be related to the company or at least to the market for the shares: those situations in which the securities themselves or the proceeds therefrom were misappropriated. [1981 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,024, at 91,295.

<sup>58</sup> 664 F.2d at 17.

<sup>59</sup> *Id.* at 17-18.

duct under the Securities Acts.”<sup>60</sup> As to the defendant’s argument that the fraud did not have the requisite “connection with the purchase or sale of securities,” Judge Van Graafeiland noted that the Supreme Court had said, long before *Newman*, that this phrase included fraud “touching” the sale of securities,<sup>61</sup> and that *Newman* had bought and sold securities.<sup>62</sup> Judge Van Graafeiland asserted that the language of rule 10b-5 itself provided “clear notice to appellee that his fraudulent conduct was unlawful.”<sup>63</sup>

Notably missing from the Second Circuit’s analysis was any reference to the SEC’s own interpretations of rule 10b-5, which supported the district court’s decision. Also absent was reference to any court decision, other than its own *Chiarella* opinion that had been reversed by the Supreme Court,<sup>64</sup> holding that the use of nonpublic information in the trading of stock by one who was not a corporate insider or “tippee” violated rule 10(b). Since the Second Circuit was bound by *Chiarella*’s holding that no duty was owed to the sellers of the stock, the court seemingly held that any breach of trust or fraud which is motivated by or assists the purchase or sale of stock is a violation of section 10(b). Thus, under this reasoning, a person who steals money with which to buy securities has apparently committed a fraud “in connection with the purchase or sale of securities.”<sup>65</sup> A burglar who converts his loot to cash, looks for a place to invest it, and then buys securities, may also have violated section 10(b). In any event, the Second Circuit all but embraced the doctrine which the Supreme Court rejected in *Chiarella*, that anyone who trades securities on nonpublic information violates rule 10(b).

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<sup>60</sup> *Id.* at 18.

<sup>61</sup> *Id.* The case cited, *Superintendent of Insurance v. Bankers Life & Casualty Co.*, 404 U.S. 6 (1971), involved a scheme by which all the stock of a corporation was sold and the assets of the company used to pay for the stock. Included in the scheme was a sale of bonds by the company. The Court thought that the fraud in connection with the sale of bonds (the corporation was duped into believing that it, and not an outsider, would receive the proceeds) was a violation of section 10(b).

<sup>62</sup> “[S]ince appellee’s sole purpose in participating in the misappropriation of confidential takeover information was to purchase shares of the target companies, we find little merit in his disavowal of a connection between the fraud and the purchase.” 664 F.2d at 18.

<sup>63</sup> *Id.* at 19.

<sup>64</sup> *United States v. Chiarella*, 588 F.2d 1358 (2d Cir. 1978), *rev’d*, 445 U.S. 222 (1980).

<sup>65</sup> See 664 F.2d at 18; note 62 *supra*.

The only way to acquire such information is, directly or indirectly, by breach of a fiduciary relationship. It is also difficult, if not impossible, to imagine a case in which one who trades on such information is not hurting, taking advantage of, or "sully-ing" someone.<sup>66</sup>

My point is not that *Newman* is bad securities law.<sup>67</sup> As Judge Haight noted, what Newman and his cohorts did is *now* clearly unlawful.<sup>68</sup> To suggest that it was clearly a violation of section 10(b) in 1978, however, borders on the preposterous.

In *United States v. Angelilli*,<sup>69</sup> the Second Circuit was faced with a novel interpretation of the Racketeer Influenced and Corrupt Organizations Act of 1970 (RICO).<sup>70</sup> The defendants were New York City Marshals, officers of the city's Civil Court, who were in charge of levying on the property of judgment debtors, selling it at public auction, and remitting the proceeds to judgment creditors. They carried out a scheme among themselves, some auctioneers, and some buyers, to engage in a rigged auction whereby the property would be sold at a previously agreed upon price, apparently well below market value.<sup>71</sup> Thereafter, a second private auction would be held wherein the same buyers seriously bid for the property. The difference between the price paid in the public auction and that paid in the private auction then would be distributed to the marshals and the buyers.<sup>72</sup> The judgment creditor would receive only the proceeds from the rigged auction.

Among other charges, the defendants were tried and con-

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<sup>66</sup> It is also difficult to see how an acquiring corporation can avoid a section 10(b) violation if it acquires nonpublic information about the target company before buying the latter's securities. *But see* *General Tire Corp. v. Talley Indus., Inc.*, 403 F.2d 159 (2d Cir. 1968).

<sup>67</sup> District Judge Dumbauld dissented from the panel decision because he was "not certain" that Newman's fraud was "in connection with the purchase or sale of any security." 664 F.2d at 20. The panel also reversed Judge Haight's holding that the conduct was not mail fraud, and Judge Dumbauld concurred in that decision. *Id.* at 20-21. For another discussion of *Newman* in this issue, see Poser, *Misuse of Confidential Information Concerning a Tender Offer as a Securities Fraud*, 49 BROOKLYN L. REV. 1265 (1983).

<sup>68</sup> [1981 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,024, at 91,296.

<sup>69</sup> 660 F.2d 23 (2d Cir. 1981).

<sup>70</sup> 18 U.S.C. § 1962(c) (1976).

<sup>71</sup> 660 F.2d at 26.

<sup>72</sup> *Id.*

victed of violations of RICO and of conspiring to violate RICO.<sup>73</sup> The theory of the prosecution under RICO was that the defendants had conspired to engage and did engage in a "pattern of racketeering activity" (mail fraud and extortion) "in the conduct of the affairs" of an "enterprise" engaged in interstate or foreign commerce.<sup>74</sup> The "enterprise" in which the defendants engaged was the New York City Civil Court.<sup>75</sup>

On appeal, the defendants claimed that the City Court was not an "enterprise" within the meaning of RICO. Judge Kearse, joined by Judge Mansfield, disagreed.<sup>76</sup> Judge Kearse disposed of the defendants' argument by noting that "the definition of 'enterprise' is quite broad"<sup>77</sup> and "we see no sign of an intention by Congress to exclude governmental units from its scope."<sup>78</sup> Moreover, Judge Kearse noted, RICO's substantive goals include protection of governmental entities from corruption, as evidenced by the fact that bribery, obstruction of justice, and obstruction of law enforcement are included in the definitions of "racketeering activity."<sup>79</sup>

The defendants argued, however, that if "enterprise" includes the New York City Civil Court, it would also include federal courts and agencies.<sup>80</sup> They could have added that it would also include the Department of Justice or any subdivision thereof, and even the Congress itself, or its staffs or subcommittees. Indeed, it would seem to cover every association of people for any purpose whatsoever.

Given the broad interpretation of racketeering activity in

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<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 30.

<sup>75</sup> RICO § 1962(c) provides:

It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(c) (1976).

<sup>76</sup> 660 F.2d at 30-31.

<sup>77</sup> The court regarded as a definition of "enterprise" the following RICO section: "'enterprise' includes any individual partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity; . . ." 660 F.2d at 30 (quoting 18 U.S.C. § 1961(4) (1976)).

<sup>78</sup> 660 F.2d at 31.

<sup>79</sup> *Id.* at 32-33.

<sup>80</sup> *Id.* at 34.

*Angelilli* and other cases, if "enterprise" is thus broadly defined, then virtually any dishonest participation in such an "enterprise" would be a RICO violation. If lawyers for parties in litigation write dishonest briefs, or a court writes a dishonest opinion, that is arguably a violation of RICO, at least if it is done twice within ten years.<sup>81</sup>

Judge Friendly dissented, noting that "no one would think of describing a court as an 'enterprise' as a matter of ordinary English speech," and that standard dictionaries define it as a commercial or business firm.<sup>82</sup>

In *United States v. Margiotta*,<sup>83</sup> the court was faced with what it conceded was a "novel" interpretation of the mail fraud statute<sup>84</sup> and a matter "of first impression."<sup>85</sup> The defendant, who had been Republican Committee Chairman of both the Town of Hempstead, New York, and Nassau County, New York, was convicted of mail fraud and several counts of extortion.<sup>86</sup>

<sup>81</sup> As *United States v. Margiotta*, see notes 83-122 and accompanying text *infra*, makes clear, a public official owes a duty of honesty to the public and a breach of that duty, if it involves the mails, is mail fraud. Thus, the judges and the prosecutors in my example would seem clearly to be guilty of mail fraud. A dishonest lawyer who was not a public official would present more difficult questions. Apart from that, it would seem clear, under *Angelilli*, that these persons are potential racketeers. Since mail fraud is a "racketeering activity" under RICO § 1961, 18 U.S.C. § 1262 (1976), and our hypothetical judges and lawyers are participating in the "affairs" of an "enterprise," all that is necessary is a "pattern" of racketeering activity. The mailing of a brief or an opinion would presumably constitute a violation of the mail fraud statute, but it might not be enough to constitute a "pattern." Two briefs or two opinions, however, would assure racketeer status. See generally Tarlow, *RICO: The New Darling of the Prosecutor's Nursery*, 49 *FORDHAM L. REV.* 165, 210-13 (1980).

<sup>82</sup> 660 F.2d at 42. The majority in *Angelilli* found considerable support in the Supreme Court's decision in *United States v. Turkette*, 452 U.S. 576 (1981), which held that "enterprise" includes illegitimate as well as legitimate enterprises. The Court felt that the statutory language was unambiguous on that issue and that the rule of lenity was therefore inapplicable. *Id.* at 2531 n.10. In his *Angelilli* dissent, however, Judge Friendly cogently argued that "[t]he problem here is totally different . . . . The issue in *Turkette* was 'whether there was any justification for excluding from the term 'enterprise' an association that would normally be deemed to come within it. The question here is whether there is any justification for expanding the term to include something that would normally be deemed to fall outside it.'" 660 F.2d at 43.

<sup>83</sup> 688 F.2d 108 (2d Cir. 1982).

<sup>84</sup> *Id.* at 121.

<sup>85</sup> *Id.* at 120. For a more in depth discussion of the Second Circuit's decision in *Margiotta*, see Comment, *Mail Fraud and the De Facto Public Official: The Second Circuit Protects Citizens' Rights to Honest Government*, 49 *BROOKLYN L. REV.* 933 (1983).

<sup>86</sup> 688 F.2d at 118.

The conviction was based on the facts that the defendant, in his position as chairman, recommended a certain insurance broker to be the town and county broker of record, in return for the broker's agreement to distribute fifty percent of his insurance commissions to various persons designated by the defendant.<sup>87</sup> The designees were primarily other insurance brokers, but there were some lawyers.<sup>88</sup> Margiotta himself apparently shared in the kickbacks.<sup>89</sup> The defendant argued that this practice, which was a longstanding method of distributing political patronage, was not in violation of New York law, defrauded nobody, and, in any event, was not a violation of the mail fraud statute.<sup>90</sup> The court, through Judge Kaufman, briefly bowed to the rule that ambiguous penal laws "are to be construed strictly against the Government,"<sup>91</sup> but never returned to the subject. Instead, the court spent eleven pages<sup>92</sup> explaining why the mail fraud statute, more than a century old,<sup>93</sup> could fairly be applied for the first time to the conduct before the court.<sup>94</sup>

The court first reviewed the case law from which it "distilled" the principle that "a public official may be prosecuted under 18 U.S.C. § 1341 when his alleged scheme to defraud has as its sole object the deprivation of intangible and abstract political and civil rights of the general citizenry."<sup>95</sup> A public official may thus commit mail fraud even though he doesn't defraud anyone in the usual sense; it is enough that he deprives his constituents of their intangible right to "good government."<sup>96</sup> Margiotta apparently conceded that such was the law where a public

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<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 119.

<sup>90</sup> 18 U.S.C. § 1341 (1976).

<sup>91</sup> 688 F.2d at 120.

<sup>92</sup> *Id.* at 120-30. It should hardly have taken so much verbiage to explain that the statute was unambiguous and, therefore, that the rule of lenity did not apply, but that was implicit in the court's failure explicitly to square its decision with the rule.

<sup>93</sup> 18 U.S.C. § 1341 proscribes use of the mails, directly or indirectly, in the service of "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses. . . ." *Id.* It was enacted in 1872, in response to lottery swindlers who used the mails in their schemes. 688 F.2d at 123. Judge Kaufman found no legislative history indicating "that Congress . . . intended the mail fraud statute to deal only with schemes to defraud involving money or property." *Id.*

<sup>94</sup> 688 F.2d at 123.

<sup>95</sup> *Id.* at 121.

<sup>96</sup> *Id.* at 120.

official was concerned,<sup>97</sup> but argued that since he was not a public official, the principle the court "distilled" was simply not applicable to him.<sup>98</sup> It had never been held, for example, that a private citizen could commit mail fraud simply by doing something against the interest of "good government." Subjecting a private individual to the law concerning public officials was the "novel" question the court faced.

The court conceded that the mere fact that a person participates in government, e.g., by party activities, lobbying, speech-making, creates no duty on his part to deal fairly or honestly in his political activities;<sup>99</sup> otherwise, all such participants would be criminals. Judge Kaufman concluded, however, that where a private individual "dominates" or has "de facto control" over a governmental process, he owes the same fiduciary duty as a public official.<sup>100</sup> Since Margiotta, as party chairman, had a "stranglehold"<sup>101</sup> on town and county government, he could not avoid the fiduciary duties of a public official.<sup>102</sup> Judge Kaufman found no support in the legislative history of the mail fraud statute, or even in prior decisions, for this extension of the law. Instead, he quoted Holmes' aphorism that people "must turn square corners when they deal with the Government,"<sup>103</sup> to which he added that it "requires little imaginative leap to conclude that individuals who in reality are the government owe a fiduciary duty to the citizenry."<sup>104</sup>

The next issue before the court was defining the fiduciary

<sup>97</sup> *Id.* at 121.

<sup>98</sup> *Id.* at 122.

<sup>99</sup> *Id.* at 122-23.

<sup>100</sup> *Id.* at 122, 127-28.

<sup>101</sup> *Id.* at 122.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 124 (quoting *Rock Island, A. & L.R. Co. v. United States*, 254 U.S. 141, 143 (1920) (action against United States for refund of taxes; taxpayer had not exhausted administrative remedies which were condition of suing government)).

<sup>104</sup> 688 F.2d at 124. I am not sure what Judge Kaufman's implication — that if the citizenry must deal honestly with the government, the government must deal honestly with the citizenry — had to do with Margiotta, but it is an attractive idea, nonetheless. Unfortunately, perhaps, it is not the law. Although citizens who lie to the government commit crimes, *see, e.g.*, 18 U.S.C. § 1001 (1976) (false statement to government department or agency), much of today's law enforcement activity consists of the perpetration of elaborate frauds by the police on the citizenry, to test their honesty and/or to implicate them in crime. *See, e.g.*, *United States v. Myers*, 692 F.2d 823 (2d Cir. 1982). Is such law enforcement activity mail fraud?

duty and determining if it was breached. Margiotta argued that, as chairman of a partisan political group, he had never pretended to be other than partisan in his dealings with the town and county.<sup>105</sup> The court, however, said that the mail fraud prosecution was not predicated on his partisanship, or any obligation of impartiality.<sup>106</sup> Rather, he had a duty to disclose, to the town and county officials responsible for appointment of the broker of record, whom he recommended to them, his secret arrangement with the broker of record for the sharing of insurance commissions.<sup>107</sup> Since the obligation was owed not to these officials but to the "citizenry,"<sup>108</sup> it would seem that, under the court's rationale, disclosure to the appointing officials would not suffice. If, for example, he *had* told them about the arrangement and they were still willing to make the appointment — a matter of high probability if, indeed, Margiotta had a "stranglehold" on the system — he might be obliged to take out newspaper or television ads announcing the arrangement.<sup>109</sup>

The court, in rejecting Margiotta's claim that he had not been given "fair warning" that his conduct violated the mail fraud statute, noted that Margiotta had admitted at trial "that a corrupt agreement [involving the kickbacks of insurance commissions] could be illegal."<sup>110</sup> Thus, "the application of the mail fraud statute to his artifice should come as no surprise. . . . [A]lthough he may not have anticipated the precise legal theory . . . Margiotta was given fair warning that his activities could cause him to run afoul of the federal mail fraud statute."<sup>111</sup>

The meaning of these passages is not clear. Apparently,

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<sup>105</sup> 688 F.2d at 127.

<sup>106</sup> *Id.* This may have been correct, but much language in the opinion suggests that the prosecution *could* have been so predicated.

<sup>107</sup> *Id.* at 127-28.

<sup>108</sup> *Id.* at 122, 126. *See also id.* at 127 (suggesting duty to disclose secret agreement "to the public").

<sup>109</sup> At least one of the officials, the Nassau County Executive, denied that he had been told of or was aware of the arrangement for kicking back insurance premiums. *Id.* at 143 (Winter, J., dissenting). If, however, the practice was widespread and of long-standing, as was apparently conceded, *id.* at 144, one may doubt that Margiotta had to tell any of the officials about it in order for them to know of it. As Judge Winter observed, the appointing official "surely . . . did not think that Margiotta's interest in naming the Broker of Record stemmed from intellectual curiosity about the application of actuarial principles." *Id.* at 143.

<sup>110</sup> *Id.* at 129.

<sup>111</sup> *Id.*

however, the court was of the view that if one suspects that his conduct, or something similar, may be illegal, his suspicion is a *substitute* for fair notice. It is immaterial, as far as fair notice principles are concerned, that the suspicions are based upon ignorance and would not have been held by one who was better informed on the law. Moreover, if in fact the conduct is unlawful, e.g., under state law, it is immaterial, insofar as fair notice is concerned, that one had no basis for believing that it was a *federal* crime.<sup>112</sup>

Judge Winter wrote a powerful dissenting opinion, charging that the majority had converted mail fraud into "a catch-all prohibition of political disingenuousness [that] expands [the mail fraud] legislation beyond any colorable claim of Congressional intent. . . ." <sup>113</sup> The majority's rationale, he urged, applied to candidates as well as public officers, and could subject them to a federal prosecution for making a false campaign promise.<sup>114</sup> He also read the majority's decision as criminalizing the fact that a partisan political leader supports a candidate for an appointive post, partly as a reward for party services or party loyalty, without disclosing that fact.<sup>115</sup> Similarly, a party leader who resists modernization of political office in order to retain jobs for the party faithful, without disclosing that motivation, has seemingly committed mail fraud.<sup>116</sup> Judge Winter concluded that the majority's opinion "finds not the slightest basis in Congressional intent, statutory language or common canons of statutory interpretation."<sup>117</sup>

Judge Winter conceded that the majority's reading of prior

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<sup>112</sup> Although none of it was cited in Judge Kaufman's opinion, there is probably some support for all these devices for evading anti-vagueness prohibitions and notice requirements. See generally *Winters v. New York*, 333 U.S. 507, 539 (1948) (Frankfurter, J., dissenting opinion); *United States v. Seregos*, 655 F.2d 33 (2d Cir. 1981); *W. LAFAVE AND A. SCOTT*, *supra* note 12, at 83-89. Judge Kaufman also invoked another notion, that a statute is not impermissibly vague if it requires willfulness or scienter. 688 F.2d at 129. This doctrine has Supreme Court support. See, e.g., *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337 (1952). It is, however, absurd, as demonstrated in Justice Jackson's dissent in *Boyce*, 342 U.S. at 345, and the unanswerable dissent of Justice Roberts in *Screws v. United States*, 325 U.S. 91, 151 (1945).

<sup>113</sup> 688 F.2d at 139. The court also upheld Margiotta's convictions for violating the Hobbs Act. Judge Winter concurred in that result.

<sup>114</sup> *Id.* at 140.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 142.

cases involving the fiduciary obligations of public officials was far from outrageous.<sup>118</sup> Indeed, he agreed that there is "substantial and direct precedent" for "much of what they say."<sup>119</sup> To hold that one has a "fiduciary obligation," without more definition and application to concrete situations, however, is to leave juries "free to apply a legal standard which amounts to little more than the rhetoric of sixth grade civics classes."<sup>120</sup> "One searches in vain," he added, "for even the vaguest contours of the legal obligations created beyond the obligation to conduct governmental affairs 'honestly' or 'impartially,' to ensure one's 'honest and faithful' participation in government."<sup>121</sup>

Judge Winter added:

I shudder at the prospect of partisan political activists being indicted for failing to act 'impartially' in influencing governmental acts. Where a statute, particularly a criminal statute, does not regulate specific behavior, enforcement of inchoate obligations should be by political rather than criminal sanctions. Where Congress has not passed legislation specifying particular acts by the politically active as criminal, our reliance rather should be on public debate, a free press, and an alert electorate.<sup>122</sup>

Judge Winter applied the rule of lenity.

## CONCLUSION

In *Newman*, *Angelilli*, and *Margiotta*, the defendants had all engaged in conduct that was unlawful, or arguably so, under state laws. In the latter two cases, and arguably in *Newman* as well, however, there was no strong federal interest involved. In any event, there was no basis in any of these cases for concluding that the Congress had ever identified a federal interest in the conduct and had decided to invoke the federal criminal law to protect that interest.

In *Newman*, what precedent there was suggested that the conduct was not covered by the federal securities law; in *Angelilli*, there was little precedent either way; in *Margiotta*,

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<sup>118</sup> *Id.* at 141.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 142.

<sup>121</sup> *Id.* at 142-43.

<sup>122</sup> *Id.* at 143. There are many other reasons to shudder over the implications of *Margiotta*; indeed, enough to warrant a full-fledged fit. See note 81 *supra*.

there was absolutely none on the precise point that was "novel." In all three cases, however, the Second Circuit held that the conduct was proscribed by federal criminal laws.

In all three cases, one can argue, as the court did, that the conduct clearly proscribed by the statute is analogous to the conduct in issue.<sup>123</sup> An omniscient Congress might well have chosen to criminalize the conduct had it considered the specific situations when it legislated. But the legislation in *Newman* was half a century old and that in *Margiotta* more than a century. Should a court undertake to "modernize" or bring "up to date" legislation that could not possibly have envisioned the myriad forms in which modern venality might manifest itself? The majorities in *Newman* and *Margiotta* obviously thought so, and saw nothing illegitimate in undertaking such a modernization.<sup>124</sup> The majority in *Angelilli* undertook to modernize RICO in advance, by interpreting it to cover everything.

There is much to be said for this "common law" approach to non-penal statutes.<sup>125</sup> Ironically, however, the Supreme Court in recent years has been taking a "literalist" approach to statutory interpretation in the non-penal context, reading into the statute no more than its words require.<sup>126</sup> There is something very disturbing about a society in which judges make criminal law by the "common law method" but require legislatures to be explicit when enacting non-criminal legislation. Is criminal law not *important* enough to command the attention of Congress? Is it not *important* enough to require that the democratically elected arm of government make the decisions about what conduct shall be criminal and what shall not? Do courts and prosecutors have *expertise* that the Congress lacks in such matters?

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<sup>123</sup> An interesting irony is that the prosecutor in *Margiotta* supported the conviction by comparisons with the Soviet Union, apparently suggesting that Margiotta's conduct was somehow akin to the Soviet system, which is "alien to our country." 688 F.2d at 144 n.7. The conviction was sustained, however, by adopting something akin to "punishment by analogy," which was once common in Russia but is "not compatible with our constitutional system." *Papacristou v. City of Jacksonville*, 405 U.S. 156, 168-69 (1972). Even the Soviet Union ultimately abolished crime by analogy, as incompatible with justice. See Grzybowski, *Soviet Criminal Law Reform of 1958*, 35 IND. L.J. 125, 129 (1960).

<sup>124</sup> On judicially filling statutory "loopholes," see J. HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 50-52 (2d ed 1960).

<sup>125</sup> See generally G. CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982).

<sup>126</sup> See Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 HARV. L. REV. 892, 894 (1982).

One can plausibly argue the affirmative on all of these propositions, if criminal punishment is viewed simply as a means of regulation. The administrative model has much to commend itself in criminal law, if our priority is efficiency.<sup>127</sup> But why bother with law at all? Why not just enact a general authorization to convict as criminals anyone whose behavior is seriously antisocial, and let prosecutors and jurors decide that question?

The reason, of course, is that the power to criminalize is the power to destroy, as Judge Winter ominously reminded us in his *Margiotta* dissent.<sup>128</sup> Moreover, the quintessential purpose of criminal law is to ceremonialize and to solidify the core values of society. It loses its moral force, and hence undermines its primary purpose, when those values are not democratically determined. There is little reason to respect judge-made criminal law and no per se basis to condemn those who are caught up in it.

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<sup>127</sup> For an effort to show that the administrative model has taken over part of our criminal law, see Duke, *Prosecutions for Attempts to Evade Income Tax: A Discordant View of a Procedural Hybrid*, 76 YALE L.J. 1 (1967).

<sup>128</sup> 688 F.2d at 143 (Winter, J., dissenting).

