HOW TO INTERPRET STATUTES – OR NOT: PLAIN MEANING AND OTHER PHANTOMS*

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I. INTRODUCTION

In 1926 the Government alleged that Timothy McBoyle hired a pilot to steal an airplane and fly it from Illinois to Oklahoma. Although McBoyle denied the charge, the jury convicted him of interstate transportation of a stolen motor vehicle in violation of a federal statute. The operative language of the National Motor Vehicle Theft Act of 1919 defined "motor vehicle" to include "an automobile, automobile truck, automobile wagon, motor cycle, or any other self-propelled vehicle not designed for running on rails."[1]

On appeal, the Tenth Circuit affirmed the conviction, rejecting McBoyle's contentions that

> the word "vehicle" includes only conveyances that travel on the ground; that an airplane is not a vehicle but a ship; and that, under the doctrine of ejusdem generis, the phrase "any other self-propelled vehicle" cannot be construed to include an airplane.[2]

Canvassing several dictionaries, the court of appeals determined that "vehicle" means "[a]ny receptacle, or means of transport, in which something is carried or conveyed, or travels."[3] It

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1. *McBoyle v. U.S.*, 43 F.2d 273, 274 (10th Cir. 1930).
2. *Id.*
3. *Id.* (quoting *Century Dictionary*).

concluded that

> the derivation and the definition of the word "vehicle" indicate that it is sufficiently broad to include any means or device by which persons or things are carried or transported, and it is not limited to instrumentalities used for traveling on land.[4]

The court acknowledged ambiguity in the statute insofar as a land-based vehicle "may be the limited or special meaning of the word."[5] But the court noted by way of example that "[w]e do not think it would be inaccurate to say that a ship or vessel is a vehicle of commerce."[6] Indeed, as the court pointed out,

> [a]n airplane is self-propelled, by means of a gasoline motor. It is designed to carry passengers and freight from place to place. . . . It furnishes a rapid means for transportation of persons and comparatively light articles of freight and express. It therefore serves the same general purpose as an automobile, automobile truck, or motorcycle. It is of the *same general kind or class* as the motor vehicles specifically enumerated in the statutory definition and, therefore, construing an airplane to come within the general term, "any other self-propelled vehicle," does not offend against the maxim of *ejusdem generis*.[7]

The Supreme Court granted certiorari and reversed the court of appeals.[8] Justice Holmes, writing for a unanimous Court, held that the statute making it a federal crime to move a stolen "motor vehicle" in interstate commerce did not apply to a stolen airplane, although he acknowledged that "[n]o doubt etymologically it is possible to use the word [vehicle] to signify a conveyance working on land, water or air."[9] But the Supreme Court was otherwise persuaded:

> It is impossible to read words that so carefully enumerate the different forms of motor vehicles and have no reference of any kind to aircraft, as including airplanes under a term

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4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.* (emphasis added).

8. *McBoyle v. U.S.*, 283 U.S. 25, 27 (1931).

9. *Id.* at 26. Indeed, that is the "plain meaning" of the word vehicle, as the Tenth Circuit had found by both "derivation and definition." *McBoyle*, 43 F.2d at 274.

> that usage more and more precisely confines to a different class.[10]

The Court alluded to but did not explicitly invoke familiar maxims or canons of construction that were seemingly applicable. It did not, for example, directly apply the doctrine of ejusdem generis to narrow the broad language "any other self-propelled vehicle" to the grouping of ground-based vehicles enumerated by the statute.[11] And it did not explicitly invoke the tool of judicial resort to legislative history to interpret ambiguous statutes; there is only a passing observation that airplanes "were not mentioned in the reports or in the debates in Congress."[12] Nor did it explicitly invoke the familiar rule of lenity to resolve a statutory ambiguity against the Government in a criminal prosecution, although the dissenting judge on the court of appeals had done so.[13]

The Supreme Court chose the rationale that contemporary usage had effectively narrowed the plain meaning of "motor vehicle" in the dictionary sense to land-based vehicles: "But in everyday speech 'vehicle' calls up the picture of a thing moving on land."[14] Building on that linguistic premise, the Court relied additionally upon the principle of fair play:

> [I]t is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.[15]

This analysis, based on unfairness to McBoyle as an individual, is dubious because he clearly knew that he was conspiring to commit and was committing (as an aider and abettor) the ancient common law crime of larceny. Every sane person knows that it

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10. *McBoyle*, 283 U.S. at 27.

11. The Tenth Circuit had reached the opposite conclusion, determining instead that planes were of "the same general class as an automobile and a motorcycle." *McBoyle*, 43 F.2d at 274.

12. *McBoyle*, 283 U.S. at 26.

13. *McBoyle*, 43 F.2d at 276 (Cotteral, J., dissenting) (stating that "[a] prevailing rule is that a penal statute is to be construed strictly against an offender and it must state clearly the persons and acts denounced").

14. *McBoyle*, 283 U.S. at 26.

15. *Id.* at 27.

is wrong to steal.[16] The only colorable claim of lack of fair warning was whether a reasonable person would know that he was committing a crime against the United States in addition to the crime(s) against state law. Analogy from other (albeit later) cases suggests that knowledge of the federal character of the offense is not an element for which mens rea is required.[17]

The only solid basis for the Court's decision in *McBoyle* is a rejection of a foolish literalism based on the apparent congressional intent in 1926, when aviation was in its infancy and "motor vehicle" would have conjured up only images of ground-based vehicles. Inevitably, reaching that conclusion involves some consideration of the maxim ejusdem generis. The frustrating thing for judges and lawyers is that the Tenth Circuit had considered and rejected precisely that factor in affirming the conviction, leaving later courts to puzzle over the push and pull between the court of appeals and the Supreme Court.

There are several lessons to be drawn from this opinion. The first is that superficially clear statutory language may upon concentrated analysis prove ambiguous, so that even a term as simple, familiar, and concrete as "motor vehicle" becomes subject to interpretation. The second is that in the search for statutory meaning, context trumps literalism. In other words, there is no plain meaning without context. This latter point helps to make sense out of what is otherwise the dialectical inconclusiveness of the primary canons of statutory interpretation.[18] By way of example, a few familiar dueling maxims are adduced below.

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16. Larceny is malum in se, a Ten Commandments crime. *See Foster v. State*, 596 So. 2d 1099, 1103, 1103 n. 2 (Fla. 5th Dist. App. 1992) (Cowart, J., dissenting) (citing Deuteronomy 5:17: "Neither shalt thou steal").

17. *Cf. U.S. v. Feola*, 420 U.S. 671, 685 (1975) (holding both that the crime of assaulting a federal officer does not require proof that defendant knew victim was a federal officer and that there is "no risk of unfairness" in such rule).

18. The same principles generally apply to the interpretation of other forms of positive law. As the Florida Supreme Court held generations ago, "[t]he rules used in construing statutes are in general applicable in construing the provisions of a Constitution." *State ex rel. McKay v. Keller*, 191 So. 542, 545 (Fla. 1939). And it has also noted that "[t]he fundamental object in construing a constitutional provision is to ascertain and give effect to the intentions of the framers and adopters, and constitutional provisions must be interpreted in such a manner as to fulfill this intention rather than to defeat it." *State ex rel. Dade County v. Dickinson*, 230 So. 2d 130, 135 (Fla. 1969).

II. THE OSTENSIBLE RULES

A. The Plain Meaning of a Statute Controls—Or Not

This familiar canon is widely accepted in both state and federal courts, along with an exception. Thus, the plain meaning of a statute controls "unless this leads to an unreasonable result or a result contrary to legislative intent."[19] A more detailed statement of the rule and counter-rule is this:

> Under some circumstances . . . a court may look beyond the language of a statute. If a literal reading of a statute produces an outcome that is demonstrably at odds with clearly expressed congressional intent to the contrary, or results in an outcome that can truly be characterized as absurd, *i.e.*, that is so gross as to shock the general moral or common sense, then we can look beyond an unambiguous statute and consult legislative history to divine its meaning."[20]

B. "Shall" is Mandatory, "May" is Permissive—Or Not

This is a convention in both state and federal courts arising from ordinary English usage. The plain meaning of "may" denotes a permissive term, but

> if reading "may" as permissive leads to an unreasonable result or one contrary to legislative intent, courts may look to the context in which "may" is used and the legislature's intent to determine whether "may" should be read as a mandatory term.[21]

And the Supreme Court itself has held that

> [t]he word "may," when used in a statute, usually implies some degree of discretion. This common-sense principle of statutory construction is by no means invariable, however, . . . and can be defeated by indications of legislative intent

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19. *Cherry v. State*, 959 So. 2d 702, 713 (Fla. 2007) (quoting *Nicoll v. Baker*, 668 So. 2d 989, 990-91 (Fla. 1996)).

20. *U.S. v. Crabtree*, 565 F.3d 887, 889 (4th Cir. 2009) (quoting *Sigmon Coal Co. v. Apfel*, 226 F.3d 291, 304 (4th Cir. 2000)).

21. *Sloban v. Fla. Bd. of Pharmacy*, 982 So. 2d 26, 33 (Fla. 1st Dist. App. 2008).

> to the contrary or by obvious inferences from the structure and purpose of the statute.[22]

C. "And" is Conjunctive, "Or" is Disjunctive—Or Not

This canon is, again, a function of conventional English usage and is widely followed in state and federal courts. "In its elementary sense the word 'or' is a disjunctive particle that marks an alternative, generally corresponding to 'either,' as 'either this or that.'"[23] But there are also some exceptions, situations "in which the conjunction 'or' is held equivalent in meaning to the copulative conjunction 'and.'"[24] As the D.C. Circuit has opined,

> [n]ormally, of course, "or" is to be accepted for its disjunctive connotation, and not as a word interchangeable with "and." But this canon is not inexorable, for sometimes a strict grammatical construction will frustrate legislative intent. That, we are convinced, is precisely what will occur here unless "or" is read as "and."[25]

This dichotomy has long been recognized. In 1866, the Supreme Court stated that a statutory use of the word "and" could express the ordinary, conjunctive meaning but could also signify the disjunctive "or": "In the construction of statutes, it is the duty of the court to ascertain the clear intention of the legislature. In order to do this, courts are often compelled to construe 'or' as meaning 'and,' and again 'and' as meaning 'or.'"[26] The Court continued by noting that "[a]s is often the case in statutes, though the intention is clear, the words used to express it may be ill chosen," [27] and the Court held that "and" meant "or" in this case.[28]

In *De Sylva v. Ballentine*,[29] the Court interpreted a section of the Copyright Act, which stated "or if such author, widow,

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22. *U.S. v. Rodgers*, 461 U.S. 677, 706 (1983) (footnotes and citations omitted).
23. *Pompano Horse Club v. State*, 111 So. 801, 805 (Fla. 1927).
24. *Id.*
25. *U.S. v. Moore*, 613 F.2d 1029, 1040 (D.C. Cir. 1979).
26. *U.S. v. Fisk*, 70 U.S. 445, 447 (1866).
27. *Id.*
28. *Id.* at 447-48.
29. *De Sylva v. Ballentine*, 351 U.S. 570 (1956).

widower *or* children be not living, then the author's executors" were the affected parties.[30] The Court's analysis started "with the proposition that the word 'or' is often used as a careless substitute for the word 'and'; that is, it is often used in phrases where 'and' would express the thought with greater clarity."[31] The Court then held that although "[t]he clause would be more accurate . . . were it to read 'author, widow or widower, *and* children[,]" there lacks any evidence that Congress intended the word "or" to have a disjunctive meaning.[32]

D. Penal Statutes Should Be Strictly Construed—Or Not

This is yet another example of a dichotomous "rule" of construction of uncertain meaning and inconsistent application. There are in fact at least two different rules.[33] The traditional rule emanated from the English common law at a time when most felonies were punishable by death. The rule thus avoided imposition of capital punishment when the conduct in question was not clearly prohibited by law. For example, Justice William Blackstone, in his influential 1769 treatise, referred to a criminal statute penalizing the theft of sheep "or other cattle," and noted that

> the act was held to extend to nothing but mere sheep. And therefore, in the next sessions, it was found necessary to make another statute . . . extending the former to bulls, cows, oxens, steers, bullocks, heifers, calves, and lambs by name.[34]

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30. *Id.* at 571 (emphasis added).

31. *Id.* at 573. Cases in which the Supreme Court held that "or" means "and" include *Chemehuevi Tribe of Indians v. Fed. Power Commn.*, 420 U.S. 395, 417-18 (1975); *Swearingen v. U.S.*, 161 U.S. 446, 450 (1896); and *Union Ins. Co. v. U.S.*, 73 U.S. 759, 764-65 (1868). Cases in which other federal courts held that "and" means "or" include *U.S. v. Cumbee*, 84 F. Supp. 390, 391 (D. Minn. 1949); *U.S. v. Mullendore*, 30 F. Supp. 13, 15 (N.D. Okla. 1939); and *Union Cent. Life Ins. Co. v. Skipper*, 115 F. 69, 71-72 (8th Cir. 1902).

32. *De Sylva*, 351 U.S. at 574 (emphasis in original).

33. *See* Frank B. Cross, *The Significance of Statutory Interpretive Methodologies*, 82 Notre Dame L. Rev. 1971 (2007) (discussing four categories of statutory interpretive methodologies: textualism, legislative intent, canons, and pragmatism).

34. William Blackstone, *Commentaries on the Laws of England* vol. 1, *88 (available at Yale L. Sch., Lillian Goldman L. Lib., *Avalon Project*, http://avalon.law.yale.edu/18th_

Blackstone noted the judges' inability to determine what else was covered by "cattle" under the statute, although Parliament clearly intended to include other English farm animals.

This rule of strict construction found its way into early American case law through Chief Justice Marshall:

> The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment.[35]

The rule required examination of the statute's text, for "[t]he intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction."[36] Then the Court expounded what might be called the facial approach: "To determine that a case is within the intention of a statute, its language must authorise us to say so."[37] Thus, the Court held that the statutory language of "on the high seas" did not encompass a homicide committed on an inland river, even if other sections of the statute indicated congressional intent that the federal courts have jurisdiction, because "probability is not a guide which a court, in construing a penal statute, can safely take."[38]

Less than a half century after Chief Justice Marshall's words, the Supreme Court began to deviate from the traditional or facial rule, admitting first that "[w]e are not unmindful that penal laws are to be construed strictly."[39] But the Court then

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century/blackstone_intro.asp#2 (accessed Oct. 28, 2009; copy on file with Journal of Appellate Practice and Process)).

35. *U.S. v. Wiltberger*, 18 U.S. 76, 95 (1820) (analyzing whether statute's language of "on the high seas" granted federal court jurisdiction over manslaughter committed on a ship anchored in a river).

36. *Id.* at 95-96.

37. *Id.* at 96.

38. *Id.* at 105; *see also* Lawrence M. Solan, *Law, Language, and Lenity*, 40 Wm. & Mary L. Rev. 57, 89-94 (1998) (discussing Chief Justice Marshall's incorporation of the rule of lenity into the American court system).

39. *U.S. v. Hartwell*, 73 U.S. 385, 395 (1868) (analyzing whether the statute's language of "any banker, broker, or other persons not an authorized depository of the public moneys" includes a clerk in the office of the U.S. assistant treasurer so that the clerk is subject to the penalties prescribed in the statute for misconduct by officers).

declared that

> [t]he proper course in all cases is to adopt that sense of the words which best harmonizes with the context, and promotes in the fullest manner the policy and objects of the legislature. The rule of strict construction is not violated by permitting the words of the statute to have their full meaning, or the more extended of two meanings.[40]

This contextual approach to the rule of lenity[41] obviously affords far less protection to a charged defendant than does the common law rule. But this was a white collar crimes prosecution, and the absence of the death penalty and the Court's perceived need to protect the public probably influenced the decision.

The Court in *United States v. Harris*[42] reverted to the facial or traditional rule:

> [I]t still remains that the intention of a penal statute must be found in the language actually used, interpreted according to its fair and obvious meaning. It is not permitted to courts . . . to attribute inadvertence or oversight to the legislature when enumerating the classes of persons who are subjected to a penal enactment, nor to depart from the settled meaning of words or phrases in order to bring persons not named or distinctly described within the supposed purpose of the statute.[43]

In reversing the conviction, the Court closed by quoting Chief Justice Marshall's language in *Wiltberger* and held that the implied intention of Congress was inadequate to overcome the express words of the statute.

But nine years later in *United States v. Corbett*,[44] the Court tacked back to the contextual approach of *Hartwell*: "The rule of strict construction does not require that the narrowest technical

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40. *Id.* at 396.

41. *Id.* at 395 ("The context of the section and the language of the clause both sustain this view of the subject. If this be not the proper construction, then the consequence would follow that in this elaborate section, obviously intended to cover the whole ground of frauds by receivers, custodians, and disbursers of the public moneys, of every grade of office, punishment is provided for only one of the offences which the act designates. There is no principle, which, properly applied, requires or would warrant such a conclusion.").

42. 177 U.S. 305 (1900).

43. *Id.* at 309 (analyzing whether the statute's language of "any company, owner, or custodian of such animals" includes a railroad receiver to whom the statute's criminal penalties were sought to be applied).

44. 215 U.S. 233 (1909).

meaning be given to the words employed in a criminal statute, in disregard of their context, and in frustration of the obvious legislative intent."[45] As the Court noted, "[t]he rule of strict construction is not violated by permitting the words of the statute to have their full meaning, *or the more extended of two meanings* . . . but the words should be taken in such a sense . . . as will best manifest the legislative intent."[46]

None of the considerations animating the rule of lenity at common law were observed in *Corbett*:

> [T]he rule thus stated affords us ground for *extending a penal statute beyond its plain meaning*. But it inculcates that a meaning which is within the text and within its clear intent is not to be departed from because, by resorting to a narrow and technical interpretation of particular words, the plain meaning may be distorted and the obvious purpose of the law be frustrated.[47]

This diluted version of the rule of lenity continued to be applied in subsequent cases. "The canon in favor of strict construction is not an inexorable command to override common sense and evident statutory purpose."[48] And again:

> [T]hat "rule [of lenity]" . . . only serves as an aid for resolving an ambiguity; it is not to be used to beget one . . . The rule comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers.[49]

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45. *Id.* at 242 (analyzing whether the statute's language of "any agent appointed to examine the affairs of any such bank" includes the Comptroller of the Currency when such an agent would be required to examine the books and papers of the bank, and this case involved a false entry as to the condition of the bank in a report).

46. *Id.* (quoting *Hartwell*, 73 U.S. at 396) (emphasis added).

47. *Id.* at 243 (emphasis added).

48. *U.S. v. Brown*, 333 U.S. 18, 25 (1948) (analyzing whether the statute's language of "held" signifies that the defendant's additional sentence for attempting to escape will begin upon the expiration of his current sentence being served or at the expiration of the aggregate term of his consecutive sentences then in effect, of which the one currently being served is his first sentence of three).

49. *Callanan v. U.S.*, 364 U.S. 587, 596 (1961) (analyzing whether the defendant, who was convicted under the statute of the crimes of obstructing commerce by extortion and conspiracy to commit extortion, was convicted of two distinct crimes for which two separate sentences might be administered) (footnote omitted).

Again, the values of protecting individual liberty and respecting the separation of powers are subordinated to considerations of public policy.[50]

United States v. Bass[51] departed from this broader context-based approach and returned again to the facial or traditional approach, holding that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity."[52] For the defendant to be held liable, the courts "require that Congress should have spoken in language that is clear and definite."[53] The rationale echoes Chief Justice Marshall's opinion in *Wiltberger*, stemming as it does from the principle that lenity provides potential defendants a fair warning of the conduct that Congress intends to punish, and also assures the separation of powers so that only the legislature—and not the courts—defines criminal activity.[54] But the *Bass* ruling did not establish a new dominance of the traditional rule. On the contrary, in the same year the Court held that "[i]f an absolutely literal reading of a statutory provision is irreconcilably at war with the clear congressional purpose, a less literal construction must be considered."[55]

The tug of war over the rule of lenity shifted ground dramatically in *Huddleston v. United States*.[56] There the Court failed to apply the rule of lenity because it "perceive[d] no grievous ambiguity or uncertainty in the language and structure

50. *See e.g. Rewis v. U.S.*, 401 U.S. 808 (1971) (indicating that ambiguity should be resolved in favor of lenity); *U.S. v. Turley*, 352 U.S. 407 (1957) (noting that criminal statutes are to be construed strictly, but that courts need not use narrowest possible construction); *U.S. v. Bramblett*, 348 U.S. 503 (1955) (same), *overruled on other grounds*, *Hubbard v. U.S.*, 514 U.S. 695 (1995).

51. 404 U.S. 336 (1971).

52. *Id.* at 347 (citing *Rewis*, among other cases, and analyzing whether the statute's reference to one "who receives, possesses, or transports in commerce or affecting commerce . . . any firearm" requires the government to prove that the possession of a firearm by a convicted felon is connected to interstate commerce).

53. *Id.* (quoting *U.S. v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-22 (1952)).

54. *See id.* at 348.

55. *U.S. v. Campos-Serrano*, 404 U.S. 293, 298 (1971) (analyzing whether the statute's language of "uses, attempts to use, possesses, obtains, accepts, or receives any such visa, permit, or document, knowing it to be forged, counterfeited, altered, or falsely made" includes the defendant's possession of a counterfeit alien registration receipt card).

56. 415 U.S. 814 (1974).

of the Act."[57] The Court cited no precedent for thus raising the bar. And this was not an aberration. The Court repeated the new standard in later cases, by holding, for example, that "[t]he rule of lenity is not applicable unless there is a 'grievous ambiguity or uncertainty in the language and structure of the Act.'"[58] For lenity to apply, the statute must "produce a result so 'absurd or glaringly unjust,' . . . as to raise a 'reasonable doubt' about Congress' intent."[59]

The inconsistency of the Court's lenity opinions from case to case was compounded by the internal inconsistency of a single justice from case to case. For example, Justice Thurgood Marshall wrote two opinions in the same year in which he diminished the importance of the rule of lenity in the hierarchy of statutory construction.[60] In May of 1990, he wrote that "longstanding principles of lenity . . . preclude our resolution of the ambiguity against petitioner on the basis of general declarations of policy in the statute and legislative history."[61] But in December 1990, he shifted emphasis, stating that "we have always reserved lenity for those situations in which a reasonable doubt persists about a statute's intended scope even *after* resort to 'the language and structure, legislative history, and motivating policies' of the statute."[62]

In the 1990s, the Court's inconsistency in applying the rule of lenity was exacerbated by splits among the justices. *United States v. R.L.C.*,[63] for example, displayed a high degree of

57. *Id.* at 831 (analyzing whether the statutory language—"acquisition" and "sale or other disposition"—was applicable to the defendant's redemption of firearms from a pawnbroker who was a registered firearms dealer).

58. *Chapman v. U.S.*, 500 U.S. 453, 463 (1991) (quoting *Huddleston* in analysis of whether the statute's language of "a mixture or substance containing a detectable amount of . . . LSD" required that the weight of the carrier medium be included when determining the appropriate sentencing for trafficking in LSD).

59. *Id.* at 463-64 (citations omitted).

60. *See Moskal v. U.S.*, 498 U.S. 103 (1990) (analyzing whether a person who knowingly procures genuine vehicle titles that incorporate fraudulently tendered odometer readings receives those titles "knowing [them] to have been falsely made"); *Hughey v. U.S.*, 495 U.S. 411 (1990) (analyzing whether statute's provisions allowed a court to order a defendant charged with multiple offenses but convicted of only one to make restitution for losses related to the other alleged offenses).

61. *Hughey*, 495 U.S. at 422.

62. *Moskal*, 498 U.S. at 108 (emphasis in original) (citation omitted).

63. 503 U.S. 291 (1992) (analyzing whether Congress intended courts to treat upper limit of penalty as "authorized" in case involving juveniles convicted as adults when proper

fragmentation among the Justices, even while reaching a lenient reading of the statute at issue. The plurality opinion, written by Justice Souter and joined in part by the Chief Justice and Justices White and Stevens, attained this result despite a broader gauge of statutory meaning, relying on the statute's legislative history and implied congressional purpose. The plurality declared that

> lenity does not always require the "narrowest" construction, and our cases have recognized that a broader construction may be permissible on the basis of nontextual factors that make clear the legislative intent where it is within the fair meaning of the statutory language.[64]

Justice Scalia, writing the primary concurring opinion, attacked Justice Souter's use of legislative history to clarify statutory ambiguity.[65] "In my view it is not consistent with the rule of lenity to construe a textually ambiguous penal statute against a criminal defendant on the basis of legislative history,"[66] he wrote, taking the position that a criminal statute must speak "plainly and unmistakably."[67] Justice Thomas's concurring opinion agreed that "the use of legislative history to construe an otherwise ambiguous penal statute against a criminal defendant is difficult to reconcile with the rule of lenity."[68] But, he emphasized, "the rule [of lenity] is not triggered merely because a statute appears textually ambiguous *on its face*."[69] The Court should then resort to its "rules of construction powerful enough to make clear an otherwise ambiguous penal statute."

In yet another 1990s decision consistent with the view expressed by Justice Thomas in *R.L.C.*, the Court held that "[t]he simple existence of some statutory ambiguity . . . is not sufficient to warrant application of that rule, for most statutes

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application of mandated sentencing guideline in adult case would bar imposition up to the limit).

64. *Id.* at 306, n. 6.

65. Justice Scalia has expressed himself on statutory interpretation in Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton U. Press 1997), which was widely reviewed when first published. *See e.g.* William N. Eskridge, Jr., *Textualism, the Unknown Ideal?* 96 Mich. L. Rev. 1509 (1998).

66. *R.L.C.*, 503 U.S. at 307.

67. *Id.* at 310 (quoting *U.S. v. Gradwell*, 243 U.S. 476 (1917)).

68. *Id.* at 311.

69. *Id.* (emphasis in original).

are ambiguous to some degree," but rather "[t]o invoke the rule [of lenity], we must conclude that there is a 'grievous ambiguity or uncertainty' in the statute."[70] To avoid the application of strict construction, "[t]he rule of lenity applies only if, 'after seizing everything from which aid can be derived,' . . . we can make 'no more than a guess as to what Congress intended.'"[71]

These opinions diminished the protections afforded by the rule of lenity far below the level articulated by Chief Justice Marshall in *Wiltberger* and in the text of other like-minded opinions. They reduced the rule of lenity to a secondary doctrine of statutory construction, ranking legislative history and congressional policy as more important and more determinative than statutory clarity and certainty.

The impaired vitality of the rule of lenity is exemplified by the Court's decision on a gun possession charge in *Caron v. United States*.[72] The majority held that the "petitioner's approach yields results contrary to a likely, and rational, congressional policy,"[73] and pointed out that

> [t]he rule of lenity is not invoked by a grammatical possibility. It does not apply if the ambiguous reading relied on is an implausible reading of the congressional purpose . . . [and] petitioner's reading is not plausible enough to satisfy this condition.[74]

In dissent, Justices Thomas, Scalia, and Souter examined the plain meaning of the statutory text to conclude that the rule of lenity was applicable because

> the alleged ambiguity does not result from a mere grammatical possibility; it exists because of an interpretation that . . . both accords with a natural reading

70. *Muscarello v. U.S.*, 524 U.S. 125, 138-39 (1998) (analyzing whether statute's language of "carries a firearm" is limited to carrying of firearm on the person, or also applies to a person who knowingly possesses and conveys firearms in a vehicle, including in the locked glove compartment or trunk of a car); *see also* Lawrence M. Solan, *The New Textualists' New Text*, 38 Loy. L.A. L. Rev. 2027 (2005).

71. *Muscarello*, 524 U.S. at 138 (quoting *U.S. v. Wells*, 519 U.S. 482, 499 (1997)).

72. 524 U.S. 308 (1998) (analyzing whether federal handgun restriction makes convictions under state law count under federal law prohibiting those convicted of violent felonies from possessing firearms).

73. *Id.* at 315.

74. *Id.* at 316.

> of the statutory language and is consistent with the statutory purpose.[75]

Again, we have an approach that fuses elements of the textualist and contextualist approaches.

In 2008, with two new putatively conservative justices sitting, the Court decided *United States v. Santos*,[76] in which the defendant was convicted of running an illegal gambling business, two counts of conspiracy (one to run an illegal gambling business and one to launder money), and two counts of money-laundering. Santos moved for post-conviction relief on the three money-laundering convictions on the ground that the money-laundering statute's use of the term "proceeds" was ambiguous, requiring the Court to apply the rule of lenity. The Court agreed and reversed the three convictions involving money-laundering.[77]

The plurality opinion, written by Justice Scalia and joined by Justices Souter and Ginsburg, and in part by Justice Thomas, began by noting that the term "proceeds" was not defined by the statute and also noting that "[w]hen a term is undefined, we give it its ordinary meaning."[78] Next, the Court examined the money-laundering statute as a whole because "context gives meaning, [and] we cannot say the money-laundering statute is truly ambiguous until we consider 'proceeds' not in isolation but as it is used in the federal money-laundering statute."[79] But the Court refused to impute a particular congressional intent to the definition of "proceeds" because the courts "do not play the part of a mind reader," and "[w]hen Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity."[80] After analyzing "proceeds," then, the plurality concluded that

> [u]nder either of the word's ordinary definitions, all provisions of the federal money-laundering statute are

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75. *Id.* at 319.

76. ___ U.S. ___, 128 S. Ct. 2020 (2008) (analyzing whether statutory language of "proceeds" refers to profits or gross receipts under federal money-laundering statute where the defendant is convicted of operating an illegal lottery/gambling business).

77. *Id.* at ___, 128 S. Ct. at 2025-31.

78. *Id.* at ___, 128 S. Ct. at 2024.

79. *Id.*

80. *Id.* at ___, 128 S. Ct. at 2026 (quoting *Bell v. U.S.*, 349 U.S. 81, 83 (1955)).

> coherent; no provisions are redundant; and the statute is not rendered utterly absurd. From the face of the statute, there is no more reason to think that "proceeds" means "receipts" than there is to think that "proceeds" means "profits." Under a long line of our decisions, the tie must go to the defendant. The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them.[81]

Then the plurality succinctly stated the rationale for the "venerable" rule of lenity, noting that it

> not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed. It also places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead. Because the "profits" definition of "proceeds" is always more defendant-friendly than the "receipts" definition, the rule of lenity dictates that it should be adopted.[82]

There were two dissenting opinions in *Santos*. The principal dissenting opinion by Justice Alito (joined by the Chief Justice and Justices Kennedy and Breyer),[83] conceded that the term "proceeds" has more than one meaning but declined "to abandon any effort at interpretation and summon in the rule of lenity."[84] It criticized the plurality for being "quick to pronounce the term hopelessly ambiguous and thus to invoke the rule of lenity."[85] In the dissenters' view, the Court should have analyzed the traditional meaning of "proceeds" in the context of a money-laundering statute.[86] The dissent then concluded that the rule of lenity was not applicable because the statute's

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81. *Id.* at ___, 128 S. Ct. at 2025.

82. *Id.*

83. The other dissenting opinion was by Justice Breyer.

84. *Id.* at 2036.

85. *Id.* at 2035.

86. *Id.* at 2036. The dissent argued that other money laundering statutes commonly define "proceeds" as "the total amount brought in," citing an international treaty, fourteen state statutes, and the Model Money Laundering Act. Furthermore, "the total amount brought in" definition serves the two primary purposes of money-laundering statutes: deterring criminal activity by preventing the criminals from enjoying money earned through illegal acts and inhibiting the growth of criminal enterprises. *See id.* at 2036-38.

context, its legislative history, and Congress's stated purpose for enacting it, when combined with traditional interpretations of other similar statutes, all support a definition of "proceeds" that equates it with "gross receipts."[87]

Although the *Santos* Court mustered five votes for the majority's application of the rule of lenity (with Justice Stevens supplying the fifth vote partly on that basis), its lesson was muddled by later decisions in which some justices seemed to change positions.

In *United States v. Hayes*,[88] the majority analyzed the language and structure of a statute, as well as the legislative history and congressional intent, in order to determine whether the phrase "a misdemeanor crime of domestic violence" covered a state misdemeanor battery where the state statute did not require proof of a domestic relationship as an element of the predicate offense, although it in fact existed in defendant's case. The Court concluded that "Congress' less-than-meticulous drafting . . . hardly shows that the legislators meant to exclude from [the statute's] firearm possession prohibition [those] convicted under generic assault or battery provisions."[89] As the Court put it,

> "[T]he touchstone of the rule of lenity is statutory ambiguity." . . . We apply the rule "only when, after consulting traditional canons of statutory construction, we are left with an ambiguous statute." . . . [The statute's] definition of "misdemeanor crime of domestic violence," we acknowledge, is not a model of the careful drafter's art. . . . . But neither is it "grievous[ly] ambigu[ous]." . . . The text, context, purpose, and what little there is of drafting history all point in the same direction: Congress defined "misdemeanor crime of domestic violence" to include an offense "committed by" a person who had a specified domestic relationship with the victim, whether or not the misdemeanor statute itself designates the domestic relationship as an element of the crime.[90]

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87. *Id.* at 2045.

88. ___ U.S. ___, 129 S.Ct. 1079 (2009).

89. *Id.* at ___, 129 S. Ct. at 1085.

90. *Id.* at ___, 129 S. Ct. at 1088-89 (internal citations omitted); *see also* Jonathan R. Siegel, *What Statutory Drafting Errors Teach Us About Statutory Interpretation*, 69 Geo. Wash. L. Rev. 309 (2001).

The dissent, written by the Chief Justice and joined by Justice Scalia (who had taken opposite sides in *Santos*), also examined the statute's language, context, intent, and legislative history. The Chief Justice concluded that the rule of lenity should be applied, for if the rule

> means anything, it is that an individual should not go to jail for failing to conduct a 50-state survey or comb through obscure legislative history. Ten years in jail is too much to hinge on the will-o'-the-wisp of statutory meaning pursued by the majority.[91]

Once again, the clarity of the common law rule, focusing on the statutory language alone, was compromised by the willingness of both the majority and the dissenting justices to go beyond the face of the statute to consider also its context, purpose, and legislative history. The reliance expectations of citizens and the cause of predictability in judicial decisions were both diminished.

The last decision of the Court on lenity at the writing of this article was *Dean v. United States*.[92] The majority opinion, written by the Chief Justice and joined by Justices Kennedy, Thomas, Souter, Ginsburg, Alito, and Scalia, reiterated the "grievous ambiguity" standard of *Huddleston*:

> The simple existence of some statutory ambiguity . . . is not sufficient to warrant application of that rule [of lenity], for most statutes are ambiguous to some degree . . . [and] [t]o invoke the rule, we must conclude that there is a grievous ambiguity or uncertainty in the statute.[93]

The majority concluded that the text of the statute did not contain any words of limitation regarding the defendant's state of mind and so did not require proof of intent.[94] Therefore, there was no need to apply the rule of lenity because the statutory language, context, and structure did not leave the statute

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91. *Id.* at ___, 129 S. Ct. at 1093.

92. ___ U.S. ___, 129 S.Ct. 1849 (2009) (analyzing whether the statute at issue requires proof of intent when gun is discharged in course of violent or drug-trafficking crime, thus invoking ten-year mandatory minimum sentence enhancement).

93. *Id.* at ___, 129 S. Ct. at 1856 (quoting *Muscarello v. U.S.*, 524 U.S. 125 (1998)).

94. *See id.* at ___, 129 S. Ct. at 1853-54.

grievously ambiguous.[95] The dissenting opinions, written by Justices Stevens and Breyer, who had taken opposite positions in *Santos*, noted that because Congress did not explicitly provide for or against an intent requirement, the Court should have applied the rule of lenity and erred on the side of exclusion—not inclusion—in order to provide fair warning to potential offenders.[96]

The lesson of these cases is that the rule of lenity is a highly flexible guide that produces uncertain and unpredictable results. The Court itself cannot agree on the proper role and weight of the rule or even its proper definition.[97] Is it triggered by facial ambiguity or only by grievous ambiguity? Should the Court go behind the words of the statute to find its meaning? Even Justices Scalia and Thomas, who so often agree in matters of criminal law and procedure, do not share common ground. Worse, judging by the admittedly unrefined standard of whether individual justices vote in each case for the government or the defendant, it appears that they take inconsistent positions from one case to the next.[98]

III. WHAT IS A LAWYER OR A JUDGE TO DO?[99]

The fatal flaw in these dichotomous directives is that there is no built-in mechanism for determining which is which:

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95. *See id.* at ___, 129 S. Ct. at 1856 ("In this case, the statutory text and structure convince us that the discharge provision does not contain an intent requirement.").

96. *See id.* at ___, 129 S. Ct. at 1856-61 (Stevens, J., dissenting, and Breyer, J., dissenting).

97. *See generally* Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 Fordham L. Rev. 885 (2004) (providing a comprehensive discussion of the rule, its interpretation, and its application).

98. Justice Marshall's reversal of position is noted above, as is the Chief Justice's apparent switch of sides from *Santos* to *Hayes*. *See* nn. 58-60, 82-85, 89 and accompanying text. As a further example, in *Santos* Justice Stevens applied the rule of lenity, but in *Hayes* disagreed with its application because the text, context, purpose, and legislative history all supplied enough information to enable him to find the poorly written statute comprehensible, or at least not "grievously ambiguous." *See* Santos, ___ U.S. at ___, 128 S. Ct. at 2033 (Stevens, J., concurring in the judgment and noting that "the rule of lenity may weigh in the determination"); *Hayes*, ___ U.S. at ___, 129 S. Ct. at 1082, 1089 (indicating that Stevens, J., joined the opinion of the Court, in which the rule of lenity was not applied because the statute at issue was not "grievously ambiguous"). His position in *Dean* adds yet another nuance.

99. *Cf.* Rick Sims, *What Appellate Judges Do*, 7 J. App. Prac. & Process 193 (2005).

whether the putative "rule" or its "exception" applies in a particular case. One cannot tell without resort to something extrinsic whether "shall" is to be read as "may"; whether "and" is to be read as "or"; whether plain meaning controls; or whether strict construction applies. It is impossible for the advocate to know in advance whether the canons of construction will predict decision, as distinguished from helping to explain it after the fact. And a judge approaching such a case is left at sea in the search for statutory meaning without reliance upon something beyond the canons.

This insight is not original to the author; it was first published nearly seventy years ago by Karl Llewellyn.[100] On the dualistic nature of the standard tools of statutory interpretation, Llewellyn was quite blunt about what Legal Realists might term judge-speak: "[T]he accepted convention still, unhappily, requires discussion as if only one single correct meaning could exist. Hence there are two opposing canons on almost every point."[101] In other words, like a variant of Newton's Third Law of Motion, for every canon there is an equal and opposite canon. The state of the analytical art has not advanced much beyond this dialectic. As Llewellyn said, the canons are "still needed tools of argument" and every lawyer must know them all. But they do not, and indeed they cannot, decide the hard cases.

In this regard, appellate opinions have been on the whole remarkably unreflective about the inherent ambiguity of written language. Oral, in-person communication is infinitely richer in nuance and detail arising from the meaning(s) imparted by the personae and relationship of the speakers, body language, facial expression, proximity, gestures, tone of voice, rhythm, emphases, pauses, pacing, articulation, inflection, and more. Although much oral communication relates to simple subjects or tasks, even in complex and sustained presentations, like an appellate oral argument or a law school lecture, a speaker receives almost instantaneous signals of comprehension,

100. See Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* 521-35 (Little, Brown 1960) (Appendix C: *Canons on Statutes*), a book described by former Yale Law School Dean Anthony Kronman as "the best account of common-law adjudication that any American has ever offered." Anthony Kronman, *The Lost Lawyer* 211 (Belknap Press 1993).

101. Llewellyn, *supra* n. 100, at 521.

confusion, or doubt from his interlocutors. Even if only one person is speaking, oral communication is reciprocal, an ongoing feedback loop of communication.

A written text, by contrast, is much more limited in its reach and power.[102] "The printed word is presented to us in a linear way, with syntax supreme in conveying the sense of the words in their order. We read privately, mentally listening to the writer's voice and translating the writer's thoughts."[103] Statutes face the additional expressive challenge of universality, trying to regulate (or exempt) every foreseeable occurrence or omission of a certain kind or class.

The reticence of judges to be more explicit about the interpretive process and their reliance upon "accepted conventional vocabulary"[104] is no doubt traditional. It is also professional. Judges are not linguists or grammarians, although they are of necessity arbiters of language. Social and political constraints apply to the degree of candor in their opinions. Black-letter high-school civics, reinforced by the cable television commentariat, emphasizes a rather mechanical separation of powers in which judges merely apply positive law. Judges are like umpires, asserted the Chief Justice during his Senate confirmation hearings, a position repeated in substance by Justice Sotomayor during hers. Since the era of the Warren Court, judicial lawmaking has fallen into such political disrepute that a combination of denial and pretense is now the only politically acceptable position. Our inheritance of centuries of judge-made common law on the most fundamental matters of life and death is largely ignored or repudiated.

A more candid evaluation of the challenge of interpreting statutes would acknowledge that precision in statutory drafting is aspiration rather than reality, becoming more difficult as the complexity of the subject under regulation increases. Judges are necessary as translators of the statutory language in each case-specific context as it arises. They mediate the meaning of

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102. For a more detailed analysis and discussion of the differences between—and the different strengths of—oral and written argument, see Mark R. Kravitz, *Written and Oral Persuasion in the United States Courts: A District Judge's Perspective on their History, Function, and Future*, 10 J. App. Prac. & Process 247 (2009).

103. Lynne Truss, *Eats, Shoots & Leaves* 180 (Profile Books 2003).

104. Llewellyn, *supra* n. 100, at 521.

statutes, as any reader must do.[105] There is no other possibility. How, then, should they proceed?

In truth, all meaning is contextual. The meaning of individual words may, of course, be clear: "A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning."[106] But meaning arises also from syntax, the interrelationship of words living, in Judge Learned Hand's phrase, "a communal existence."[107] Readers experience the meaning of each word informing the others and "all in their aggregate tak[ing] their purport from the setting in which they are used."[108] Thus, the overall meaning of the sentences, sections, and paragraphs of a statute written in clear words may still be ambiguous in application, as amply demonstrated by the courts' struggles to apply the National Motor Vehicle Theft Act to McBoyle's long-ago theft of an airplane.

Statutory language may be plain yet ambiguous.[109] In *Kasischke v. State*,[110] for example, the Florida Supreme Court held that "[t]he plain language of the statute could be construed in at least four ways."[111] The two dissenters wrote separately to argue that the statute was unambiguous and its meaning plain,[112] but it is just as plain that the Court as a whole could not find clear meaning in statutory language prohibiting the possession of pornography "relevant to the offender's deviant behavior pattern."[113] For that reason, the majority resorted to a variety of

105. *See* Alberto Manguel, *A History of Reading* 39 (Viking Penguin 1996) (quoting Lewin C. Wittrock, *Reading Comprehension*, in *Neuropsychological and Cognitive Processes in Reading* (Oxford U. Press 1981) for the insight that "readers attend to the text. They create images and verbal transformations to represent its meaning. Most impressively, they generate meaning as they read by constructing relations between their knowledge, their memories of experience, and the written sentences, paragraphs and passages").

106. *Perrin v. U.S.*, 444 U.S. 37, 42 (1979) (citing *Burns v. Alcala*, 420 U.S. 575 (1975)).

107. *NLRB v. Federbush Co., Inc.*, 121 F.2d 954, 957 (2d Cir. 1941) (L. Hand, J.).

108. *Id.*

109. *See generally* Eric S. Lasky, Student Author, *Perplexing Problems with Plain Meaning*, 27 Hofstra L. Rev. 891 (1999).

110. 991 So. 2d 803 (Fla. 2008).

111. *Id.* at 806.

112. *Id.* at 815-27 (Lewis, J., dissenting), 827-35 (Bell, J., dissenting).

113. *Id.* at 805 (quoting statute).

canons of construction, following the maxim that "if the language of the statute is unclear, then the rules of statutory construction control."[114]

With statutes presenting clear language but multiple possible interpretations, the dictionary ceases to determine meaning. More sophisticated analysis is required, and context is king. "Language, of course, cannot be interpreted apart from context. The meaning of a word that appears ambiguous if viewed in isolation may become clear when the word is analyzed in light of the terms that surround it."[115] And "in ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole."[116]

In this sense, "plain meaning" is a misnomer and is better called "situational meaning." Even a stop sign does not mandate a stop if a traffic officer standing beside it waves cars through the intersection[117] or a driver speeds through the intersection because his passenger is in cardiac arrest and requires immediate attention in a hospital emergency room. If the plain meaning of statutes were really so plain, would not the appellate opinions explaining them be redundant? Would not the cases more properly be decided by per curiam affirmance after per curiam affirmance? Further, would not the losing parties be liable for sanctions (the payment of costs or fees) for pursuing frivolous appeals where plain meaning was, as the trial courts decided, against the loser's position?

Of course, that is far from reality. How else does one explain a five-to-four decision turning on words that appear to be simple?[118] The fact is that plain meaning is riddled with exceptions and doubts:

> In *Church of the Holy Trinity v. United States* . . . this Court conceded that a church's act of contracting with a

114. *Id.* at 811 (quoting *Joshua v. City of Gainesville*, 768 So. 2d 432, 435 (Fla. 2000)).

115. *Smith v. U.S.*, 508 U.S. 223, 229 (1993); *accord Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004).

116. *Household Credit Servs., Inc. v. Pfennig*, 541 U.S. 232, 239 (2004) (quoting *Kmart Corp. v. Cartier, Inc.*, 486 U.S. 281 (1988)).

117. *See e.g.* Fla. Stat. § 316.123(2)(a) (LEXIS 2009).

118. *See e.g. Natl. Fedn. of Fed. Employees Loc. Union 1309 v. Dept. of Interior*, 526 U.S. 86, 101 (1999) (O'Connor, J., dissenting) ("The Court today ignores the plain meaning of the Federal Service Labor-Management Relations Statute.").

> prospective rector fell within the plain meaning of a federal labor statute, but nevertheless did not apply the statute to the church: "It is a familiar rule," the Court pronounced, "that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers."[119]

Complicating the plain-meaning analysis is the fragmentation among jurists regarding techniques of finding statutory meaning. The previous section addressing the Supreme Court's twists and turns in applying the rule of lenity demonstrates the degree to which the Court has abandoned the relatively mechanical but reliable common law approach without developing an agreed-upon coherent approach to replace it. With respect to the plain meaning canon, the justices likewise cannot agree whether a putatively plain meaning should foreclose consideration of a statute's legislative history or other extrinsic sources.[120]

Justice Scalia:

> After all, "[a] statute is a statute," . . . and no matter how "authoritative" the history may be . . . one can never be sure that the legislators who voted for the text of the bill were aware of it. The only thing that was authoritatively adopted *for sure* was the text of the enactment; the rest is necessarily speculation.[121]

But Justice Souter's approach diverges: "Believers in plain meaning might be excused for thinking that the text answers the question. But history may have something to say about what is plain, and here history is not silent."[122] To similar effect is the argument that the plain-meaning rule is "rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists."[123] In fact,

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119. *Zuni Public Schools Dist. No. 89 v. Dept. of Educ.*, 550 U.S. 81, 108 (2007) (Scalia, Thomas & Souter JJ., and Roberts, C.J., dissenting) (citations omitted).

120. *See R.L.C.*, 503 U.S. at 307-08 (Scalia, Kennedy & Thomas, JJ., concurring in part and concurring in the judgment).

121. *Id.* at 309; *see also* Sarah Newland, Student Author, *The Mercy of Scalia: Statutory Construction and the Rule of Lenity*, 29 Harv. C.R.-C.L. L. Rev. 197 (1994).

122. *U.S. v. Mezzanotto*, 513 U.S. 196, 212 (1995) (Souter & Stevens, JJ., dissenting).

123. *Boston Sand & Gravel Co. v. U.S.*, 278 U.S. 41, 48 (1928) (Holmes, J., writing for the majority); *see also U.S. v. Am. Trucking Assns., Inc.*, 310 U.S. 534, 543-44 (1940) ("When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may

> it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.[124]

III. CONCLUSION

The courts have long taken the position that statutes are, in effect, to be read as one reads most texts, following dictionary definitions (except for terms of art), and applying rules of syntax, grammar, and punctuation where they work to produce a sensible result—the most plausible interpretation of the language in question. Excessive literalism is to be avoided. Thus, courts should "disregard the punctuation, or repunctuate, if need be, to render the true meaning of the statute."[125] And why? Because "[s]tatutory construction is a holistic endeavor,"[126] that must account for a statute's "object and policy."[127] This dichotomy bears an obvious parallel to the divergence over the meaning and application of the rule of lenity discussed above.

Often, plain meaning or statutory ambiguity ("grievous" or otherwise) will be plain enough using common sense and common understanding. But it is the hard cases, those that justify a reasoned appellate opinion or second-tier review, that truly illuminate the unavoidable judicial choices in the decisionmaking process and the limited utility of the canons of construction. In such cases, the search for plain meaning or ambiguity devolves to a choice among competing options in the hope of arriving at the most plausible meaning among the several alternatives.

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appear on 'superficial examination.'") (quoting *Helvering v. N.Y. Trust Co.*, 292 U.S. 455 (1934)).

124. *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir. 1945), *aff'd*, 326 U.S. 404 (1945).

125. *Hammock v. Loan & Trust Co.*, 105 U.S. 77, 84-85 (1882) (internal quotation marks and citation omitted).

126. *United Sav. Assn. of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988).

127. *U.S. v. Heirs of Boisdore*, 49 U.S. (8 How.) 113, 122 (1849) (quoted in more than a dozen cases).

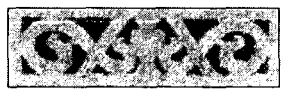
The advocate's job is to advance the interpretation of the statute most beneficial to the client's position as the one that is also most consistent with the common sense of the statute. Plain meaning and other canons can facilitate that argument but not decide it conclusively. As Dean Kronman reminds us,

> Llewellyn stresses that cases cannot be decided merely by identifying the controlling rules of law, the "paper" rules, as he dismissively describes them. The decision of a case always requires a choice among alternatives, hence an exercise of will.[128]

Hence,

> to make any canon take hold in a particular instance, the construction contended for must be sold, essentially, by means other than the use of the canon: The good sense of the situation and a *simple* construction of the available language to achieve that sense, *by tenable means, out of the statutory language.*[129]

Mutatis mutandis, the task for judges in the search for law and justice in a case of statutory interpretation is ultimately the same; and it is attainable by what Dean Kronman calls the exercise of "sound judgment"[130] by a jurist that Judge Posner would characterize as a "constrained pragmatist."[131]



128. Kronman, *supra* n. 100, at 196 (footnote omitted).

129. Llewellyn, *supra* n. 100, at 521 (emphasis in original).

130. Kronman, *supra* n. 100, at 231-32 (attributing the term to Judge Posner).

131. Richard A. Posner, *How Judges Think* 230 (Harvard U. Press 2008).