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What's the Meaning of This?
Making Sense of Statutory Interpretation

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Interpretive Theories

Lawyers have long debated the best approaches to statutory interpretation. Over time, these approaches fall in and out of favor. Practitioners can benefit from understanding how the law of statutory interpretation has developed (generally and in relation to Texas law). Because variations on these theories reappear, practitioners who can identify the influence of the underlying ideas will be at an advantage. You'll be able to spot when your opponent uses an out-of-favor theory or canon and what arguments to use against it. Also, you'll be able to appeal to judges regardless of their approach to interpretation.

Natural Law

At the time of the Founding, natural law predominated. Its proponents believed that a judge could divine the law by focusing on general principles of justice or logic. They did not feel constrained by statutory text because, as independent actors uncovering the one true law, once true law was discovered, any statute to the contrary was wrong. Even when additional structure (like canons of construction and other interpretive rules) was introduced into the law, judges' opinions obfuscated the real motivations for decisions and allowed them to essentially make law without constraint. *See* Brian Z. Tamanaha, *Understanding Legal Realism*, 87 TEX. L. REV. 731, 741 (2009).

The Roots of Legal Realism

Skepticism of the claims that judges were arriving at their conclusions by pure legal reasoning (rather than lesser notions of policy or politics) began in the 1880s. *Id*. at 743-44. Chief Justice Marshall had declared it

> emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. This is of the very essence of judicial duty.

Marbury v. Madison, 5 U.S. 137, 177-78 (1803). But there had developed a sense among these skeptics that a judge could always "find" legal authority to reach whatever outcome he wanted, such that judges were really legislating under the guise of higher order logic and reason.

Although the umbrella term for this loosely organized movement—Legal Realism—was not coined until the 1930s,[1] there were sporadic demands for a more realistic view of judging that abandoned the charade that law was "the perfection of human reason." 87 TEX. L. REV. at 734-47. Oliver Wendell Holmes said it this way: "The life of the law has not been logic: it has been experience."

Plain-Meaning

An approach that centered around enforcing the literal words of the statute had already been operative in England (called the Literal Rule) and can be found in early Texas decisions around this time. *See, e.g.*, *Harris v. State*, 17 Tex. App. 132, 1884 WL 8637, at *2 (1884) ("Whether or not the statute … is wise legislation is not for us to determine. We can only administer the law as we find it"). As Holmes famously said in his essay on interpretation, "We do not inquire what the legislature meant; we ask only what the statute means." *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 419 (1899).

This ancestor theory of modern or "new" textualism was criticized because it focused only on the four corners of the text, disregarding that context is frequently essential to meaning.[2]

Intentionalism

Throughout this same period, early American decisions reflect the idea that the ultimate job of interpreting statutes is to implement the intent of the Legislature—even if that conflicted with its chosen words:

> If courts were in all cases to be controlled in their construction of statutes by the mere literal meaning of the words in which they

[1] Karl Llewellyn played an important role in naming the group and, many years later, famously argued that because nearly every canon of construction has a mirror opposite, they provide no determinacy to interpretation. *See* Karl N. Llewellyn, Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed, 3 VAND. L. REV. 395, 401-06 (1950).

[2] John Manning, "What Divides Textualists from Purposivists?" 106 COLUM. L. REV. 70, 79 (2006).

> are couched, it might well be admitted that appellants' objection to the evidence was well taken. But such is not the case. To be thus controlled, as has often been held, would be for the courts in a blind effort to refrain from an interference with legislative authority by their failure to apply well-established rules of construction to, in fact, abrogate their own power and usurp that of the legislature, and cause the law to be held directly the contrary of that which the legislature had in fact intended to enact. While it is for the legislature to make the law, it is the duty of the courts to "try out the right intendment" of statutes upon which they are called to pass, and by their proper construction to ascertain and enforce them according to their true intent. For it is this intent which constitutes and is in fact the law, and not the mere verbiage used by inadvertence or otherwise by the legislature to express its intent, and to follow which would pervert that intent.

Russell v. Farquhar, 55 Tex. 355, 359–60 (1881); *see also Minor v. Mechanics' Bank of Alexandria*, 26 U.S. 46, 64 (1828) (stating as the general rule of statutory construction that the interpretation that should be adopted is the one that "carries into effect the true intent and object of the legislature in the enactment. The ordinary meaning of the language must be presumed to be intended, unless it would manifestly defeat the object of the provisions.").

A criminal case before Justice Holmes when he was on the First Circuit is illustrative. *Johnson v. United States*, 163 F. 30, 32 (1st Cir. 1908). The defendant was accused of hiding property from the trustee overseeing his bankruptcy. At trial the government offered a schedule of assets and liabilities that Johnson was required to file as part of the bankruptcy proceedings. He objected to this evidence under a federal statute that provided

> No pleading of a party, nor any discovery or evidence obtained from a party…by means of a judicial proceeding…shall be given in evidence…in any criminal proceeding, [except in a prosecution for perjury.]

The evidence was admitted, he was convicted, and he appealed. He challenged the admission on appeal. The government responded that the schedule was not

strictly a "pleading," "discovery, or "evidence," and because of the canon that statutes modifying the common law should be strictly construed, the statute did not apply. Justice Holmes observed that the common law rule had been limited only to pleadings and that the statute clearly aimed to expand the common law rule. This was an expression of the Legislature's will from the clear face of the statute. Because its object was to exclude from evidence items that were required by pretrial court procedures to be produced, the schedule should not have been admitted. In so deciding, Holmes explained, "it is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before." *Id*.

At other times, courts limited the power to depart from the literal meaning of the legislature's words to cases of ambiguity. *See*, *e.g*., *Sparks v. State*, 76 Tex. Crim. 263, 266 (1915) (meaning of the legislature's words may be enlarged or restricted to carry out the intent of the Legislature when they are ambiguous; but where there is no question of meaning, attempting to construe the terms "would be to exercise legislative functions").

Intentionalism had a lot of staying power. Even by 1990, it was considered one of the most popular foundational theories of interpretation. William Eskridge William and Philip Frickey, "Statutory Interpretation as Practical Reasoning," 42 STAN. L. REV. 321, 325 (1991). Treatises like Sutherland's Statutory Construction are filled with canons influenced by the theory, *e.g*., "Courts may eliminate or disregard words in a statute to effect legislative intent or meaning." Norman Singer & Shambie Singer, Sutherland's STATUTES AND STATUTORY CONSTRUCTION § 47:37 (7th ed. 2014). One of intentionalism's claims to legitimacy is a theory of legislative supremacy that acknowledges the legislature as primary lawmaker and the courts as its faithful agents, who in focusing on the legislature's intentions keeps judges from imposing their own views and ensuring that the will of the elected lawmakers is followed. Eskridge & Frickey, at 326.

Critique of Intentionalism and Legislative History as Source of Actual Intent

Intentionalists were criticized because of the difficulty of (1) determining what the legislature's actual intent was, (2) pinpointing any one intent for a collective body, and (3) assuming that legislators were always motivated by a policy intent in passing a bill. Most intentionalists looked to legislative history

as a source for determining actual intent,[3] scouring the legislative material to find whether the legislature expressed an opinion on the interpretative question at hand. But while this kind of consideration of legislative history had long been resorted to,[4] it had also long been criticized. *See, e.g.*, *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 318 (1897) ("There is, too, a general acquiescence in the doctrine that debates in congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body.")

More from the Legal Realists

During the 1940s through the 1960s, several scholars were critical of the canons of construction, which led to a decline in their use. *See, e.g.*, J. Thomas, 3 Harv. J. Legis. 191, 194, 209-10 (Feb. 1966) (cited in *Boykin v. State*, 818 S.W.2d 782, 786 n.4 (Tex. Crim. App. 1991)) (canons divert from the real

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[3] Another approach traded actual intent for "imaginative reconstruction" where the judge "should try to think his way as best he can into the minds of the enacting legislators and imagine how they would have wanted the statute applied to the case at bar." *See* Richard Posner, Statutory Interpretation—in the Classroom and in the Courtroom, 50 U. CHI. L. REV. 800, 817 (1983).

[4] Courts have gone back and forth on the use legislative history and when it can be considered. As one commentator noted:

> [B]y 1940 the Supreme Court had repudiated use of the plain meaning rule as a "filtering device" for statutory interpretation, stating that "there certainly can be no 'rule of law' which forbids [the use of legislative history], however clear the words may appear to be on 'superficial examination.'"

Richard A. Danner, *Justice [Robert] Jackson's Lament: Historical and Comparative Perspectives on the Availability of Legislative History*, 13 DUKE J. COMP. & INT'L L. 151, 155–56 (2003) (cleaned up) (quoting *United States v. Amer. Trucking Assoc.*, 310 U.S. 534, 544 (1940)).

For early Texas uses of legislative history, *see Statutory Construction-Admissibility of History of Passage of Act Through Legislature*, 11 TEX. L. REV. 562, 563 (1933); *Felton v. Johnson*, 112 Tex. 412, 416–17 (Comm'n App. 1923) (considering legislative history where title or caption suggested different meaning than text of the law on the question whether "labor" included not just physical toil but also professional services, explaining, "Under such circumstances, it is proper to try to account for that discrepancy, if the legislative history of the act will clear it up.").

task of determining meaning: "Rules and canons of statutory construction must be abolished and eliminated from the legal vocabulary. Students of the law must be shown that these rules are a hindrance and not an aid to statutory understanding."); *see also* Felix Frankfurter, Some Reflections On The Reading of Statutes, 47 COLUM. L. REV. 527, 530, 543 (1947) (available on HeinOnline) ("a page of history is worth a volume of logic") (calling canons a "crutch"). The legal realists saw advances in psychology and other fields and yet observed judges making law, not "finding it" as they claimed. *See* Scalia & Garner at 5.

Purposivism

In the late 1950s, Professors Henry Hart and Albert Sacks expanded on the legal realists and others' criticism of intentionalism as being out of touch with how legislatures really worked and also being subject to manipulation in the legislative record. Eskridge & Frickey, 42 STAN. L. REV. at 332-33. Hart and Sacks' theory of interpretation endorsed legislative supremacy but, instead of attempting to discover actual intent, they relied on the fiction of a legislature "made up of reasonable persons pursuing reasonable purposes reasonably." Henry M. Hart, Jr. and Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application at 1415 (1958). This was their way of ensuring that they had an objective measure for interpretation. If there was an express statement of purpose in the legislative history, this would be considered. But if not, the purpose would have to be inferred—and done so at a specific enough level of abstraction that it would not leave doubt about the answer to the interpretative question. They would first ask what problem(s) the legislature was attempting to solve with the legislation. They might compare the former law with the new law and ask why reasonable legislators would have enacted the new law. They could look to what might have seemed a flaw in the old law and how the new law provided a remedy.[5] They took the unquestionably clear parts of the statute at issue as a guide and from the derived purpose (as an additional point of reference) would reason to how an objective, reasonable legislature would resolve the interpretative question at issue, looking for an interpretation that promoted coherence and workability. *Id*. at 1415-1417. The ordinary meaning of the words, however, could not be

[5] Courts were permitted to rely on public knowledge of what was considered the mischief needing remedying. Hart & Sacks, at 1415.

trumped by the discovered purpose or objective. Instead, purpose was used to resolve ambiguity. 42 STAN. L. REV. at 333. Even when words seemed initially not to convey a single meaning, words served a double role: "first as a factor together with relevant elements of the context in the formulation of hypotheses about possible purposes, and, second, as a separately limiting factor in checking the hypotheses." Hart & Sacks, at 1411. Moreover, legislative history was examined only for the purpose of shedding light on the legislation's general purpose—never for answering the specific question at issue. *Id*. at 1416.

The assumptions of purposivists that legislators act rationally and are motivated by a policy purpose are likely not empirically supportable, and thus the theory is susceptible to the criticism that in its effort to achieve an objective source of interpretive clues to meaning, it is far removed from reality. Another criticism of purposivism is that legislation is frequently the result of compromise and that, by elevating the importance of purpose, adherents of the theory may undo a deliberate (though awkwardly worded) statute and end up law-making.[6] Similarly, the public cannot rely as greatly on the text to guide behavior and give notice of the law since purpose is considered paramount.

[6] Manning, 106 COLUM. L. REV. at 74, 99.

Textualism (late 1980s / early 1990s)

The rule-of-law failings of purposivism are a selling point for the resurgence of plain-meaning interpretation, called modern or "new" textualism.[7] Its most famous adherent was Justice Antonin Scalia, who along with Bryan Garner authored the latest statutory interpretation treatise: READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012).[8] Like purposivism, textualism also recognizes legislative supremacy and democratic values but does so by making the text of the statute—the only part of legislative materials agreed upon by the legislature and signed into law by the executive—paramount. Scalia and Garner's view in a nutshell:

> In their full context, words mean what they convey to reasonable people at the time they were written—with the understanding that general terms may embrace later technological innovations.

Scalia & Garner, at 16. Proponents of textualism argue that this approach makes judges more accountable because they must justify their interpretation by resort to the objective text. Similarly, legislative history is considered very rarely by most adherents or only for limited purposes.

One feature of textualism is that it may more frequently constrain judges from altering the text to save a likely or even obvious meaning.[9] This is likely seen as a benefit by proponents but it can come at a high cost to the legislature.

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[7] Scalia and Garner point out that their views are not the ridged formalistic interpretation of earlier days referred to as Literalism by critics. READING LAW, at 355-56. Their method is about employing common sense and arriving at a fair reading, not a "crabbed" or hyper-literal one.

[8] It also includes Dean of Harvard Law School, John Manning, see Absurdity Doctrine, 116 Harv. L. Rev. 2387, 2454-56 (2003), and Judge Frank Easterbrook on the Seventh Circuit.

[9] The Absurdity Doctrine, which is permitted by Scalia and Garner but criticized by other textualists, is an exception to this principle but may function as a safety valve to permit deviation from text when it is widely viewed as shockingly wrong. *See* Richard M. Re, "Permissive Interpretation," 171 U. PENN. L. REV. p. 9 (Jan 2023 draft).

Pragmatists often favor judges implementing solutions through interpretation, particularly as amending a statute in case the court gets it wrong is not as difficult as constitutional amendment. Textualism is frequently expressed as attempting to discover how reasonable persons conversant with the applicable social and linguistic conventions would understand the text at issue.[10] This focus tends to consider meaning only from one perspective—that of the reasonable listener or reader—and thus isn't focused on what meaning the speaker may have wanted conveyed.

Judges on the Court of Criminal Appeals have made several statements on statutory interpretation consistent with textualism:

- "If we only defer to the legislature when we agree with their policy determinations then we are not deferring to the legislature at all." *Vandyke v. State*, 538 S.W.3d 561, 569 (Tex. Crim. App. 2017).

- "it is not for this Court to add to, subtract from, or otherwise revise a democratically-enacted statute simply because we believe that our revisions would improve the day-to-day operation of the criminal justice system. Those concerns are better addressed democratically, rather than from the bench." *State v. Velasquez*, 539 S.W.3d 289, 295 (Tex. Crim. App. 2018).

Fixed or Floating Meaning

Interpreters also disagree about what is the relevant time period for determining meaning. Most textualists adhere to originalism: meaning is determined by how words are reasonably understood by ordinary persons hearing the term (unless it is a technical term) *at the time of enactment*. Developments in technology and the emerging field of Corpus Linguistics may offer judges a more objective method of determining how listeners from times past understood terminology. *See* Stefan Th. Gries & Brian G. Slocum, *Ordinary Meaning and Corpus Linguistics*, 2017 B.Y.U.L. REV. 1417, 1462 (2017) (performing the corpus-linguistic analysis on the question in *Smith v.*

[10] Manning, 106 COLUM. L. REV. at 96.

United States, 508 U.S. 223 (1993), whether bartering a gun for drugs qualified as "use" of a firearm in a drug-trafficking crime and finding majority's intuitive sense that it fit the ordinary meaning of "use" was not borne out by the data); *see also NY State Rifle & Pistol Ass'n v. Bruen*, Amicus Brief For Corpus Linguistics Professors and Experts (analyzing Founding Era Corpora to discover use of the phrase "keep and bear arms").

The other choice—dynamic interpretation—permits judges to interpret statutes in light of present society and in the current political and legal context. *See* Eskridge, "Dynamic Statutory Interpretation," 135 U. PA. L. REV. 1479 (July 1987). Under this latter view, judges are not simply agents of the legislature but cooperative partners with legislatures of the past to proscribe a sensible meaning to the statute for present day.

Pluralism and Convergence

As the two predominant approaches (purposivism and textualism) aim to constrain[11] judges (and to do so objectively) and merely disagree on how to best accomplish that goal, there is some appeal to combining these approaches.[12] Several observers have commented on how the theories are converging either toward the consensus that textualism has won-out as the

[11] Eskridge & Frickey, 42 STAN. L. REV. at 325 ("each [of the three grand theories: intentionalism, purposivism, textualism] seeks an objective standard that will constrain the discretion of judicial interpreters.").

[12] "[T]he actual practice of legal interpretation cuts across familiar interpretive approaches like textualism and purposivism." Re, 171 U. PENN. L. REV. at 5 (advocating a structured pluralism like the British System incorporating a (1) literal rule, (2) mischief rule—deviate from the literal rule to advance lawmaker's specific goals and interpret in light of the specific issue the legislation aims to address, and (3) golden rule—deviate to avoid catastrophic or senseless harm; that is: textualism, purposivism, absurdity principle or pragmatism).

dominant theory[13] or that they are influencing (and tempering) each other.[14] Others argue that the theory is for the academics and that practitioners have always resorted to whatever tools at their disposal for interpreting statutes. Eskridge & Frickey, 42 STAN. L. REV. at 321. *See* Justice Breyer, Interview at 15:40-18:60 (https://www.youtube.com/watch?v=9uk110w08_s This echoes Chief Justice Marshall's inclination: "[w]here the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived." *United States v. Fisher*, 6 U.S. 358, 386 (1805).

In one recent Court of Criminal Appeals opinion, the court considered the consequences of a particular interpretation as part of its analysis: "We further note, to the extent the statutory language is ambiguous, that the consequences of a particular construction may aid in our understanding." *Compton v. State*, No. AP-77,087, 2023 WL 2904267, at *21 (Tex. Crim. App. Apr. 12, 2023) (citing *Chiarini v. State*, 442 S.W.3d 318, 320 (Tex. Crim. App. 2014) and TEX. GOV'T CODE § 311.023). Compton had been charged with capital murder of a person "employed" by a prison, TEX. PENAL CODE § 19.03(a)(5)(A). The Court held that testimony that the employee-victim was committing misconduct did not make her no longer an employee and thus did not raise the lesser-included offense of murder. In reaching that conclusion, the Court considered the consequences of Compton's argument—*i.e.*, that employees on break or who were clocked out and just leaving for the day would not fall within the statute.[15]

Another sign of convergence in the theories is the common use (even by textualists) of legislative history as confirmatory evidence of the Court's interpretation. *See, e.g., Mason v. State*, No. PD-0881-20 (Tex. Crim. App. May 11, 2022). In one opinion, Justice Kagan expressed the practice this way:

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[13] Justice Kagan, "We're all textualists now." 2015 Scalia Lecture, A Dialogue with Justice Elena Kagan on the Reading of Statutes, Video at 8:30; Scalia & Garner, at 16 ("Everyone is a textualist."); Jonathan T. Molot, "The Rise and Fall of Textualism," 106 COLUM. L. REV. 1, 36 & n.156 (2006).

[14] *See* Manning, John, "What Divides Textualists from Purposivists," 106 COLUM. L. REV. 70 (2006); Judge Richard Posner doesn't think there's much to the differing theories and that it is mostly political differences. Video at 2:15.

[15] Scalia and Garner also recognize that, to some extent, the consequences of a decision can provide a key to sound interpretation. Scalia & Garner, at 352.

"legislative history, for those who care about it, puts extra icing on a cake already frosted." *Yates v. United States*, 574 U.S. 528, 557 (2015) (Kagan, J., dissenting)).

Constitutional Roles in Determining the Tools and Theory of Interpretation in Texas

Under the Texas Constitution:

> The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: those which are Legislative to one, those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.

TEX. CONST. art. II, § 1. Additionally, the power of courts to be the final arbiter of what the law is arguably includes deciding what methods and tools of interpretation to employ. *See* Tex. Const. Art. V, § 1 ("The judicial power of this State shall be vested in one Supreme Court, in one Court of Criminal Appeals, in Courts of Appeals, in District Courts, in County Courts, in Commissioners Courts, in Courts of Justices of the Peace, and in such other courts as may be provided by law."). While a court could treat a statutory pronouncement on these matters as confirmatory,[16] the Court of Criminal Appeals has not acquiesced in the legislature deciding this.

In 1967, while intentionalism and purposivism were prominent, the Texas legislature passed the Code Construction Act, purporting in Art. 5429b-2, § 3.03 (now Tex. Gov't Code § 311.023) to permit judges to consider legislative history and purpose regardless of any ambiguity. Acts 1967, 60th Leg., R.S.,

[16] The Court does on occasion reference parts of the Code Construction Act's broader provisions without explanation or citation to *Boykin*, 818 S.W.2d at 785. *See, e.g.*, *Compton*, 2023 WL 2904267, at *21; *Hardy v. State*, 281 S.W.3d 414, 422 (Tex. Crim. App. 2009).

p. 1036, ch. 455, § 2 (eff. Sept. 1, 1967) (HB 292). More specifically, it and the proceeding section permit the following considerations:

> § 311.021: Intention in Enactment of Statutes
> Presume:
> -constitutional compliance (constitutional avoidance)
> -entire statute effective (surplusage canon)
> -just and reasonable result is intended (consequentialist)
> -result feasible of execution is intended (absurdity)
> -public interest favored over any private interest
> Tex. Gov't Code 311.023: invitation to consider (regardless of ambiguity):
>
> - Object sought to be maintained
> - Legislative history
> - Consequences of particular construction
> - Administrative construction
> - Title (caption)

The Court of Criminal Appeals in *Boykin*, 818 S.W.2d at 785 (written in 1991, not long after new textualism was gaining attention) recognized that § 311.023's authorization to consider statutory history before a finding of ambiguity would intrude on the carefully circumscribed role of the court to interpret, not make law.[17] In a footnote, it also suggested that legislative directives on interpretation could violate separation of powers.[18] Texas is one

[17] The Court again recently recognized that this was a constitutional command. *In re Smith*, No. WR-93,354-02, 2022 WL 17480102, at *7 (Tex. Crim. App. Dec. 7, 2022). The Texas Supreme Court has recognized essentially the same principle: "plain language forbids open-ended improvisation, including the nontextual purposivism and consequentialism winked at in the Code Construction Act. Our aversion to extratextual impulses is less prudish than prudent: If it is not necessary to depart, it is necessary not to depart." *BankDirect Capital Fin., LLC v. Plasma Fab, LLC*, 519 S.W.3d 76, 85 (Tex. 2017).

[18] *Boykin*, 818 S.W.2d at 786 n.4. *See also Lang v. State*, 561 S.W.3d 174, 188 (Tex. Crim. App. 2018) (Yeary, J., dissenting) (rejecting Lang's argument that it should look to legislative meaning beyond the text regardless of ambiguity and that "[t]o the extent the extent that Section 311.023 nevertheless purports to authorize courts to do so, the statute itself is at risk of being declared an unconstitutional delegation of legislative authority to the courts.").

of only a few states in this situation. *See* Jennifer M. Bandy, *Interpretive Freedom: A Necessary Component of Article III Judging*, 61 DUKE L.J. 651, 659 (2011) (recognizing Texas's relatively rare assertion of independence in its interpretative role and rejection of the legislature's attempts to impose a method of interpretation); Abbe R. Gluck, *The States As Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1791 (2010) (describing Texas and Connecticut with court-legislature battles over textualism). Scalia and Garner echo this concern that legislative prescription of interpretative rules raise concerns both about one legislature binding a future legislature and separation of powers from the courts. Scalia & Garner, at 24-25, 43-44.

Note that the Legislature is currently considering an amendment to § 311.023. *See* Tex. Leg., 88th Leg. HB 2139 (view current status here) (prohibiting a court from inquiring into the intent of the legislature when interpreting statute, and requiring that a court interpret statute using only the meaning that the words would have to an ordinary speaker of the English language).

The Code Construction Act also sets out several permissive canons or rules of interpretation:

- § 311.005(13) "includes" doesn't create presumption that components not expressed are excluded (exception to *expressio unius* canon)
- § 311.014 computing time (first day is excluded and last day is included, Sat/Sun. holiday not included, how to count months from a particular day)
- § 311.016 (may/shall/must)
- § 311.024 (Headings don't limit or expand the meaning of a statute) (but might still be an aid to meaning in case of ambiguity)
- § 311.025 (Irreconcilable Statutes & Amendments)
- § 311.026 (Special or Local controls over general if can't give effect to both and general is not the later with manifest intent to prevail)

It does not mandate any of these considerations. *See* Tex. Gov't Code § 311.003 ("the rules provided in this chapter …are meant to describe and clarify common situations in order to guide the preparation and *construction* of codes."). Instead of being methods of interpreting, these may be more like definitions of terms or interpretive directions, see Scalia & Garner, READING LAW, at 225-233, "Interpretive-Direction Canon," that would not intrude on

interpretive role and instead is part of law-making, as is setting out generally applicable definitions in Tex. Penal Code § 1.07.

The Penal Code purports to expressly adopt some but not all portions of the Code Construction Act. TEX. PENAL CODE § 1.05(b). The "may/shall" statute is one of the ones not adopted. But even for the portions that are purported to be applicable, the Penal Code provides a limitation that these parts of the Act will not apply if "a different construction is to be required by the context." *Id.*; *Timmins v. State*, 601 S.W.3d 345, 352 (Tex. Crim. App. 2020).

It is possible that there are other directives that could violate separation of powers and intrude on the court's task of interpretation. This might include directives that the Penal Code or Code of Criminal Procedure be strictly or liberally construed (TEX. PENAL CODE § 1.05(a) & TEX. CODE CRIM. PROC. art. 1.26) and the statutory rule of lenity, TEX. GOV'T CODE § 311.035, which purports to apply outside the penal code and controlled substances act. Nevertheless, courts do cite these rules without delving into whether there could be a separation of powers limitation. *See, e.g.*, *Mason v. State*, No. PD-0881-20, 2022 WL 1499513, at *5 (Tex. Crim. App. May 11, 2022) ("In 2015, the Rule of Lenity was formally codified to ensure that all criminal laws, if ambiguous, are read in favor of the defendant. *See* Tex. Gov't Code § 311.035.").

Similarly, statutory severability clauses are sometimes ignored by courts,[19] perhaps on the theory that no legislature can predict all the possible combinations of provisions remaining when a court finds part of a bill unconstitutional. *See, e.g.*, *Louk v. Cormier*, 622 S.E.2d 788, 803 (W. Va. 2005) (noting a non-severability provision but employing its own severability analysis); *Stiens v. Fire & Police Pension Ass'n*, 684 P.2d 180, 184 (Colo. 1984) (unseverability clause was not conclusive of legislative intent).

Other Code Construction Act Limitations

The Code Construction Act may not apply to *all* of Title I of the Code of Criminal Procedure (i.e., Arts. 1.01 –67.305). It applies wholesale to any

[19] *See United States v. Jackson*, 390 U.S. 570, 585 n.27 (1968) ("the ultimate determination of severability will rarely turn on the presence or absence of such a clause.").

codes that were re-enacted by the 60th or subsequent legislatures (Tex. Gov't Code § 311.002(2)). The Code Construction Act also expressly applies if a set of statutes was originally in the Revised Statutes but has since been compiled into a code "by the 60th or subsequent legislature as part of the state's continuing statutory revision program." TEX. GOV'T CODE § 311.002. Neither of these situations fits the Code of Criminal Procedure, which was enacted by the 59th Legislature and has not been revised wholesale. *See* Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722 (SB 107)(creating Code and excepting from repeal certain articles of the 1925 Code of Criminal Procedure, Art. 54.02); *See also* Texas Code Crim. Proc. Revision Research Guide, Leg. Ref. Library.

Despite not applying wholesale, the Code Construction Act does apply to "each amendment, repeal, revision, and reenactment of a code *or code provision* by the 60th or a subsequent legislature." GOV'T CODE § 311.002(2) (emphasis added). There is some debate about whether that could include a provision of a code that had not yet been reenacted or revised, *see Robbins Chevrolet Co. v. Motor Vehicle Bd.*, 989 S.W.2d 865 (Tex. App.—Austin 1999, rev. denied). But the Court of Criminal Appeals has said it applies to any "amendments" and "revisions" within the Code of Criminal Procedure since the 60th Legislature. *Barbee v. State*, 432 SW2d 78 (Tex. Crim. App. 1968) (op. on reh'g); *see also* Revisor's Report to Nonsubstantive Revision of Provisions of Code of Criminal Procedure, Submitted to 86th Leg., Regarding Title I of Code of Criminal Procedure ("Chapter 311, Government Code (Code Construction Act), applies to the construction of each *provision* in the Code of Criminal Procedure that is enacted under Section 43, Article III, Texas Constitution (authorizing the continuing statutory revision program), in the same manner as to a code enacted under the continuing statutory revision program, except as otherwise expressly provided by the Code of Criminal Procedure.")

Unamended and unrevised Articles of the Code of Criminal Procedure that might not be covered by the Act include:

> Art. 16.08, 16.14, 24.07, 24.08, 24.19, 24.21, 28.06, 28.07, 39.13 (for instance, there are many, many more)

The Code of Criminal Procedure does not have time-calculating provisions, so that might be one way it might matter whether the Code Construction Act

applies or not. But Art. 1.27 of the Code of Criminal Procedure permits the rules of the common law to be applied if the Code fails to provide a rule of procedure; so that might govern in such a situation. There are at least a few time-sensitive provisions that have not been amended or revised including:

Art. 28.08 (discharge defendant 10 days after sustaining motion to set aside)

Art. 51.12 (time for sheriff's report to DPS of defendants who have fled)

The Code Construction Act does expressly apply to Title 2 (Arts. 101-104) (covering court costs, jury pay, collections). *See* TEX. CODE CRIM. PROC. art. 101.002; (SB 854) (codifying—in a nonsubstantive revision— statutes that were expressly saved from repeal by the legislature enacting the 1965 Code of Criminal Procedure).

In What Order Do Courts Employ Their Interpretative Tools?

Another important principle is figuring out when to employ canons of construction, rules of grammar, determinations of ambiguity, and forays (or deep dives) into legislative history. Typically the thing that matters is what tools can be routinely employed and what can be employed only in the event of ambiguity (what *Boykin* referred to as "extra-textual"). The whole reason behind what one judge has called the "ambiguity wall"[20] is that the legislature's clear and plain meaning should be respected, and where meaning is clear, there is no need to look elsewhere.

Some interpretative questions can be resolved immediately into the interpretive exercise by employing ordinary grammar rules or by looking at the context of the provision in which a contested word or phrase appears. *Hegar v. Health Care Serv. Corp.*, 652 S.W.3d 39, 43 (Tex. 2022) ("Words that in isolation are amenable to two textually permissible interpretations are often not ambiguous in context."). A court might consult various dictionary definitions.[21]

[20] It also includes absurdity. *See* Justice Paul Thissen, "When Rules Get in the Way of Reason," 76 BENCH & B. MINN. 24 (Nov. 2019).

[21] One judge has recently looked to a dictionary published shortly before the statute at issue was enacted to assess the meaning of the contested terms. *See Dunham v. State*, No. PD-0831-18, 2023 WL 151346, at *10 (Yeary, J., dissenting) (determining that misrepresentation as to the source or provider of commodity or service was not a misrepresentation of "style, grade, or model" for purposes of deceptive business practices

In *Clinton v. State*, for example, and the Court construed the statutorily undefined terms "use" and "present" in the debit card abuse statute by first resorting to dictionary definitions and other statutory clues. The offense required a defendant to have "present[ed]" or "use[d]" a debit card with intent to fraudulently obtain a benefit and "with knowledge that the card, whether or not expired, has not been issued to him and is not used with the [cardholder's] effective consent." TEX. PENAL CODE § 32.31. The facts showed Clinton had attempted to swipe a stolen debit card through a Walmart card reader but was declined and unable to purchase the cigarettes she was intending to buy. 354 S.W.3d 795 (Tex. Crim. App. 2011). The Court rejected Clinton's argument that she had not "used" the card because the transaction had not gone through. *Id*. at 801. It found its own dictionary definitions less restrictive than the court of appeals and observed that the statute can be committed even with an expired card—further supporting its argument. By contrast, it held Clinton's interpretation created the unreasonable result of a defendant being liable for a completed offense if the State alleged "present" but only liable for an attempted offense if the State alleged "use." Finally, it held that the existence of overlap between "use" and "present" did not render the terms meaningless or produce an absurd result. *Id*. at 802.[22]

The Court of Criminal Appeals has sometimes said that "statutory history" (in contrast to legislative history) is not extra-textual material that requires ambiguity before it may be considered. *Timmins*, 601 S.W.3d at 354 (considering the statutory history of bail jumping statute as part of its analysis, "none of which involves examining extra-textual indicia of meaning"); *but*

law); *See also* Scalia & Garner, 417-424 (listing historical dictionaries and characterizing the dictionary at issue—Webster's Third New International Dictionary (1961)— as "notoriously permissive." *Id*. at 417.

[22] In *State v. Torres*, No. PD-0018-22 & PD-0019-22, 2023 WL 2993882 (Tex. Crim. App. Apr. 19, 2023), the Court similarly considered dictionary definitions and statutory clues to determine that a magistrate had "used" the procedure to determine voluntariness of a juvenile's statement simply by asking that the juvenile be brought to him--even though police had not complied with that request. The statute assigned the role of "user" to the magistrate and, the Court reasoned, "[i]t would be inconsistent with the clear import of [Family Code] § 51.095(f) to construe it in a way that allows the failure of law enforcement to comply with the magistrate's request to mean that the *magistrate* did not use the procedure.").

see State v. Hardin, No. PD-0799-19, 2022 WL 16635303 (Tex. Crim. App. Nov. 2, 2022) (considering statutory history but after the proviso "[e]ven if we were to assume that the statute was ambiguous"). Sometimes, the statutory history is necessarily a part of the interpretation, as when the contested issue involves interpreting an amendment. *See Watkins v. State*, 619 S.W.3d 265, 274-278 (Tex. Crim. App. 2021) (considering what the discovery statute—the provision at issue—was like before and after the Morton Act, before holding that the meaning of "material" was unambiguous).

Although consequences of a construction are sometimes listed among the extra-textual sources (as it appears in the list in Gov't Code § 311.023 that *Boykin* declined the invitation to consider), the Court does on occasion rely on it, even without first finding an ambiguity. *See Torres*, 2023 WL 2993882, at *7, nn.10 & 11 (considering impact of State's interpretation that statute to have magistrate consider voluntariness of juvenile's statements was not invoked if police did not comply with magistrate's request to bring the juvenile to the magistrate).[23]

If the meaning is still not clear, another tool to use is the canons of construction. As *Boykin* observed:

> If the meaning of the statutory text, *when read using the established canons of construction relating to such text*, should have been plain to the legislators who voted on it, we ordinary give effect to that plain meaning.

Boykin, 818 S.W.2d at 785.[24] It then stated the exception: if it would lead to absurd consequences or is still ambiguous, then "out of absolute necessity," extra-textual factors can be considered. *Id*. Importantly, however, although

[23] In her dissenting opinion, Presiding Judge Keller suggests that some uses of consequences, particularly those that do not involve consideration of legislative history and can be gleaned from the text are "more textually related" and possibly more permissible to consider even in absence of ambiguity. *Torres*, 2023 WL 2993882, at *8, n.4 (Keller, P.J.).

[24] The Texas Supreme Court has followed a different rule at least for some canons. *Tex. State Bd. of Examiners of Marriage & Family Therapists v. Tex. Med. Ass'n*, 511 S.W.3d 28, 41 (Tex. 2017) ("We…will not address these construction canons unless we conclude that the statutes' language is ambiguous.").

Boykin says that canons can be employed in determining ordinary meaning, the canons should not be used to *create* an ambiguity.

In *State v. Kahookele*, 640 S.W.3d 221 (Tex. Crim. App. 2021), the Court considered whether, under Tex. Penal Code § 12.42(d), two prior sequential felonies could be used to habitually enhance an aggravated state jail felony (*i.e.*, a SJF punishable under Section 12.35(c)). The Court held that the statute's text limited the application of subsection (d) only to a "state jail felony punishable under Section 12.35(a)." The Court noted that the express exclusion of ordinary SJFs implied the inclusion of aggravated SJFs—an application of the "*Expressio Unius*" canon. But the Court did not consider the fact that Section 12.42 is titled "Penalties for Repeat and Habitual Felony Offenders on Trial for First, Second, or Third Degree Felony." It noted that "Headings and Titles are relevant only in the face of an ambiguous statute." *Id*. at 227.

Some substantive (or policy-based) canons, like the rule of lenity, likely require ambiguity before consideration. *See Hegar*, 652 S.W.3d at 43 n.9; Scalia & Garner, at 298 (explaining how the rule of lenity is applied in practice).

Just what counts as ambiguity is not always clear. The Court has said that "Ambiguity exists when a statute may be understood by reasonably well-informed persons to have two or more different meanings" or is "reasonably susceptible to more than one understanding." *Cortez v. State*, 469 S.W.3d 593, 598 (Tex. Crim. App. 2015). That there were two different interpretations by the court of appeals does not render a statute ambiguous. *Kahookele*, 640 S.W.3d at 227 (neither majority nor dissent in the court of appeals claimed statute was ambiguous).[25]

[25] Instances of the Court of Criminal Appeals finding statutes ambiguous are fairly rare. Three recent examples include *State v. Ross*, 573 S.W.3d 817, 822 (Tex. Crim. App. 2019) (meaning of "calculated to alarm" in disorderly conduct); *Lang v. State*, 561 S.W.3d 174, 181 (Tex. Crim. App. 2018) (does ordinary shoplifting constitute organized retail theft); *Arteaga v. State*, 521 S.W.3d 329, 334 (Tex. Crim. App. 2017) (whether first-degree-felony sexual assault enhancement required that defendant be prohibited from marrying the victim generally or prohibited from marrying her by the bigamy statute).

In this way, ambiguity functions as a line of demarcation, ensuring that the plain text that legislators chose will ordinarily reign supreme and not be cast aside in favor of less objective measures allowing judges to import their own interpretations.

Hierarchy of Canons

As mentioned above, the canons of construction were used less for a period of time in the middle part of the last century but have experienced a revival since textualism came to the forefront. Scalia and Garner's book READING LAW is an excellent way to familiarize yourself with the canons they consider "established" (and those they don't).[26] There is a certain predictability that results from a canon being widely known and accepted; textualists justify their consideration of these extra-textual sources partially on the basis that they are familiar to practitioners and to the Legislature and thus they form part of the background upon which the Legislature legislates.[27]

Also, the Court of Criminal Appeals has stated that it will observe "Time honored canons….[that] esteem textual interpretation." *Watkins v. State*, 619 S.W.3d 265, 272 (Tex. Crim. App. 2021) (quoting *BankDirect Capital Fin., LLC v. Plasma Fab, LLC*, 519 S.W.3d 76, 84 (Tex. 2017)). Most of the semantic canons will likely qualify, but a few of the policy-based or more substantive canons that might also qualify as specifically being characterized as "time-honored":

- The rule of lenity. *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 550 (1961);

[26] *See* "Thirteen Falsities Exposed" in READING LAW, which includes that remedial statutes should be liberally construed (p. 364—66), but surprisingly not the rule about construing statutes in derogation of the common law, which Texas has statutorily rejected since at least 1895 for the civil statutes. *See* TEX. GOV'T CODE § 312.006 (formerly Rev. Civ. St. 1895, General Provisions, Sec. 3, p.1103).

[27] *But see* Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U.L. REV. 109, 161 (2010) (asking why if courts once had power to adopt canons it would subsequently dissipate). Even though not "time-honored," there may be new canons being created that may be entirely consistent with textualism, like the Major Questions Doctrine, establishing when Congress can delegate certain authority to an agency.

- Not passing on constitutional questions unless unavoidable. *Spector Motor Serv. v. McLaughlin*, 323 U.S. 101, 105 (1944).

Some caution is necessary however, as canons shift over time and are not always referred to by the same name from one treatise or case to another. In fact, cases sometimes employ these rules of thumb without making clear that they are applying a canon. The canons are not law themselves, but caselaw discussing them can become precedent, and particularly under the "Prior Construction Canon"[28] has an impact on future interpretations of that phrase, whether in that statute or a later one.

Some recent Court of Criminal Appeals cases involving the canons include:

- *Expressio Unius:* Kahookele[29] (express exclusion of ordinary SJFs from 12.42(d) implied the inclusion of agg SJFs)
- *Surplusage:* Hardin[30] (Fail to maintain single lane's safe-movement requirement would be rendered meaningless if not staying as nearly as practical within the lane alone sufficed for offense)
- *Ejustem generis:* Stephens[31] (Attorney General's "such other duties as may be required by law" in Tex. Const. was limited by prior listed duties)
- *Constitutional Doubt:* Martin[32] (element of gang "member" incorporates part of the definition of "criminal street gang" to avoid freedom of association and other First Amendment concerns)

[28] Scalia and Garner, at 322 (when legislature passes new laws incorporating the same terminology it used in earlier laws, authoritative opinions construing that language are understood to carry over).

[29] 640 S.W.3d at 227.

[30] 2022 WL 16635303, at *6.

[31] *State v. Stephens*, No. PD-1032-20 & PD-1033-20, 2021 WL 5917198, at *6 (Tex. Crim. App. 2021).

[32] *Martin v. State*, 635 S.W.3d 672 (Tex. Crim. App. 2021).

- *In pari materia*: Ex parte Nuncio[33] (importing definition of "patently offensive" from obscenity into obscene harassment)

Although there is no generally applicable hierarchy of canons because it will depend on the particular situation, that doesn't mean that all canons are of equal importance when applied to a particular interpretive question. Here's an example:

> Result of Interpretation #1: The entire purpose of the law is defeated.
> Result of Interpretation #2: A word is rendered superfluous (*i.e.*, violates the "Surplusage" canon as not every word is given effect)
> Choose Interpretation #2.

Treatises like Sutherland and READING LAW can help identify what makes particular canons weaker or stronger in given situations.[34] Some canons permit deviation from the plain meaning while others only help break a tie between two competing interpretations. Some examples follow below.

Handling Dueling Canons

Consider a dueling canons case, where (as Llewellyn observed) the two proffered canons are mirror opposites: the "Last Referent" (a/k/a "Last Antecedent") and "Series Qualifier" canons at issue in *Lockhart v. United States*, 577 U.S. 347, 349 (2016). There, the defendant argued he should not have been eligible for a 10-yr minimum sentence for possession of child pornography because the operative statute required him to have a prior "relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct *involving a minor or ward*" and his prior was for sexual abuse of an adult. In

[33] *Ex parte Nuncio*, No. PD-0478-19, 2022 WL 1021276, at *11 (Tex. Crim. App. 2022).

[34] With the "Surplusage" canon, Scalia and Garner describe two kinds of violations: (1) those that read out an important part of the statute (such as the word "only" or "exclusively") and permit the opposite of what the ordinary meaning of the statute allows, and (2) those that render use of particular words redundant (because another word already serves that purpose in the statute). Of this second form, they explain that avoiding the redundancy is not always of paramount importance: "Sometimes drafters *do* repeat themselves and *do* include words that add nothing of substance, either out of a flawed sense of style or to engage in the ill-conceived but lamentably common belt-and-suspenders approach." READING LAW, at 177.

other words, he argued that "aggravated sexual abuse," "sexual abuse," and "abusive sexual conduct" were a series of words all subject to the qualifier "involving a minor." Authoring the majority decision, Justice Sotomayor rejected the application of the Series Qualifier and ruled that the Last Referent canon better fit the phrase. She explained that the Last Referent canon "reflects the basic intuition that when a modifier appears at the end of a list, it is easier to apply that modifier only to the item directly before it. That is particularly true where it takes more than a little mental energy to process the individual entries in the list, making it a heavy lift to carry the modifier across them all." 577 U.S. at 351.

Consider a more familiar example—the lyrics to Frosty the Snowman, which describes him as having "a corn-cob pipe and a button nose and two eyes made out of coal." We know already from context that the pipe and nose aren't made from coal. But even if we didn't, as Sotomayor explains, it requires a little bit of effort for your mind to drag the phrase "made from coal" back through the list of the proceeding items. The longer the phrase, the more effort required and the less natural the application. Sotomayor offered a contrasting example: "the laws, the treaties, and the constitution of the United States." *Id*. at 352. There, "of the United States" more naturally applies to all the things that come before because of the parallel structure repeating "the" before each item and the frequency with which "of the United States" occurs in language applying to a list. So the Series Qualifier would work there. In interpreting the statute in *Lockhart*, it also helped that the names of three sequential code sections in the Federal Criminal Code were: "Aggravated Sexual Abuse," "Sexual Abuse," and "Sexual abuse of a minor or ward." *Id*. at 353.

Doing the Interpretive Work

In this video, Scalia explains how a statute can provide clues while applying the canons to help a judge resolve an interpretive problem. *See* Scalia & Garner https://youtu.be/Ml3Lfp6irpk at 19:50-21:00.

Lenity (Tiebreaker Canon)

1. Rationale: A just legislature will not decree punishment without making clear what conduct incurs the punishment and what the extent of the punishment will be. READING LAW, at 296.

Law & Economics: Every statute over-deters to some extent. Citizens steer clear of behavior close to the line, and this deprives society of whatever benefits might have come from the avoided, but still-lawful conduct. This happens more often with a criminal law with harsh penalties, and thus these laws should be construed more narrowly to avoid this unnecessary cost. Richard A Posner, "Economics, Politics, and the Reading of Statutes and the Constitution," 49 U. CHI. L. REV. 263 (1982); *see also* Hart & Sacks, at 1413 (suggesting that the principle behind the rule "as special force when the conduct on the safe side of the line [between criminal and non-criminal] is not, in the general understanding of the community, morally blameworthy.").

2. Classic Case: *United States v. Wiltberger*, 5 Wheat. 76, 77, 5 L.Ed. 37 (1820): Wiltberger, a US citizen and master on a US merchant ship, killed an American sailor on board when the ship was on a river about 35 miles above the mouth of the river, where it was half-a-mile wide. A federal statute gives jurisdiction to the federal courts only if the manslaughter was committed "on the high seas." The Court recited the rule that penal laws are strictly construed so that the legislature has the power of punishment and to define crime and held that the defendant's crime was not cognizable in the courts of the United States. *Id*. at *10.
3. Supreme Court: "The rule of lenity is premised on two ideas: 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; second, legislatures and not courts should define criminal activity." *Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687, 704 n. 18, 115 S.Ct. 2407, 132 L.Ed.2d 597 (1995).[35]

[35] *See also* David S. Romantz, *Reconstructing the Rule of Lenity*, 40 CARDOZO L. REV. 523, 526 (2018) (describing benefit-of-the-clergy rule that served as impetus for Rule of Lenity—strictly construing what was a felony so that defendants could be tried in ecclesiastical courts and thus be saved from death penalty).

4. Disfavored Variation: Construe penal law strictly against the gov't (regardless of ambiguity)
    a. Some states/courts have jettisoned the rule to strictly construe penal statutes
    b. Texas already has: TEX. PENAL CODE § 1.05(a) (rule of strict construction doesn't apply to Penal Code)
    c. *United States v. Campos-Serrano*, 404 US 293, 298 (1971) (the canon of lenity "does not mean that every criminal statute must be given the narrowest possible meaning in complete disregard of the purpose of the legislature.")
    d. "widespread sentiment that the historic rule of strict construction of penal statutes is no longer justified or desirable." Sutherland, § 59:7; *See* Samuel A. Thumma, *State Anti-Lenity Statutes and Judicial Resistance: "What A Long Strange Trip It's Been,"* 28 GEO. MASON L. REV. 49, 80 (2020)
5. Favored Variation: In event of ambiguity, choose the interpretation that favors the defendant.
    a. "The rule of lenity… applies only when, after consulting traditional canons of statutory construction, we are left with an ambiguous statute." *United States v. Shabani*, 513 U.S. 10, 17 (1994)
    b. "[T]hat venerable rule [of lenity] is reserved for cases where…the Court is "left with an ambiguous statute."" *Smith v. United States*, 508 U.S. 223, 239 (1993).
    c. *See also Cuellar v. State*, 70 S.W.3d 815, 819 n.6 (Tex. Crim. App. 2002) (requiring ambiguity); *Abramski v. United States*, 134 S. Ct. 2259 (2014) (noting that while "the text creates some ambiguity, the [statute's] context, structure, history, and purpose resolve it.").

Absurdity (Rule authorizing legislative history & Canon that can defeat plain meaning)

1. Usual rule: Don't divert from plain meaning of text unless it would lead to absurd outcomes. Also called Golden Rule.[36]
2. Rationale: Language is inherently imperfect, unintended errors may result. If legislators had foreseen the problem, they would have revised the statute to avoid the result; tempers the sometimes harsh effects of the plain meaning canon in its literalist formulation.
3. Origin in US: *United States v. Kirby*, 74 U.S. (7 Wall.) 482 (1868) (refusing to apply the "letter" of the law to say that U.S. Marshal who delayed ship carrying the mail to arrest a mail carrier on a murder warrant thereby "knowingly and willfully obstruct[ed] or retard[ed] the passage of the mail").
4. When to apply: sparingly, otherwise supplanting what legislature clearly wrote. Follow plain language unless the absurdity of applying law to the circumstances was "so monstrous that all mankind would without hesitation write in rejection of the application." *Sturges v. Crowninshield*, 17 U.S. 122, 202 (1819); *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930) ("the absurdity must be so gross as to shock the general moral or common sense")
5. Scalia would limit to permission to verify that no one thought of the absurd consequence, not to help discover what appropriate interpretation should be. *See Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527 (1989) (Scalia, J., concurring, in decision that Fed. R. of Evid. 609(a)(1) would be absurd if it permitted balancing of probative value and prejudicial effect of prior felony convictions only for a testifying "defendant" in a civil case, but not the plaintiff).
6. Interaction with other canons—

a. Is this absurdity in every case or just a few? Does it defeat law's purpose?

[36] Linda D. Jellum, *Why Specific Absurdity Undermines Textualism*, 76 BROOK. L. REV. 917, 921 (2011).

b. Compared to Rule of Lenity, if it would defeat entire purpose, avoiding the absurdity wins out over the rule of lenity.

Negative Implication / Expression Unius est Exclusio Alterius

1. Rationale: In natural communication, we often imply things without saying so directly. E.g. low financing to purchasers with good credit, implies that those with bad credit won't get the favorable rates (Scalia & Garner, 107)
2. When to apply: when context shows Legislature is specifying the entire field or all involved, not just giving a few examples
3. Opposite: Implied Mental State for Common Law Crimes
4. Application: Culpable Mental States (*Elonis v. US*, 575 US 723, 733 (2015))

   Figuring out it doesn't apply:

   a. No shirt, no shoes, no service in convenience store (argument: implies other missing items of apparel will not result in denial of service (but context: shouldn't have to specify some things--pants implied)
   b. *Williams v. State*, 965 S.W.2d 506 (1998) (warrant specified that the day of execution would be excluded--but not the day of its issuance-- from 3-day time period for executing the warrant but canon doesn't apply because there is a special reason to mention day of execution but not day of issuance—because common law already excluded the issuance and so does the statute Art. 18.07, but it abrogates common law to exclude the last day of the period, i.e., execution

Resources

Learning The Canons

Professor Josh Blackman, Video, 70 Principles of Statutory Interpretation Everyone Should Know (Feb. 2020) (based on READING LAW) https://www.youtube.com/watch?v=e-TM7D5DCHw

READING LAW, Scalia & Garner (2012) (Textualism)

Supreme Court Fellows Program Annual Lecture (Mar. 2015): https://youtu.be/Ml3Lfp6irpk (covering handful of canons, including pronunciations, and a quiz)

Sutherland on Statutory Construction

Corpus Linguistics

Founding Era Corpora https://founders.archives.gov/

Project in the works: Corpus of Founding Era American English (COFEA) https://lcl.byu.edu/projects/cofea/