

# Reading Law

## The Interpretation of Legal Texts

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## Semantic Canons

### 6. Ordinary-Meaning Canon

**Words are to be understood in their ordinary, everyday meanings—unless the context indicates that they bear a technical sense.**

"The enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said."

Chief Justice John Marshall,  
*Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 71 (1824).

The ordinary-meaning rule is the most fundamental semantic rule of interpretation.<sup>1</sup> It governs constitutions, statutes, rules, and private instruments. Interpreters should not be required to divine arcane nuances or to discover hidden meanings. Justice Joseph Story's words are as true today as they were when written in the middle of the 19th century, and they are true not just of constitutions but of all other legal instruments:

[E]very word employed in the constitution is to be expounded in its plain, obvious, and common sense, unless the context furnishes some ground to control, qualify, or enlarge it. Constitutions are not designed for metaphysical or logical subtleties, for niceties of expression, for critical propriety, for elaborate shades of meaning, or for the exercise of philosophical acuteness or judicial research. They are instruments of a practical nature, founded on the common business of human life, adapted to common wants, designed for common use, and fitted for common understandings.<sup>2</sup>

<sup>1</sup> See, e.g., James Kent, *Commentaries on American Law* 432 (1826) ("The words of a statute are to be taken in their natural and ordinary signification and import; and if technical words are used, they are to be taken in a technical sense."); Cal. Code Civ. Proc. § 1861 ("The terms of a writing are presumed to have been used in their primary and general acceptance . . .").

<sup>2</sup> Joseph Story, *Commentaries on the Constitution of the United States* 157–58 (1833).

This is not to say that interpretation will always be straightforward and easy—just that we should not make it gratuitously roundabout and complex.

Most common English words have a number of dictionary definitions, some of them quite abstruse and rarely intended. One should assume the contextually appropriate ordinary meaning unless there is reason to think otherwise. Sometimes there is reason to think otherwise, which ordinarily comes from context. And it should not be forgotten that not all colloquial meanings appropriate to particular contexts are to be found in the dictionary—as the “using a firearm” example we gave earlier (see p. 32) illustrated.

Many words have more than one ordinary meaning. The fact is that the more common the term (e.g., *run*), the more meanings it will bear—the more “polysemous” it is, as linguists put it. Hence *run* was once calculated as having more than 800 meanings.<sup>3</sup> Yet context disambiguates. We can tell the meanings of *he is running down the hill*, *she is running late*, *she has been running the company for four years*, *the car is running low on gas*, *his enemies kept running him down*, *the driver was intent on running him down*, and so on.

One scholar has suggested that the ordinary-meaning rule “presumes, wrongly, that all native listeners and readers of language always understand words to mean the same thing the speakers intended.”<sup>4</sup> But those absolutes (*all* and *always*) mischaracterize the presumption. What the rule presumes is that a thoroughly fluent reader can reliably tell in the vast majority of instances from contextual and idiomatic clues which of several possible senses a word or phrase bears. Consider: A *check* might be an inspection, an impeding of someone else’s progress, a restaurant bill, a commercial instrument, a patterned square on a fabric, or a distinctive mark-off. A *kite* might be an object flown in the sky on a string, a hawklike bird, or a predatory person—or, as a verb, *to kite* might mean “to fly,” “to hurry,” or “to pass (commercial paper) fraudulently.” To say something nondescript such as “There was a check”

3 See John J. DeBoer, Walter V. Kaulfers & Helen Rand Miller, *Teaching Secondary English* 133 (1951) (“the little word *run*, with its compounds, has 800 meanings, from *home run* to *run on a bank* or *run in a stocking*”).

4 Linda D. Jellum, *Mastering Statutory Interpretation* 64 (2008).

or “The kite was present” means nothing certain. But once you combine words in ordinary, idiomatic ways—as by referring to *check-kiting* or by saying *He checked the kite carefully before flying it*—no ordinary speaker of the language could even pretend to misunderstand.

Some theorists deny that plain meaning or ordinary meaning ever exists.<sup>5</sup> But common experience proves the contrary: In everyday life, the people to whom rules are addressed continually understand and apply them. Let us consider how the ordinary-meaning canon affects legal analysis. That occurs in a great variety of contexts.

Sometimes the canon governs the interpretation of so simple a word as a preposition. The Pennsylvania Supreme Court had to interpret the meaning of *into* in a statute that read: “A person commits an offense if he knowingly, intentionally, or recklessly discharges a firearm from any location into an occupied structure.”<sup>6</sup> One James McCoy was inside the Old Country Buffet when he fired his gun. The question was whether, in ordinary English, *into* denotes the movement from outside to inside—or whether the movement of the bullet from the gun chamber into the area in which it first struck something would be sufficient for discharging “into an occupied structure.” One might have analogized to other idioms: *Run into an occupied structure* suggests starting outside and going inside; while *peer into an occupied structure* suggests a continuing presence outside. On appeal, McCoy was properly held not to have fired his gun “into” the restaurant (since he was already inside), so his conviction was overturned.<sup>7</sup>

On a question like that one, a judicial interpreter might be tempted simply to rely on his or her own sense of the language—or *Sprachgefühl*, as the Germans call it (and, believe it or not,

5 See, e.g., Stanley Fish, *There Is No Textualist Position*, 42 San Diego L. Rev. 629, 633 (2005) (arguing that there is no such thing as plain meaning). See also Steven L. Winter, *Indeterminacy and Incommensurability in Constitutional Law*, 78 Cal.

L. Rev. 1441, 1468 (1990) (criticizing California Supreme Court’s preference for plain-meaning arguments because “there is no such thing as ‘plain meaning’”).

6 18 Pa. Stat. § 2707.1(a).

7 *Commonwealth v. McCoy*, 962 A.2d 1160 (Pa. 2009).

*sprachegefühl* has been a word in our shamelessly pilfering English language since about 1894.<sup>8</sup> But lexicographers and usage commentators have explicitly dealt with questions such as the meaning of *into*, and it would be a mistake not to consult them. As the Pennsylvania court's opinion demonstrated,<sup>9</sup> these authorities can illuminate a question such as the precise contours of *into*. For our readers' convenience, we include as Appendix A a list of the principal dictionaries that can be consulted to determine the near-contemporaneous common meaning of words from 1750 to the present.

Courts have sometimes ignored plain meaning in astonishing ways. The Kansas Supreme Court, for example, perversely held that roosters are not "animals," so that cockfighting was not outlawed by a statute making it illegal to "subject[] any animal to cruel mistreatment."<sup>10</sup> Far more satisfactory is the holding of a Massachusetts appellate court that a goldfish is an animal for purposes of a statute prohibiting the award of "any live animal as a prize or an award in a game . . . involving skill or chance."<sup>11</sup> The court relied in part on dictionary definitions:

"The word 'animal,' in its common acceptation, includes all irrational beings." This broad definition, which accords with most dictionary meanings, leaves us little to contrib-

8 *Merriam-Webster's Collegiate Dictionary* 1208 (11th ed. 2003).

9 962 A.2d at 1166-67 (citing *Webster's Third New International Dictionary* 1184 (1961; repr. 1984) (noting that *into* typically follows "a verb that carries the idea of motion . . . to indicate a place or thing . . . enterable or penetrable by or as if by a movement from the outside to the interior part"); *Webster's New World Dictionary* 738 (2d ed. 1984) (noting that *into* describes action "from the outside to the inside of; toward and within"). See also *Garner's Modern American Usage* 450 (3d ed. 2009) (stating that "*into* denotes movement. Thus, a person who swims . . . *into* the ocean is moving from, say, the mouth of a river."); 8 *Oxford English Dictionary* 9 (2d ed. 1989) (giving the "general sense" of *into* as "expressing motion from without to a point within limits of space, time, condition, circumstance, etc.").

10 *State ex rel. Miller v. Claiborne*, 505 P.2d 732, 733 (Kan. 1973) (noting that the cruelty-to-animals-statute had traditionally applied only to four-legged animals).

11 Mass. Gen. Laws ch. 272, § 80F (1977). See *Knox v. Massachusetts Socy for Prevention of Cruelty to Animals*, 425 N.E.2d 393 (Mass. App. Ct. 1981).

ute by deliberating on where the line should be drawn on any taxonomic scale.<sup>12</sup>

Sometimes context indicates that a technical meaning applies. Every field of serious endeavor develops its own nomenclature—sometimes referred to as *termini of art*. Where the text is addressing a scientific or technical subject, a specialized meaning is to be expected: "In terms of art which are above the comprehension of the general bulk of mankind, recourse, for explanation, must be had to those, who are most experienced in that art."<sup>13</sup> And when the law is the subject, ordinary legal meaning is to be expected, which often differs from common meaning. As Justice Frankfurter eloquently expressed it: "[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it."<sup>14</sup>

Perhaps the most famous example of the technical-meaning exception—one that pervades legal drafting—is the presumption that *person* in legal instruments denotes a corporation and other entity, not just a human being (see § 44 [artificial-person canon]). This presumption has been known to rattle nonlawyers when they encounter it.

A case exemplifying ordinary legal meaning that diverges from everyday usage is *State v. Gonzales*,<sup>15</sup> which involved a Louisiana statute defining the crime of *contributing to the delinquency of a juvenile* as "the intentional enticing, aiding, soliciting, or permitting, by anyone over the age of seventeen, of any child under the age of seventeen . . . to . . . [p]erform any sexually immoral act."<sup>16</sup> Ernest Gonzales, an adult, was convicted of this crime after enticing a 16-year-old girl to have sex with him. Yet she had already been emancipated and twice married. Was she a "child under the age of

12 *Knox*, 425 N.E.2d at 396 (quoting *Commonwealth v. Turner*, 14 N.E. 130, 132 (Mass. 1887)).

13 Hugo Grotius, *The Rights of War and Peace* 177 (1625; A.C. Campbell trans., 1901).

14 Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947).

15 129 So.2d 796 (La. 1961).

16 La. Rev. Stat. Ann. § 14:92.

seventeen"? No, according to the Louisiana Supreme Court: The word *child* does not include an emancipated minor in the "ordinary accepted meaning under civil law."<sup>17</sup>

Another technical-meaning case involved the word *consideration*, which in general English means "something to be taken account of" or "polite thoughtfulness," but in law means "value given in exchange for a benefit." Now consider a statute that makes a felon of "[w]hoever for a consideration knowingly gives false information to any officer of any court with intent to influence the officer in the performance of official functions."<sup>18</sup> A criminal defendant seeking reduced bail lies to a trial court, saying that he has never before been convicted of a crime—as a result of which he gets his bail reduced. Has he lied "for a consideration"? A non-lawyer unschooled in the ways of legal terminology might well say so. But from the legal point of view, did he lie in exchange for something of value? The prosecution said that he did: The reduction in bail that he received as a consequence of his false statement was valuable to him. The defense lawyers argued that the phrase *for a consideration* means "for an agreed exchange" and in the context of this statute envisions "some benefit received from a third party" in exchange for false testimony. They urged that there was no agreed exchange—no legal "consideration"—when leniency is merely the consequence of false testimony. And they were right, as the Wisconsin Court of Appeals held.<sup>19</sup> If the court had not applied the specialized legal sense of *consideration*, it would have misconstrued the statute.

Courts as well as advocates have been known to overlook technical senses of ordinary words—senses that might bear directly on their decisions. Consider *Estep v. State*, decided in 1995 by the Texas Court of Criminal Appeals.<sup>20</sup> At issue was the meaning of a procedural rule that provided:

<sup>17</sup> 129 So.2d at 798.

<sup>18</sup> Wis. Stat. § 946.65.

<sup>19</sup> *State v. Howell*, 414 N.W.2d 54 (Wis. Ct. App. 1987).

<sup>20</sup> 901 S.W.2d 491 (Tex. Crim. App. 1995).

An appeal shall be dismissed on the State's motion, supported by affidavit, showing that appellant has escaped from custody pending the appeal and that to the affiant's knowledge, has not voluntarily returned to lawful custody within the State within ten days after escaping.<sup>21</sup>

Having been convicted of telephone harassment, Jeffrey Estep appealed. Twelve days later the state filed a motion to dismiss Estep's appeal, together with an affidavit from a prosecutor stating that Estep was taken into custody and then "mistakenly" released by the Dallas County Sheriff's Department on the same day he filed a notice of appeal. According to the affidavit, he had "not voluntarily returned to lawful custody within Texas within ten days" of leaving the Dallas County Sheriff's Department. Had he escaped? Finding that he had, the trial court granted the motion.<sup>22</sup>

On appeal, the crucial question was the meaning of the word *escape*. The prosecutors argued that if a convicted criminal is accidentally released—even by the intentional action of a person with authority to release him—he is considered to have escaped. The court of appeals disagreed. For its understanding of the term *escape*, the court relied on an abridged, outdated, nonscholarly dictionary—the 1980 edition of the *Oxford American Dictionary*—which defined *escape* as "to get oneself free from confinement or control."<sup>23</sup> The court decided not to "expand[] the concept of 'escape' to include releases authorized by persons in authority but not authorized by law."<sup>24</sup>

What the court overlooked, perhaps because it failed to consult a law dictionary, is that *escape* as a term of art has traditionally borne precisely the meaning that the court disclaimed—to include a release authorized by a jailer but without legal sanction. Consider one sense in which law dictionaries have consistently defined *escape* since the mid-19th century:

<sup>21</sup> Tex. R. App. P. 60(b).

<sup>22</sup> See 901 S.W.2d at 492.

<sup>23</sup> *Oxford American Dictionary* 217 (1st ed. 1980).

<sup>24</sup> 901 S.W.2d at 495.

- **1839:** "An escape is the deliverance of a person out of prison, who is lawfully imprisoned, before such person is entitled to such deliverance by law."<sup>25</sup>
- **1847:** "The escaping or getting out of lawful restraint; as when a man has been arrested or imprisoned and gets away before he is discharged by due course of law. An *escape* is either negligent or voluntary; negligent, where the party escapes without the consent of the sheriff or his officer; voluntary where the sheriff or his officer permits him to go at large."<sup>26</sup>
- **1969:** "A criminal offense at common law, and by statute in most jurisdictions, consisting in the unlawful departure of a legally confined prisoner from custody or the act of a prisoner in regaining his liberty before being released in due course of law. The criminal offense committed by a jailer, warden, or other custodian of a prisoner in permitting him to depart from custody unlawfully."<sup>27</sup>
- **2009:** "At common law, a criminal offense committed by a peace officer who allows a prisoner to depart unlawfully from legal custody."<sup>28</sup>

This term-of-art sense, admittedly on the wane in legal usage, should have been considered in determining which sense the word bore in the rule (see § 53 [canon of imputed common-law meaning]). The court's decision may well have been correct, but not because *escape* could not possibly mean a release in which the prisoner was a passive participant.

Not always is it easy to determine whether ordinary meaning or a specialized meaning applies. For example, in *Nix v. Headden*, the Supreme Court of the United States was presented with the question whether tomatoes were subject to the import tariff ap-

<sup>25</sup> John Bouvier, *A Law Dictionary* 369 (1839).

<sup>26</sup> Henry James Holthouse, *A New Law Dictionary* 184-85 (1847).

<sup>27</sup> James A. Ballentine, *Ballentine's Law Dictionary* 415 (William S. Anderson ed., 3d ed. 1969).

<sup>28</sup> *Black's Law Dictionary* 623 (9th ed. 2009).

plicable to fruit, or to the higher tariff applicable to vegetables.<sup>29</sup> Although botanists classify the tomato as a fruit, the American people consider it a vegetable. In a brief, straightforward opinion, the Court sided with ordinary meaning (not exactly a victory for the ordinary person, who as a result had to pay more for tomatoes). The decision was not clearly correct, since the Court had long applied a rule that ambiguities in tariff and tax statutes are to be construed in favor of the taxpayer.<sup>30</sup>

<sup>29</sup> 149 U.S. 304 (1893) (per Gray, J.).

<sup>30</sup> See, e.g., *American Net & Twine Co. v. Worthington*, 141 U.S. 468, 474 (1891) (per Brown, J.). See § 49.

## 10. Negative-Implication Canon

### The expression of one thing implies the exclusion of others (*expressio unius est exclusio alterius*).

*Expressio unius*, also known as *inclusio unius*, is a Latin name for the communicative device known as negative implication. In English, it is known as the negative-implication canon. We encounter the device—and recognize it—frequently in our daily lives. When a car dealer promises a low financing rate to “purchasers with good credit,” it is entirely clear that the rate is *not* available to purchasers with spotty credit.

Virtually all the authorities who discuss the negative-implication canon emphasize that it must be applied with great caution, since its application depends so much on context.<sup>1</sup> Indeed, one commentator suggests that it is not a proper canon at all but merely a description of the result gleaned from context.<sup>2</sup> That goes too far. Context establishes the conditions for applying the canon, but where those conditions exist, the principle that specification of the one implies exclusion of the other validly describes how people express themselves and understand verbal expression.

The doctrine properly applies only when the *unius* (or technically, *unum*, the thing specified) can reasonably be thought to be an expression of *all* that shares in the grant or prohibition involved. Common sense often suggests when this is or is not so. The sign outside a restaurant “No dogs allowed” cannot be thought to mean that no other creatures are excluded—as if pet monkeys, potbelied pigs, and baby elephants might be quite welcome. Dogs are specifically addressed because they are the animals that customers are most likely to bring in; nothing is implied about other animals. On the other hand, the sign outside a veterinary clinic saying “Open for treatment of dogs, cats, horses, and all other farm and domestic animals” does suggest (by its detail) that the circus lion

1 See, e.g., Roland Burrows, *Interpretation of Documents* 67 (1943); Henry Campbell Black, *Handbook on the Construction and Interpretation of the Laws* 219 (2d ed. 1911).

2 Reed Dickerson, *The Interpretation and Application of Statutes* 234 (1975).

with a health problem is out of luck. (Notice how *eiusdem generis* [§ 32] also comes into play with this example.) The more specific the enumeration, the greater the force of the canon:

[I]f Parliament in legislating speaks only of specific things and specific situations, it is a legitimate inference that the particulars exhaust the legislative will. The particular which is omitted from the particulars mentioned is the *casus omissus*, which the judge cannot supply because that would amount to legislation.<sup>3</sup>

Even when an all-inclusive sense seems apparent, one must still identify the scope of the inclusiveness (thereby limiting implied exclusion). Consider the sign at the entrance to a beachfront restaurant: "No shoes, no shirt, no service." By listing some things that will cause a denial of service, the sign implies that other things will not. One can be confident about not being excluded on grounds of not wearing socks, for example, or of not wearing a jacket and tie. But what about coming in without pants? That is not included in the negative implication because the specified deficiencies in attire noted by the sign are obviously those that are common at the beach. Others common at the beach (no socks, no jacket, no tie) will implicitly not result in denial of service; but there is no reasonable implication regarding wardrobe absences not common at the beach. They go beyond the category to which the negative implication pertains.

This interpretive canon should not be confused with other principles of law that may produce identical results. One commentator ascribes to the canon the Supreme Court's doctrine that private rights of action are not to be "implied" in federal statutes that do not expressly create them—and goes on to condemn both the canon and the doctrine.<sup>4</sup> But while some cases applying the presumption against implied right of action (§ 51) mention the fact that the statute in question contains an express private right

3 J.A. Corry, *Administrative Law and the Interpretation of Statutes*, 1 U. Toronto L.J. 286, 298 (1936).

4 Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. Chi. L. Rev. 800, 812 (1983).

of action separate from the implied one asserted,<sup>5</sup> the provision of an express right is not considered the basis for or a condition of the doctrine. Indeed, the presumption against implied right of action has been invoked in several cases in which there was no basis for applying the negative-implication canon.<sup>6</sup> And perhaps the most consequential "implying" of a private right of action—one for violating § 10(b) of the Securities Exchange Act—occurred with respect to a statute that did create express private rights of action for other violations, so that the negative-implication canon would have precluded the implied right of action.<sup>7</sup> But the United States Supreme Court's rejection of implied rights of action is based not on a negative implication from an express private right of action, but instead on the principle that federal courts do not possess the lawmaking power of common-law courts. If Congress does not create a private right of action for violating one of its laws, the courts have no power to create one.<sup>8</sup>

Now for some examples.

In one case, the state constitution declared that the judges of superior courts must be elected by both branches of the legislature. Then, later, a legislative act authorized the governor to appoint a temporary superior-court judge. The court applied the negative-implication canon to the constitutional language: "If one having authority prescribe[s] the mode in which a particular act [the naming of judges] is to be done, can the agent [the legislature] who executes it substitute any other? Does not the act of prescrib-

5 See, e.g., *Hartford Underwriters Ins. Co. v. Union Planters Bank*, 530 U.S. 1 (2000) (per Scalia, J.) (holding that a statute expressly granting a bankruptcy trustee a right to recover does not also impliedly give an administrative claimant a right to recover).

6 See, e.g., *Gonzaga Univ. v. Doe*, 536 U.S. 273, 287 (2002) (per Rehnquist, C.J.) (holding that nondisclosure provisions of Family Educational Rights and Privacy Act did not create any enforceable rights); *Lopez v. Jet Blue Airways*, 662 F.3d 593, 596–97 (2d Cir. 2011) (finding no implied private right of action for violation of Air Carrier Access Act of 1986).

7 See *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 730 (1975) (per Rehnquist, J.).

8 See, e.g., *Alexander v. Sandoval*, 532 U.S. 275, 281 (2001) (per Scalia, J.); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979) (per Rehnquist, J.).



ing the mode, necessarily imply a prohibition to all other modes?"<sup>9</sup> Hence the statute was held unconstitutional.<sup>10</sup>

A second case illustrates what can happen when a court seems not even to recognize that the doctrine applies. A Mississippi statute provided that assistant district attorneys "may be removed at the discretion of the duly elected and acting district attorney."<sup>11</sup> Although district attorney was an elected position, some district attorneys were appointed by the governor between elections. And so the question arose whether a gubernatorial appointee had the power to remove assistant district attorneys.<sup>12</sup> Did he have that power even though he had not been "duly elected"? The negative-implication canon would suggest not. Yet the Mississippi Supreme Court, without even mentioning much less considering the canon, held that "appointed" district attorneys who had not been "duly elected" were empowered to fire assistant district attorneys. It likewise did not mention or consider another canon that had obvious application: the surplusage canon (§ 26). Its interpretation deprived the words *duly elected and of all effect*.

A third case exemplifies a correct result, even though the court did not specifically cite the doctrine. A New Hampshire statute immunized municipalities from "damages arising from insufficiencies or hazards on public highways, bridges, or sidewalks . . . when such hazards are caused solely by snow, ice, or other inclement weather."<sup>13</sup> A person who suffered damages from a fall on ice in a public parking lot sued the city of Laconia. The city claimed a statutory immunity, arguing that (1) the parking lots are essential components of the highway system, (2) the purpose of the statute was to protect cities from lawsuits resulting from weather conditions on public property, and (3) the legislature could not be expected to enumerate in the statute every single type of public property. The plaintiff argued that a parking lot is not a highway,

9 *State ex rel. McCready v. Hunt*, 2 Hill 1, 171 (S.C. Ct. App. 1834) (per Johnson, J.).

10 *Id.* at 168, 178-79.

11 Miss. Code Ann. § 25-31-6 (1972).

12 *Allred v. Webb*, 641 So.2d 1218 (Miss. 1994).

13 N.H. Rev. Stat. § 231-92-a (1991).

not a bridge, and not a sidewalk—and that the immunity therefore did not apply. The legislature could easily have written "any public property, including highways, bridges, and sidewalks," but it did not. The New Hampshire Supreme Court correctly held that because the law specified three types of public property but omitted all others, the immunity did not bar the lawsuit.<sup>14</sup>

As that New Hampshire case illustrates, the negative-implication canon is so intuitive that courts often apply it correctly without calling it by name. Consider *United States v. Giordano*,<sup>15</sup> decided by the Supreme Court of the United States in 1974. A statute<sup>16</sup> established procedures for obtaining court orders authorizing the interception of wire and oral communications. It said that the "Attorney General . . . or any Assistant Attorney General . . . specially designated by the Attorney General" could authorize application for such orders.<sup>17</sup> In Giordano's case, it was the Attorney General's executive assistant who applied for the court-authorized wiretap. Hence Giordano argued that the conversations to be used as evidence had been "unlawfully intercepted" and should be suppressed. A unanimous Court agreed with him: The statute named two types of high-ranking officials—and all others were excluded.<sup>18</sup>

14 *Johnson v. City of Laconia*, 684 A.2d 500, 501-02 (N.H. 1996).

15 416 U.S. 505 (1974) (per White, J.).

16 Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520.

17 *Id.*, § 2516(f).

18 416 U.S. at 514.

## 15. Presumption of Nonexclusive "Include"

### The verb to *include* introduces examples, not an exhaustive list.

In normal English usage, if a group "consists of" or "comprises" 300 lawyers, it contains precisely that number. If it "includes" 300 lawyers, there may well be thousands of other members from all walks of life as well. That is, the word *include* does not ordinarily introduce an exhaustive list, while *comprise*—with an exception that we will discuss shortly—ordinarily does. That is the rule both in good English usage<sup>1</sup> and in textualist decision-making.<sup>2</sup> Some jurisdictions have even codified a rule about *include*.<sup>3</sup>

Often the phrase that appears is *including but not limited to*—or either of two variants, *including without limitation* and *including without limiting the generality of the foregoing*. These cautious

1 See, e.g., *The Random House Dictionary of the English Language* 967 (2d ed. 1987) ("To *include* is to contain as a part or member, or among the parts and members, of a whole: The list *includes* many new names. . . . To *comprise* is to consist of, as the various parts serving to make up the whole: This genus *comprises* 50 species."); H.W. Fowler, *A Dictionary of Modern English Usage* 275 (Ernest Gowers ed., 2d ed. 1965) ("With *include*, there is no presumption . . . that all or even most of the components are mentioned; with *comprise*, the whole of them are understood to be in the list."); Theodore M. Bernstein, *The Careful Writer: A Modern Guide to English Usage* 228 (1965) ("The word *include* . . . usually suggests that the component items are not being mentioned in their entirety. If all [the component items] are being mentioned, it would be better to write . . . 'were'; or, if there is an irresistible urge for a fancy word, to use *comprised*."); Bergen Evans & Cornelia Evans, *A Dictionary of Contemporary American Usage* 110–11 (1957) ("It is better to use *comprise* when all of the constituent parts are enumerated or referred to and to use *include* when only some of them are.")

2 See, e.g., *Federal Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941) (per Murphy, J.) ("the term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle"); *United States v. Philip Morris USA Inc.*, 566 F.3d 1095, 1115 (D.C. Cir. 2009) (explaining that *including* indicates a nonexhaustive list but that "adding 'but not limited to' helps to emphasize the non-exhaustive nature"); *Richardson v. National City Bank of Evansville*, 141 F.3d 1228, 1232 (7th Cir. 1998) (for purposes of interpreting administrative regulations, *include* is a term of illustration, not limitation).

3 See, e.g., Tex. Gov't Code Ann. § 311.005(13) (West 1989) ("'Includes' and 'including' are terms of enlargement and not of limitation or exclusive enumeration, and use of the terms does not create a presumption that components not expressed are excluded.")

phrases are intended to defeat the negative-implication canon (§ 10): "Even though the word *including* itself means that the list is merely exemplary and not exhaustive, the courts have not invariably so held. So the longer, more explicit variations are necessary in the eyes of many drafters." Even so, the commonness of these belts-and-suspenders phrases does not lessen the exemplariness of *include*.

In one particular legal specialty—intellectual-property law—*comprise* is held to be synonymous with *include*. Specifically, *comprise* introduces a nonexhaustive list in the field of patent-claim drafting.<sup>4</sup> But this is a narrow, anomalous exception.

4 *Garner's Dictionary of Legal Usage* 439–40 (3d ed. 2011).

5 See *Vehicular Techs. Corp. v. Titan Wheel Int'l, Inc.*, 212 F.3d 1377, 1382–83 (Fed. Cir. 2000) ("The phrase *consisting of* is a term of art in patent law signifying restriction and exclusion, while, in contrast, the term *comprising* indicates an open-ended construction. . . . In simple terms, a drafter uses the phrase *consisting of* to mean 'I claim what follows and nothing else.' A drafter uses the term *comprising* to mean 'I claim at least what follows and potentially more.'" (emphasis added); *Genentech, Inc. v. Chiron Corp.*, 112 F.3d 495, 501 (Fed. Cir. 1997) ("*Comprising* is a term of art used in claim language which means that the named elements are essential, but other elements may be added and still form a construct within the scope of the claim.") (emphasis added); *Parnellee Pharm. Co. v. Zink*, 285 F.2d 465, 469 (8th Cir. 1961) ("The word *comprising* in the patent law is an open-ended word and one of enlargement and not of restriction. . . . In contrast, the word *consisting* is one of restriction and exclusion.") (emphasis added).

## 25. Presumption of Consistent Usage

**A word or phrase is presumed to bear the same meaning throughout a text; a material variation in terms suggests a variation in meaning.**

"[T]here is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning."

*Atlantic Cleaners & Dyers, Inc. v. United States*,  
286 U.S. 427, 433 (1932) (per Sutherland, J.).

The correlative points of the presumption of consistent usage make intuitive sense. The preparation of a legal instrument has traditionally been seen as a solemn and deliberative act that requires verbal exactitude. Hence it has long been considered "a sound rule of construction that where a word has a clear and definite meaning when used in one part of a . . . document, but has not when used in another, the presumption is that the word is intended to have the same meaning in the latter as in the former part."<sup>1</sup> And likewise, where the document has used one term in one place, and a materially different term in another, the presumption is that the different term denotes a different idea. If it says *land* in one place and *real estate* later, the second provision presumably includes improvements as well as raw land.

Yet more than most other canons, this one assumes a perfection of drafting that, as an empirical matter, is not often achieved. Though one might wish it were otherwise, drafters more than rarely use the same word to denote different concepts, and often (out of a misplaced pursuit of stylistic elegance) use different words to denote the same concept. Predictably, then, the canon has had its distinguished detractors. Justice Joseph Story called the approach "narrow and mischievous," adding: "It is by no means a correct rule of interpretation to construe the same word in the same sense, wherever it occurs in the same instrument."<sup>2</sup> One of

1 Herbert Broom, *A Selection of Legal Maxims* 443 (Joseph Gerald Pease & Herbert Chitty eds., 8th ed. 1911).

2 1 Joseph Story, *Commentaries on the Constitution of the United States* § 454, at 323 (2d ed. 1858).

Story's examples from the Constitution is *state*, which bears four meanings in the document: (1) a section of territory occupied by a political society; (2) the government established by such a society; (3) the society that is organized under such a government; and (4) the people composing such a political society.<sup>3</sup>

Because it is so often disregarded, this canon is particularly defeasible by context. Perhaps under his colleague Story's influence, Chief Justice John Marshall noted: "[I]t has . . . been also said, that the same words have not necessarily the same meaning attached to them when found in different parts of the same instrument: their meaning is controlled by context. This is undoubtedly true."<sup>4</sup> A prime example of defeasance by context was given long ago by Henry Campbell Black: A statute providing that a person who, "being married, . . . mar[r]ies] any other person during the life of the former husband or wife" is guilty of a felony. The first use of *marry* refers to a valid marriage, but if the statute is going to make any sense, the second use cannot mean the same thing, but must denote going through the ceremony of marriage (though ineffectually).<sup>5</sup> A more careful drafter might have written, in the second instance, *purports to marry or goes through a marriage ceremony with*.

But the presumption makes sense when applied (as it usually is) pragmatically. In a 1980 case,<sup>6</sup> the Supreme Court of the United States had to decide whether the word *filed* bore the same meaning in two provisions contained in the same section of the Equal Employment Opportunity Act. The respondent argued that it meant different things. The Court held: "In the end, we cannot accept respondent's position without unreasonably giving the word 'filed' two different meanings in the same section of the statute."<sup>7</sup> And the Court emphasized the besetting sin of short-term, expedient interpretations: "Even if the interests of justice might be

3 *Id.*

4 *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 19 (1831) (per Marshall, C.J.).

5 Henry Campbell Black, *Handbook on the Construction and Interpretation of the Law* 146-47 (2d ed. 1911).

6 *Mobasco Corp. v. Silver*, 447 U.S. 807 (1980) (per Stevens, J.).

7 *Id.* at 826.

served in this particular case by a bifurcated construction of that word, in the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law.<sup>8</sup>

The presumption of consistent usage applies also when different sections of an act or code are at issue. In a 1988 case, the Iowa Supreme Court was called on to decide whether *serious mental impairment* meant the same thing in the statutory section dealing with involuntary hospitalization as it did in another section dealing with habeas corpus petitions for release from involuntary hospitalization.<sup>9</sup> The psychiatric hospital argued that involuntary hospitalization entailed a more stringent standard for *serious mental impairment* than did the continued commitment of a patient who challenged the prolonged hospitalization against his will. Although in one place the statute spelled out three elements for involuntary hospitalization in the first instance—(1) mental illness, (2) deficiency of judgment, and (3) dangerousness—the hospital contended that the phrase *serious mental impairment* took on a different meaning in the later provision relating to continued confinement (dropping the dangerousness requirement). The court sensibly held that the two uses of the phrase—one in § 229.13 of the Iowa Code and the other in § 229.37—bore an identical meaning that included dangerousness.<sup>10</sup>

Yet the presumption of consistent usage can hardly be said to apply across the whole *corpus juris*. Frequently when a court is called on to construe a statutory word or phrase, counsel for one side will argue that it must bear the well-established or unavoids-able meaning that the same word or phrase has in a different statute altogether. Without more, the argument does not have much force: "[T]he mere fact that the words are used in each instance is not a sufficient reason for treating a decision on the meaning of the words of one statute as authoritative on the construction of

8 *Id.*

9 *B.A.A. v. Chief Med. Officer, Univ. of Iowa Hosps.*, 421 N.W.2d 118 (Iowa 1988).

10 *Id.* at 125 (citing Iowa Code § 229.1(2)).

another statute."<sup>11</sup> But the more connection the cited statute has with the statute under consideration, the more plausible the argument becomes. If it was enacted at the same time, and dealt with the same subject, the argument could even be persuasive.

11 Rupert Cross, *Precedent in English Law* 192 (1961).

### 31. Associated-Words Canon

#### Associated words bear on one another's meaning (*noscitur a sociis*).

The Latin phrase *noscitur a sociis* means "it is known by its associates"—a classical version, applied to textual explanation, of the observed phenomenon that birds of a feather flock together. The associated-words canon could refer to the basic principle that words are given meaning by their context (see § 2)—and some authorities use this canon at that broad level of generality.<sup>1</sup> But we mean something more specific. When several nouns or verbs or adjectives or adverbs—any words—are associated in a context suggesting that the words have something in common, they should be assigned a permissible meaning that makes them similar. The canon especially holds that "words grouped in a list should be given related meanings."<sup>2</sup>

Take a line from Shakespeare's *The Tempest*, first published in 1623, in which Gonzalo says that he would not have "treason, felony, sword, pike, knife, gun, or need of any engine."<sup>3</sup> The mere listing provides helpful context for the meaning of *engine*, which today is considered a broad term with an entirely neutral meaning. The editors of the modern Folger edition of the play translate *engine* as "military weapon." And the *Oxford English Dictionary* details the violent associations of the term from its first use in about 1300 through the 19th century: "A machine or instrument used in warfare. Formerly sometimes applied to all offensive weapons, but chiefly and now exclusively to those of large size and having mechanism, e.g. a battering-ram, catapult, piece of ordnance, etc."<sup>4</sup>

If someone were to argue that *pike*, in Gonzalo's list, might refer to a freshwater fish or that *engine* might refer to the locomotive

1 See D.C. Pearce, *Statutory Interpretation in Australia* 48 (1981).

2 *Third Nat'l Bank in Nashville v. Impac Ltd.*, 432 U.S. 312, 322 (1977) (per Stevens, J.) (correctly stating the doctrine but, in our view, misapplying its import).

3 2.1.176-77.

4 5 *Oxford English Dictionary* 250 (2d ed. 1989).

car on a train, the argument could be easily dismissed by looking to the surrounding terms. Likewise, if a statute is said to apply to “tacks, staples, nails, brads, screws, and fasteners,” it is clear from the words with which they are associated that the word *nails* does not denote fingernails and that *staples* does not mean reliable and customary food items.

For the associated-words canon to apply, the terms must be conjoined in such a way as to indicate that they have some quality in common. The walrus’s allusion to “shoes and ships and sealing-wax, . . . cabbages and kings”<sup>5</sup> provides no occasion for *notitur a sociis*. The common quality suggested by a listing should be its most general quality—the least common denominator, so to speak—relevant to the context.

There is reason to disagree with the Canadian decision holding that the statutory term *ordinances* means only laws made by a legislative body, since it was conjoined with *Acts* in the statutory phrase *Acts and ordinances*.<sup>6</sup> The only quality that those words surely have in common is a legally binding effect prescribed by a governmental authority. There is no more reason to believe that *ordinances* were meant to be similar to *Acts* in regard to the nature of the promulgator than there is to believe that they were meant to be different in that regard. That is to say, the phrase *Acts and ordinances* could have meant “Acts [of the legislature] and all other binding pronouncements [issued by any proper authority].”

Despite our nails-and-staples example, the most common effect of the canon is not to establish which of two totally different meanings applies but rather to limit a general term to a subset of all the things or actions that it covers—but only according to its ordinary meaning. So in the case just discussed, the Canadian court used the canon (wrongly, we submit) to restrict the term *ordinances* to one of its many possible applications—namely, only those laws made by a legislative body.

The associated-words canon has tremendous value in a broad array of cases. Consider the Minnesota statute making it a crime

5 Lewis Carroll, *Through the Looking Glass* 64 (1871; repr. 1917)

6 *R. v. Markin*, (1969) 68 W.W.R. 611, ¶ 6.

to carry or possess a pistol in a motor vehicle unless the pistol is unloaded and “contained in a closed and fastened case, gunbox, or securely tied package.” When police stopped Phyllis Taylor, she was found to have a pistol within her purse on the floor behind the passenger seat. On appeal, Taylor argued that her purse was a “case,” which dictionaries define as “something that encloses or contains.” The state argued that *notitur a sociis* imparts a restrictive meaning to *case*: A *gunbox* is a hard, latched container; and by the terms of the statute a *package* must be a “securely tied” package; and a *case* a “closed” and “fastened” case. This listing suggests a container that does not make the gun readily retrievable. A purse, by contrast, is just where a woman would pack heat for ready access. So the Minnesota Court of Appeals rightly held that Ms. Taylor was not within the exception to the statute.<sup>7</sup> The outcome might have been different if the general word *case* had not been qualified by such specific adjectives.

You might well wonder why the rule of lenity (§ 49) would not save Taylor here. The answer is that the rule of lenity applies only when a reasonable doubt persists *after* the traditional canons of interpretation have been considered. There was no ambiguity here.

Although most associated-words cases involve listings—usually a parallel series of nouns and noun phrases, or verbs and verb phrases—a listing is not prerequisite. An “association” is all that is required. Consider a Texas case<sup>8</sup> involving a public-information act that contained an exemption from disclosure for “[a]n internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution . . . if . . . release of the internal record or notation would interfere with law enforcement or prosecution . . . .”<sup>9</sup> An unsuccessful applicant for a position as a Fort Worth police officer submitted an open-records request for copies of the hiring-process documents relating to his application. The city refused to

7 *State v. Taylor*, 594 N.W.2d 533, 535–36 (Minn. Ct. App. 1999).

8 *City of Fort Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.—Austin 2002, no pet.).

9 Tex. Gov’t Code Ann. § 552.108(b)(1).

provide them, contending that this information was exempt from disclosure by reason of the law-enforcement exception.

In the ensuing litigation, the city argued, reasonably enough, that the information it sought to protect *was* related to law enforcement; its officers must make well-informed hiring decisions, and if the information it obtains and records during the hiring process were readily available to the public, those third parties who provide information about the applicant would be reluctant to speak candidly. The court of appeals nonetheless denied the exemption on grounds of *noscitur a sociis*:

In three separate instances, the statute links the words law enforcement and prosecutor. The doctrine of construction—*noscitur a sociis*—teaches that “the meaning of particular terms in a statute may be ascertained by reference to words associated with them in the statute; and that where two or more words of analogous meaning are employed together in a statute, they are understood to be used in their cognate sense, to express the same relations and give color and expression to each other.”

Under this rule of construction, we construe the phrases “information relating to law enforcement” and “would interfere with law enforcement” in reference to the type of information that would also “relate to prosecution” or “interfere with prosecution.” So doing, we conclude that the phrase “law enforcement,” in light of the immediately following words “prosecutor” or “prosecution,” evidences an intent by the Legislature to include within the law enforcement exception only that type of information that relates to violations of the law.<sup>10</sup>

Note the slippery reference to *intent* (see § 67), as opposed to meaning. Yet on the whole, such close textual analysis is laudable.

<sup>10</sup> 86 S.W.3d at 327 (citations omitted).

## 49. Rule of Lenity

**Ambiguity in a statute defining a crime or imposing a penalty should be resolved in the defendant's favor.**

"Blurred signposts to criminality will not suffice to create it."

*United States v. C.I.O.*,  
335 U.S. 106, 142 (1948) (Rutledge, J., concurring).

The rule of lenity—sometimes cast as the idea that "[p]enal statutes must be construed strictly"<sup>1</sup> and sometimes as the idea that if two rational readings are possible, the one with the less harsh treatment of the defendant prevails<sup>2</sup>—was termed by Jeremy Bentham "the subject of more constant controversy than perhaps of any in the whole circle of the Law."<sup>3</sup>

The rule originally rested on the interpretive reality that a just legislature will not decree punishment without making clear what conduct incurs the punishment and what the extent of the punishment will be; or at least on the judge-made public policy that a legislature *ought* not to do so. Chief Justice John Marshall explained it this way in 1820:

The rule that penal laws are to be construed strictly . . . 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.<sup>4</sup>

Some authorities consider the rule to be based on constitutional requirements of fair notice and separation of powers (federal courts have no power to define crimes<sup>5</sup>). But application of the rule of

1 1 William Blackstone, *Commentaries on the Laws of England* 88 (4th ed. 1770).

2 *McNally v. United States*, 483 U.S. 350, 359–60 (1987) (per White, J.).

3 Jeremy Bentham, *A Comment on the Commentaries: A Criticism of William Blackstone's Commentaries on the Laws of England* 141 (1776; Charles Warren Everett ed., 1928).

4 *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) (per Marshall, C.J.).

5 See *United States v. Bass*, 404 U.S. 336, 348 (1971) (per Marshall, J.) ("[B]ecause of the seriousness of criminal penalties, and because criminal punishment usually

lenity, vague as it is, does not coincide with the constitutional requirement of fair notice—or even with that requirement plus the constitutional-doubt canon (§ 38). And as for the separation of powers, the rule antedates both state and federal constitutions, and it applies not only to crimes but also to civil penalties.

Consider a straightforward case. With respect to certain specified institutions, including federally insured banks, a federal statute made it a crime to "knowingly mak[e] any false statement or report" or to "willfully overvalu[e] any land, property, or security" for the purpose of influencing action "upon any application, . . . commitment, [or] loan."<sup>6</sup> A Louisiana bank president was convicted of writing bad checks on accounts that had insufficient funds. But were the bad checks themselves "false statements" that give rise to criminal liability under the statute? Justice Blackmun wrote for a seven-member majority of the Supreme Court of the United States in holding no: "Congress should have spoken in language that is clear and definite. . . . '[The rule of lenity] would require statutory language much more explicit than that before us here to lead to the conclusion that Congress intended to put the Federal Government in the business of policing the' deposit of bad checks."<sup>7</sup>

One interpretive problem sometimes arises when the same violation of law is made subject to *both* a civil or criminal penalty and a private claim for the injury inflicted. Is the language defining the violation to be given one meaning (a narrow one) for the penal sanction and a different meaning (a more expansive one) for the private compensatory action? That seems inconceivable. The Supreme Court of the United States says as much: "[The dissent] further suggests that lenity is inappropriate because we construe the statute today 'in a civil setting' rather than 'a criminal prosecution.' The rule of lenity, however, is a rule of statutory construction

represents the moral condemnation of the community, legislatures and not courts should define criminal activity.").

6 18 U.S.C. § 1014.

7 *Williams v. United States*, 458 U.S. 279, 290 (1982) (per Blackmun, J.) (quoting *United States v. Enmons*, 410 U.S. 396, 411 (1973) (per Stewart, J.), with the really strange internal end-quote as shown).



whose purpose is to help give authoritative meaning to statutory language. It is not a rule of administration calling for courts to refrain in criminal cases from applying statutory language that would have been held to apply if challenged in civil litigation.<sup>8</sup>

The main difficulty with the rule of lenity is the uncertainty of its application. Its operation would be relatively clear if the rule were automatically applied at the outset of textual inquiry, before any other rules of interpretation were invoked to resolve ambiguity. Treating it as a clear-statement rule would comport with the original basis for the canon and would provide considerable certainty. But that is not the approach the cases have taken. The Supreme Court of the United States expresses the consensus when it says that “[t]he 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.”<sup>9</sup> Fair enough. But less comprehensible is the Court’s statement in a later case that the rule applies “only when the equipoise of competing reasons cannot otherwise be resolved.”<sup>10</sup> If that were so, the rule either would never apply (when is the last time you read a decision saying that an interpretive “equipoise” could not be resolved?) or would be superfluous (if alternative meanings were in utter equipoise, the statute would be inoperative as meaningless<sup>11</sup>).

But not to worry: Supreme Court opinions provide an ample supply of other criteria for determining when the rule of lenity applies, ranging from when the court “can make no more than a guess,”<sup>12</sup> to when the court is “left with an ambiguous statute,”<sup>13</sup>

8 *United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 518 n.10 (1992) (Souter, J., plurality opinion). See *Grandon v. United States*, 494 U.S. 152, 158 (1990) (per Stevens, J.) (applying the rule of lenity to a hybrid criminal/civil statute—in the civil context); *Leocal v. Abotroff*, 543 U.S. 1, 11 n.8 (2004) (per Rehnquist, C.J.) (same).

9 *Callanan v. United States*, 364 U.S. 587, 596 (1961) (per Frankfurter, J.). See *United States v. R.L.C.*, 503 U.S. 291 (1992) (in which the plurality of a splintered Court unfortunately applied the rule of lenity after consulting legislative history—see § 66).

10 *Johnson v. United States*, 529 U.S. 694, 713 n.13 (2000) (per Souter, J.).

11 See § 16 (unintelligibility canon).

12 *Reno v. Koray*, 515 U.S. 50, 65 (1995) (per Rehnquist, C.J.) (citing *Ladner v. United States*, 358 U.S. 169, 178 (1958)) (per Brennan, J.).

13 *Smith v. United States*, 508 U.S. 223, 239 (1993) (per O’Connor, J.).

to when there remains “grievous ambiguity or uncertainty.”<sup>14</sup> Given the multiplicity of expressed standards, one of your authors has said that the rule of lenity under current law “provides little more than atmospherics, since it leaves open the crucial question—almost invariably present—of how much ambiguity constitutes an ambiguity.”<sup>15</sup>

The criterion we favor is this: whether, after all the legitimate tools of interpretation have been applied, “a reasonable doubt persists.”<sup>16</sup>

Vague as it is, this test seems to be more comprehensible than the others. One might believe that the provision in question is not “in equipoise” or “grievously ambiguous”—while yet acknowledging that the matter is not beyond reasonable doubt. This is, to be sure, more defendant-friendly than most of the other formulations. We prefer it because we believe that when the government means to punish, its commands must be reasonably clear. When they are not clear, the consequences should be visited on the party more able to avoid and correct the effects of shoddy legislative drafting—namely, the federal Department of Justice or its state equivalent.

Does the canon attach to tax laws? For many years, the Supreme Court of the United States subjected them to a strict construction, holding that “[i]n case of doubt [statutes levying taxes] are construed most strongly against the government, and in favor of the citizen.”<sup>17</sup> Although many states continue to apply this rule,<sup>18</sup> it unfortunately can no longer be said to enjoy universal

14 *Muscarello v. United States*, 524 U.S. 125, 139 (1998) (per Breyer, J.).

15 *United States v. Hansen*, 772 F.2d 940, 948 (D.C. Cir. 1985).

16 *Moskal v. United States*, 498 U.S. 103, 108 (1990) (per Marshall, J.).

17 *Gould v. Gould*, 245 U.S. 151, 153 (1917) (per McReynolds, J.) (citing prior authorities going back to an 1842 opinion by Justice Story on circuit, *United States v. Wigglesworth*, 28 F. Cas. 595 (C.C.D. Mass. 1842) (No. 16,690)).

18 See, e.g., *Sane Transit v. Sound Transit*, 85 P.3d 346, 364 (Wash. 2004) (taxpayer won because statute was ambiguous); *State ex rel. Arizona Dept. of Revenue v. Capitol Castings, Inc.*, 88 P.3d 159, 161 (Ariz. 2004) (same); *Goodman Oil Co. v. Idaho State Tax Comm’n*, 28 P.3d 996, 998 (Idaho 2001) (same); *Skepton v. Borough of Wilson*, 755 A.2d 1267, 1270 (Pa. 2000) (same); *American Healthcare Mgmt., Inc. v. Director of Revenue*, 984 S.W.2d 496, 498 (Mo. 1999) (same).

approval.<sup>19</sup> Nor are statutes providing remedies for fraud considered penal laws subject to the canon. As Blackstone described it:

[W]here the statute acts upon the offender, and inflicts a penalty, as the pillory or a fine, it is then to be taken strictly: but when the statute acts upon the offence, by setting aside the fraudulent transaction, here it is to be construed liberally.<sup>20</sup>

The rule of lenity is often overlooked when it ought to apply. Consider the Kentucky statute making it a crime to “sell, lend, or give” liquor to a minor—unless you are the minor’s parent or guardian. Sixteen-year-old Davis and seventeen-year-old Rison decided to pool their money to buy and then drink whiskey. They did so, were caught, and were arrested. Davis, the younger boy, was charged with “giving” whiskey to Rison. The trial court dismissed the indictment without explanation, and the prosecution appealed to the Kentucky Supreme Court. Davis argued that he did not “sell, lend, or give” whiskey to Rison—and that *give* means “to bestow a gift.” The prosecution argued that, in an expanded sense, *give* means “to furnish, provide, or supply.” The court agreed with the prosecution’s argument and remanded the case for trial<sup>21</sup>—quite erroneously. The rule of lenity militated in favor of a judgment for Davis, as did *nosctur a sociis* (see § 31 [associated-words canon]), but the court dismissed the first and missed the second.

19 See, e.g., *Calgate-Palmolive-Peet Co. v. United States*, 320 U.S. 422, 429–30 (1943) (per Reed, J.) (upholding government’s imposition of excise tax despite ambiguity in Revenue Act of 1934); *Burnet v. Guggenbaim*, 288 U.S. 280, 286 (1933) (per Cardozo, J.) (upholding imposition of tax despite ambiguity in Revenue Act of 1924); *Stryker Corp. v. Director, Div. of Taxation*, 773 A.2d 674, 684 (N.J. 2001) (recognizing well-settled rule that tax laws are construed strictly against the state, yet imposing tax because “tax laws also must be construed reasonably so that the Legislature’s purpose in enacting the statute is not destroyed”); *Johnson v. State Tax Comm’n*, 411 P.2d 831, 834 (Utah 1966) (interpreting ambiguous tax statute against taxpayer to accomplish the legislative purpose and bring about “equal and non-discriminatory taxation”).

20 1 William Blackstone, *Commentaries on the Laws of England* 88 (4th ed. 1770). See also 3 Roscoe Pound, *Jurisprudence* 498 (1959).

21 *Commonwealth v. Davis*, 75 Ky. 240, 242–43 (1876).

On the whole, it might fairly be said that the rule of lenity is underused in modern judicial decision-making<sup>22</sup>—perhaps the consequence of zeal to smite the wicked. The defendant has almost always done a bad thing, and the instinct to punish the wrongdoer is a strong one. But a fair system of laws requires precision in the definition of offenses and punishments. The less the courts insist on precision, the less the legislatures will take the trouble to provide it.

Naturally, the rule of lenity has no application when the statute is clear—though just as naturally counsel will try to manufacture ambiguity when there is none. In *Sullivan v. United States*,<sup>23</sup> the District of Columbia’s Sex Offender Registration Act required registration by any person who “[c]ommitted a [sex] offense at any time and is in custody or under supervision on or after July 11, 2000” because of “[b]eing convicted of . . . an offense under the District of Columbia Official Code.”<sup>24</sup> Two years before the Act was enacted, Sullivan was convicted of assault with intent to rape. He was jailed and later released. After the Act took effect, he was convicted of driving without a permit, was placed on supervised probation, had his probation revoked, and was jailed once again.<sup>25</sup> After his release, District authorities repeatedly notified Sullivan

22 See *James v. United States*, 550 U.S. 192, 219 (2007) (Scalia, J., dissenting) (“The rule of lenity, grounded in part on the need to give ‘fair warning’ of what is encompassed by a criminal statute, . . . demands that we give this text the more narrow reading of which it is susceptible.”); *Almendarez-Torres v. United States*, 523 U.S. 224, 271 (1998) (Scalia, J., dissenting) (“[W]here the doctrine of constitutional doubt does not apply, the same result may be dictated by the rule of lenity, which would preserve rather than destroy the criminal defendant’s right to jury findings beyond a reasonable doubt.”); *United States v. O’Hagan*, 521 U.S. 642, 679 (1997) (Scalia, J., concurring in part and dissenting in part) (“While the Court’s explanation of the scope of § 10(b) and Rule 10b-5 would be entirely reasonable in some other context, it does not seem to accord with the principle of lenity we apply to criminal statutes.”); *Smith v. United States*, 508 U.S. 223, 246 (1993) (Scalia, J., dissenting) (“Even if the reader does not consider the issue to be as clear as I do, he must at least acknowledge, I think, that it is eminently debatable—and that is enough, under the rule of lenity, to require finding for the petitioner here.”)

23 990 A.2d 477 (D.C. 2010).

24 D.C. Code § 22-4001(5)(A)(I), (9).

25 990 A.2d at 478.

that he must register under the Act, yet he repeatedly failed to do so. He was then convicted of failing to register as a sex offender.

On appeal, Sullivan (or, more properly, his lawyer) argued that he did not have to register under the Act because (1) he had been released from custody for his sex offense before the Act took effect, and (2) his post-Act conviction of driving without a license (a nonviolent traffic offense) was not the type of offense that could bring him within the reach of the Act. The District of Columbia Court of Appeals correctly held otherwise. The language “convicted of . . . an offense under the District of Columbia Official Code” was broad (see § 9 [general-terms canon]) and unambiguous, and it did not exclude any type of conviction for which a court might order a person into custody or supervision.<sup>26</sup> Hence, the rule of lenity had no application.

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<sup>26</sup> *Id.* at 482.