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COMMENT

Interpretation Step Zero: A Limit on Methodology as "Law"

Legislated interpretive rules are everywhere. International law has them,[1] every state has them,[2] and Congress does too.[3] Even the Federal Rules of Civil Procedure open with an oft-overlooked legislated interpretive rule.[4] Most of these rules are modest. The federal Dictionary Act, for instance, cautions that singular words include their plural counterparts,[5] and that "he" can also mean "she."[6] Many state interpretive statutes are similarly timid, decreeing bromides.[7]

Some rules go further, however, and begin to tread on weightier aspects of the interpretive enterprise. As of 2011, twenty-four states have enacted the

1. Vienna Convention on the Law of Treaties arts. 31-33, May 23, 1969, 1155 U.N.T.S. 331, *reprinted in* 8 I.L.M. 679 (entered into force Jan. 27, 1980) (codifying customary international law with respect to treaty interpretation).

2. Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO. L.J. 341, 350 & n.35 (2010) (collecting such laws).

3. Dictionary Act, 1 U.S.C. §§ 1-7 (2006) (codifying several rules for interpreting statutes).

4. These rules "should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." FED. R. CIV. P. 1; *see also* FED. R. EVID. 102 (setting forth a similar rule for the Federal Rules of Evidence).

5. 1 U.S.C. § 1.

6. *Id*.

7. *See* sources cited in Scott, *supra* note 2, at 411-27 (listing and grouping various legislative interpretive rules in each of the states). As Scott identifies, most of these rules are intended to guide permissible linguistic inferences that the expression of one thing suggests the exclusion of others, that tenses are generally interchangeable, or that courts should follow the ordinary usage of terms, unless the legislature gives them a specified or technical meaning. *Id*. at 411-17.

Model Penal Code's interpretive rules,[8] directing courts to infer that in the absence of a specified mens rea, the mens rea is assumed to be recklessness.[9] Others have repealed the common law rule of lenity, a rule that calls upon courts to construe ambiguous penal statutes in favor of the accused.[10] Congress, for its part, has attempted to create several national security "clear statement" rules,[11] while some states have sought to require that courts ignore legislative history unless the text is ambiguous,[12] or do the opposite and permit recourse to legislative history even if the text is clear.[13]

Yet, often, these legislated interpretive rules fail.[14] This sets a puzzle for scholars and judges alike, one that has led to considerable recent debate over the legal status of such rules.[15] But scholars seem to agree on one particular point: Judicial failures to implement binding interpretive rules are a product of

8. *See* Darryl K. Brown, *Criminal Law Reform and the Persistence of Strict Liability*, 62 DUKE L.J. 285, 289 & n.8 (2012).

9. MODEL PENAL CODE § 2.02(3); *id.* § 2.02(4) (1981).

10. Jeffrey A. Love, Comment, *Fair Notice About Fair Notice*, 121 YALE L.J. 2395, 2395-97 & nn.4-7 (2012).

11. Jonathan F. Mitchell, *Legislating Clear-Statement Regimes in National-Security Law*, 43 GA. L. REV. 1059, 1060 (2009).

12. *See* Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1791-97 (2010) (describing the Connecticut experience).

13. *See id.* at 1785-91 (describing Texas's Code Construction Act).

14. *See* Brown, *supra* note 8, at 292 (describing state courts' "pervasive failure" to employ the Model Penal Code's interpretive provisions); Evan Criddle, *The Vienna Convention on the Law of Treaties in U.S. Treaty Interpretation*, 44 VA. J. INT'L L. 431, 433-34 (2004) (describing the failure of U.S. courts to abide by the rules in the internationally binding Vienna Convention on the Law of Treaties); Gluck, *supra* note 12, at 1775-1811 (describing the breakdown of legislatively and judicially crafted binding interpretive methodologies across multiple states); Mitchell, *supra* note 11, at 1061-66 (describing the failure of clear statement rules in national security law); Lawrence M. Solan, *Law, Language, and Lenity*, 40 WM. & MARY L. REV. 57, 123-34 (1998) (describing the failure of lenity-repealing statutes to eliminate the rule of lenity); Love, *supra* note 10, at 2397 & n.15 (same).

15. *See* Larry Alexander & Saikrishna Prakash, *Mother May I? Imposing Mandatory Prospective Rules of Statutory Interpretation*, 20 CONST. COMMENT. 97 (2003); Sydney Foster, *Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology?*, 96 GEO. L.J. 1863, 1884-97 (2008); Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as "Law" and the* Erie *Doctrine*, 120 YALE L.J. 1898, 1909-18 (2011); Gluck, *supra* note 12, at 1847; Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2156 (2002); Jordan Wilder Connors, Note, *Treating Like Subdecisions Alike: The Scope of Stare Decisis as Applied to Judicial Methodology*, 108 COLUM. L. REV. 681, 709 (2008). This scholarship makes up a small slice of the vast and sophisticated literature that deals with the constitutionality of legislated interpretive rules, but these relevant pieces give enough context for the purposes of this Comment.

"reluctance,"[16] "resistance,"[17] and "evasion."[18] These failures are part of a calculated strategy of judicial opposition, the product of a conscious decision to ignore the interpretive rules.

These accounts no doubt contain some truth. But this Comment argues that they mask a deeper, though more difficult to express, anxiety. Judges cannot apply a legally binding interpretive framework without first overcoming an unavoidable and often insurmountable interpretive obstacle—step zero, the initial inquiry into whether the interpretive framework applies at all. Making this step zero determination often forces judges into the middle of an intertemporal clash between a past and present legislature—a difficult lose-lose situation. This step zero problem ultimately means that binding interpretive methodologies are almost sure to unravel unless there is methodological consensus among past and future legislatures.

Parts I and II explain the structural tension implicit in mandating an interpretive methodology without first achieving interpretive consensus. Part III shows how this tension operates in practice, while disputing the resistance hypothesis. While scholars ordinarily attribute failures to follow rules mandating binding interpretive methodologies to judicial willfulness, this criticism is unwarranted. Judges who fail to heed interpretive rules are often among the legislature's most faithful agents. Judges may fail to implement binding methodological frameworks not because they won't, but because they can't.

I. THE IMPOSSIBILITY OF INFINITE REGRESS

Prior to the application of any legal rule, a court must first determine whether the rule applies. This is step zero.[19] Treating interpretive methodology

16. Love, *supra* note 10, at 2396.

17. Brown, *supra* note 8, at 303; Gluck, *supra* note 12, at 1757 (terming judicial failures to implement legislated interpretive rules "resist[ance]" and the product of "interbranch power struggles").

18. Mitchell, *supra* note 11, at 1091-92. Though Mitchell uses "evasion" specifically to describe the actions of lawyers in the executive branch, he remarks that federal courts have failed to "counter[] the executive branch's evasion," *id.*, and notes that "judicial enforcement of codified clear-statement requirements is sporadic and unpredictable" and "[t]he outcomes in court bear no relationship to a legislature's decision to establish narrow, rule-like, or explicit clear-statement requirements in national-security framework legislation," *id.* at 1098.

19. *Cf.* Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 191 (2006) (identifying *Chevron* step zero as the initial inquiry into whether the *Chevron* framework applies at all); Anthony

as law is no different.[20] To treat an interpretive methodology as law requires that, before applying the methodology, the judge first decide whether the methodology governs the interpretation of the particular statute in the particular case in which it is invoked. The judge cannot rely on the statute itself to determine whether to apply the statute because whether the statutory interpretation methodology in the statute should be applied is precisely what needs to be determined. The judge must instead, therefore, appeal to *some other* source of interpretive authority before applying the methodological framework.[21]

For example, if precedent requires the application of a particular statutory interpretation methodology, deciding whether the methodology should be used to interpret a particular statute depends on that judge's theory of precedent.[22] More importantly, at least for those who advocate *legislated* interpretive rules, if a methodological statute, *M*, tells a judge to apply a particular statutory interpretation methodology to some subset of statutes, a judge interpreting some substantive statute, *S*, must first determine if the statutory interpretation methodology required by *M* applies to the specific statute, *S*. This requires the judge to interpret *M* using an interpretive methodology whose authority is not derived from the directives of *M*.

Not only must the judge interpret *M* without reference to *M* to decide if it applies to *S*, but in the process the judge must also interpret *S* to determine if *S* falls within the class of statutes subject to *M*. While this could be a simple matter (such as deciding whether *S* is a statute at all) it could be as difficult as determining whether *S* is a *penal* statute, or whether the legislature, in enacting statute *S*, intended that *S not* be subject to *M*'s interpretive methodology.

Thus, in applying *M* to *S*, the judge must first apply at least some independent interpretive criteria outside the scope of *M* to determine whether *M* applies to *S*. But, as the next Part explains, certain axioms accepted by all interpreters—textualists and purposivists alike—counsel that in many situations, statutes dictating methodological rules cannot be applied to later substantive statutes without violating important legal norms.

Vitarelli, Comment, *Constitutional Avoidance Step Zero*, 119 YALE L.J. 837 (2010) (describing the same as applied to the constitutional avoidance canon).

20. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (holding that one cannot apply a statute without first construing it).

21. *See* Laurence H. Tribe, *Comment*, *in* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 65, 76-77 (Amy Gutmann ed., 1997).

22. *See* Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987).

II. THE PROBLEMS WITH LEGISLATING STATUTORY INTERPRETATION METHODOLOGY

To interpret statute *S* according to statute *M* demands that a judge first determine whether *M* applies to *S*. This application requires two (and potentially three) inquiries: First, did the legislature that enacted *M* intend for *M* to govern the interpretation of *S*?[23] Second, did the legislature that enacted *S* intend for *S* to be covered by *M*?[24] And, perhaps, third, are there any other reasons (of natural law, separation of powers, or special circumstances) why *M* should not apply to *S*?[25]

These questions reveal that *M*'s scope will often be cabined—with respect to statutes enacted both before and after *M*—to conform with widely held

23. One can quibble about whether the questions should make no mention of legislative "intention," but the inquiries are identical even if references to "legislative intention" are removed and the statutes are considered only in terms of what they "mean" objectively. Since such a construction is odd, I have phrased the questions in this manner instead.

24. Some have argued that this inquiry is unnecessary—that the failure to explicitly repeal *M* means judges should simply apply *M* to *S* without reference to what *S* might otherwise say about the scope of *M* in this particular case. *See, e.g.*, Mitchell, *supra* note 11, at 1071-72; Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665, 1666-68 (2002); Rosenkranz, *supra* note 15, at 2117-18. But this argument rests on two subtle conflations. First, in deciding whether *S* is within the class of statutes covered by *M*, one can either choose to take account of what *S* says about *M*'s applicability *without* recourse to *M*, or, alternatively, apply *M* and *then* attempt to see what *S* says about *M*'s applicability. Whether the interpreter chooses to apply *M* first or not, however, is a step zero issue that has to do with the interpreter's own views about the proper method of interpretation. Thus, those who say "just apply *M* to *S*" are really making a normative point about what *should* be done at step zero, even though these arguments often make it seem as if there is simply no step zero problem at all. *See infra* note 28 and accompanying text. But there is even another conflation at work here. Often, even *if* an interpreter interprets according to *M* and then asks whether *S* is meant to be covered by *M*, it does not resolve the difficult step zero question of whether *S*'s authors meant for *S* to be covered by *M*. It only changes *how* that inquiry is performed. If application of *M* leads to an absurd result, or even if *S* strongly hints that it was not meant to be covered by *M*, the interpreter will probably conclude that *S* was not meant to be covered by *M* even if the interpretation of *S* is being performed through the lens of *M*. This famously occurred in *State v. Gaines*, 206 P.3d 1042, 1046-49 (Or. 2009), in which the Oregon Supreme Court applied its interpretive framework *M* to *S*, saw that it led to an absurdity, and then *disengaged* the framework and ran through the inquiry again to see if *S* was really meant to be interpreted according to *M*. As a final note, it might be pointed out that the amount of space the interpreter is willing to give to the legislature that enacted *S* to repeal *M* by implication is not objectively determined but rather *also* depends on the interpreter's own views about how to engage in statutory interpretation.

25. *See, e.g.*, Riggs v. Palmer, 22 N.E. 188, 189-90 (N.Y. 1889); *see also* RONALD DWORKIN, LAW'S EMPIRE 15-20 (1986) (discussing a similar case).

interpretive norms. There are two reasons for this. First, it is a nearly universal rule of interpretation that the specific governs the general.[26] There are strong policy considerations undergirding this rule, most importantly the problem of unintended consequences.[27] If a legislature enacts a general rule, often it has not foreseen, and cannot foresee, all of that rule's potential implications.

Second, it is a foundational rule of statutory interpretation that no legislature may bind the hands of its successors.[28] Therefore, if a subsequent legislature passes *S* and does not wish for *S* to be interpreted according to *M*'s methodology, the interpreter is at least as bound to honor that choice as he is to honor *M*.[29]

Thus, imagine that after *M* is enacted, a legislature passes *S*. Two obstacles confront the judge applying *M* to *S*. First, it might be difficult to determine if the broad class of statues to which *M* was meant to apply includes *S*. For instance, if *M* requires that federal statutes conferring a federal "right" should be interpreted in a particular manner, the interpreter may be required to ask whether *S* confers a right at all, a potentially difficult inquiry.[30] But even if *S* is

26. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 183-88 (2012); *id*. at 185 (describing how specific provisions in both later and *earlier* statutes should be upheld over general provisions).

27. *E.g.*, Williams v. United States, 327 U.S. 711, 718 n.17 (1946); Rodgers v. United States, 185 U.S. 83, 88 (1902); *Ex parte* Kan-gi-shun-ca, 109 U.S. 556, 570-71 (1883); *see* SCALIA & GARNER, *supra* note 26, at 183 ("[T]hink of it this way: the specific provision comes closer to addressing the very problem posed by the case at hand and is thus more deserving of credence.").

28. Lockhart v. United States, 546 U.S. 142, 148 (2005) (Scalia, J., concurring); *see* Marcello v. Bonds, 349 U.S. 302, 310 (1955); *see also, e.g.*, 1 WILLIAM BLACKSTONE, COMMENTARIES *90 ("Acts of parliament derogatory from the power of subsequent parliaments bind not."); SCALIA & GARNER, *supra* note 26, at 278 ("Resting as it does on sheer logic, the principle dates from time immemorial.").

29. This argument is not the old argument against legislated interpretive rules that says they cannot be binding because they unconstitutionally bind the hands of a later legislature. That argument, as many scholars have correctly pointed out, proves too much. After all, all statutes fundamentally alter the normative universe into which future statutes are passed. *See, e.g.*, Mitchell, *supra* note 11, at 1071-72; Posner & Vermeule, *supra* note 24, at 1666; Rosenkranz, *supra* note 15, at 2118. Rather, the point here is merely to acknowledge what everyone already knows: if a later Congress wants to change the law, it can.

30. This analogy is drawn from a line of cases that begins with *Maine v. Thiboutot*, 448 U.S. 1 (1980). In *Thiboutot*, the Court held that 42 U.S.C. § 1983 creates a cause of action for deprivations under color of state law of federal statutory rights. *Id.* at 11 (Powell, J., dissenting). Admittedly, these statutes are not strictly interpretive in their directives, but for purposes of this analogy, one might think of § 1983 as *M* and a statute that creates a federal statutory right as *S*. The quest to determine what counts as a right might be seen as an embodiment of the difficulty of construing the scope of *M*. *See* JERRY L. MASHAW, RICHARD

interpreted as within the class covered by *M*, the inquiry does not end, for the legislature that passed *S* may not have even considered *M*, and the application of *M* to *S* may fundamentally interfere with *S*'s substantive aims. At this point, a court probably will not apply *M* to *S*, because the general aims of *M* will interfere with the specific aims of *S*.[31]

III. THE ISSUE IN PRACTICE: TWO CASE STUDIES

These problems with legislated statutory interpretation methodology are the principal reason that such rules so often fail. This is not mere postulate. Often, courts' stated reasons for failing to interpret statutes according to legislated interpretive rules track the step zero inquiry.

Scholars who refer to such interpretive difficulties as "reluctance,"[32] "resistance,"[33] and "evasion"[34] underestimate the bind into which mandatory methodologies place judges. These scholars fail to account for the ways in which judges must give effect to the prerogatives of past and future legislatures prior to invoking the interpretive framework at all.

This Part offers two case studies. First, it describes a major Supreme Court national security case, *Hamdi v. Rumsfeld*.[35] Second, it describes the experience of many states in enacting interpretive rules for penal statutes. In each of these case studies, the arguments align: judges, obliged to give effect to the specific intent of one legislature over the general intention of a prior legislature or judicial precedent, "ignored" otherwise legally binding interpretive rules.

A. Hamdi v. Rumsfeld*: A Hard Step Zero Case*

Hamdi v. Rumsfeld was a case decided by the Supreme Court in 2004 that

A. MERRILL & PETER SHANE, ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM 1286-91 (6th ed. 2009).

31. In *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 20 (1981), the Supreme Court held that a statute called the "Developmentally Disabled Assistance and Bill of Rights Act," 42 U.S.C. § 6011 (1976), was not within the scope of 42 U.S.C. § 1983. *Id.* at 27-29. It would be hard for any court to argue that a "Bill of Rights Act" did not confer a right. *See id.* at 33-35 (White, J., dissenting). The Court's rationale, however, was that Congress in passing this statute had not intended for it to fall within the scope of *M*. *Id.* at 18, 31-32. Congress's specific aim was to "create[] funding incentives to induce the States" to provide better care and treatment to the developmentally disabled, "[b]ut . . . do no more than that." *Id.* at 31.

32. Love, *supra* note 10, at 2395.

33. Brown, *supra* note 8, at 303; Gluck, *supra* note 12, at 1750.

34. Mitchell, *supra* note 11, at 1078.

35. 542 U.S. 507 (2004).

posed a difficult step zero problem. Though it involved a complex question of the scope and effect of a prior clear statement statute, hostility to legislated interpretive rules was nowhere to be found.

In *Hamdi*, the Supreme Court was tasked with determining whether the Authorization for Use of Military Force (AUMF), authorizing the President to use all "necessary and appropriate force"[36] against nations, groups, and persons involved in the September 11, 2001, attacks complied with a prior statute, the Non-Detention Act (NDA). The NDA bars the imprisonment or detention of a citizen of the United States "except pursuant to an Act of Congress."[37] By requiring that detention be authorized by "an Act of Congress," the NDA seems to require that Congress clearly state that it intends to authorize citizen detention in accord with the NDA—similar to a congressional "clear statement" rule of the kind Congress has enacted in other contexts.[38]

The AUMF, which only has about one-hundred sixty operative words, devotes sixty of them to declaring the AUMF to be "specific statutory authorization" for the President to engage in hostilities under the War Powers Resolution (another statute with a clear statement requirement). The AUMF, however, mentions neither detention nor the NDA explicitly.[39] Even though the NDA and the AUMF speak in plain terms—one barring detention without an "Act of Congress," one authorizing the President to use "all necessary and appropriate force"—the statutes are difficult to reconcile.[40]

The question in *Hamdi* could not be resolved by simply asking what the NDA had to say about how to interpret the AUMF. Rather, the case called on each Justice to apply her own ideas about the proper method of statutory interpretation.[41] That is, the debate occurred at step zero. Two Justices (Justices Souter and Ginsburg) held that the AUMF did not comply with the NDA,

36. Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 (2006)).

37. 18 U.S.C. § 4001 (2006).

38. *See* Mitchell, *supra* note 11.

39. *See* 50 U.S.C. § 1541(2)(b) (2006).

40. One might legitimately question whether the Non-Detention Act (NDA) is properly regarded as a methodological statute. But it is a binding prohibition on interpreting some subset of statutes a certain way. If a statute is vague but might be interpreted as licensing citizen detention, the NDA instructs courts to disfavor this interpretation. In other words, it requires that Congress speak clearly if it wishes to authorize detention.

41. For instance, Justices Ginsburg and Souter consulted legislative history, while Justice O'Connor and the plurality largely ignored it. Neither side commented on the implications to be drawn from the fact that the AUMF devoted over a third of its operative provisions to complying with the War Powers Resolution—though one could argue its implications under the NDA either way.

three Justices signed opinions that did not comment (Justices Stevens, Scalia, and Thomas), and the plurality held that it complied (Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Breyer), but also seemed to imply that even if it had not, the AUMF was not governed by the NDA.[42]

Justices Souter and Ginsburg engaged in a classic step zero analysis. First, they argued that the NDA's enactors meant for its prohibitions to be read broadly, because it was enacted in light of *Korematsu v. United States*[43] and the internment of Japanese Americans during World War II,[44] was enacted at a time when Congress was enacting many clear statement rules,[45] and was meant to safeguard liberty.[46] They then argued that the AUMF was not intended to comply with or repeal the NDA, because it was framed in general terms and related to the use of military force, and did not specifically reference detention, as they thought the NDA required.[47]

The plurality strongly disagreed. Finding it unnecessary to definitively construe the scope of the NDA,[48] they thought the terms "necessary and appropriate force" in the context of an authorization for military force were sufficiently clear to authorize detention even if the NDA had required greater clarity.[49] The plurality held that "it is of no moment that the AUMF does not use specific language of detention . . . [b]ecause detention . . . is a fundamental incident of waging war."[50]

In other words, even if the NDA explicitly required that Congress enact specific statutory language to comply with its terms, the question would still have been a close one. One could argue—and the plurality in *Hamdi* did argue—that it would make little sense to authorize "all necessary and appropriate force" without intending to grant the President the power to

42. Hamdi v. Rumsfeld, 542 U.S. 507, 508 (2004) (describing the distribution of joins, concurrences, and dissents in the case).

43. 323 U.S. 214 (1944).

44. *Hamdi*, 542 U.S. at 542 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

45. *Id*. at 544.

46. *Id*. at 544-45.

47. *Id*. at 545-46.

48. *Id*. at 517 (O'Connor, J., plurality opinion).

49. *Id*. at 518.

50. *Id*. at 519.

detain – even if the NDA required such clarity.[51]

Hamdi reveals the difficulty that arises when a present Congress confronting a perceived need enacts a law written in general terms, possibly overlooking several statutes imposed by past legislatures designed specifically to require it to act more methodically and carefully. The resulting interpretive mire is not reluctance or resistance, but struggle: struggle to weigh competing values that the imposition of the prescribed interpretive rule cannot, of its own force, overcome.

B. Rules for Interpreting Penal Statutes[52]

Eleven states have repealed the judicial common law rule of lenity, and at least five others have statutes that seem to abrogate the rule at least in part.[53] In addition, twenty-four states have implemented the Model Penal Code's interpretive rules.[54] Yet, in all of these states, courts have regularly failed to apply the legislated interpretive rules.[55] Moreover, many of them have couched their difficulties not in terms of resistance, but instead in terms of fidelity to legislative intention and rule-of-law values intrinsic to step zero.

When courts narrow lenity-repealing statutes, they expose the same structural tensions that animate step zero analysis in other contexts, imputing to the legislature that enacted the lenity-repealing statute an intent to comply with the settled rule-of-law norms that animate the rule of lenity itself, arguing that the legislature that repealed the rule of lenity could not have intended the repeal to apply to the facts of this *particular* case. In doing so, courts have in essence been applying the rule of lenity in their readings of the lenity-repealing statutes.[56] Some courts have said this explicitly. In *State v. Pena*, for example, the Arizona Court of Appeals wrote: "[W]here the [repealing] statute itself is susceptible to more than one interpretation, the rule of lenity dictates that any

51. *See id.* at 518-19. That is, even if *M* (the NDA) *had* applied to *S* (the AUMF), the plurality seemed prepared to hold that the AUMF's authors did not mean for the NDA to apply to the AUMF and therefore that the NDA did not restrict the AUMF.

52. This case study is adapted from Brown, *supra* note 8, and Love, *supra* note 10, at 2397-98.

53. Love, *supra* note 10, at 2395.

54. Brown, *supra* note 8, at 289-90.

55. *Id.* at 297; Love, *supra* note 10, at 2399-2403.

56. Love, *supra* note 10, at 2398-99 (explaining the reasoning in *Keeler v. Superior Court*, 470 P.2d 617, 625-26 (Cal. 1970)); *see also* Solan, *supra* note 14, at 123-24 (noting the same phenomenon).

doubt should be resolved in favor of the defendant."[57] As Professor Lawrence Solan has elsewhere observed, even though New York has had a lenity-repealing statute for more than a hundred years, "New York courts continue to impose lenity when they have nothing better to say about how a statute should be interpreted."[58] And both Solan and Jeffrey Love note that *Keeler v. Superior Court*,[59] a frequently cited California case, was decided on lenity grounds despite the state's 1871 statute repealing the rule of lenity.[60] The court in *Keeler* famously interpreted the lenity-repealing statute—which was broadly worded, commanding courts to interpret statutes "according to the fair import of their terms, with a view to effect its objects and to promote justice"[61]—as consistent with the use of the rule of lenity.[62]

States that have adopted the Model Penal Code's (MPC) interpretive provisions have seen their courts repeatedly argue that subsequent legislatures enacting penal statutes did not intend for their statutes to be read according to the interpretive conventions set out in the MPC. As a result, these courts have not used the MPC's conventions to interpret more recent statutes even though the MPC's interpretive provisions are on the books.[63] For example, the Oregon Supreme Court concluded that it would not apply the default MPC rules in *State v. Rutley* because, even though it had "stated that statutory silence alone is not a sufficiently clear indication of legislative intent to dispense with a culpable mental state," the crime's seriousness left no doubt that the legislature intended strict liability.[64] The Connecticut Supreme Court concluded that the absence of a term *was* sufficient to imply that the legislature intended strict liability even though the state had adopted the MPC interpretive rules. The court reasoned that, although the rules seemed to require the court to presume the underlying element of the crime required one to act with knowledge, "[o]rdinarily, the mental state required by a statute is expressly designated"[65]—a convention strong enough to override the state's statutory

57. State v. Pena, 683 P.2d 744, 748-49 (Ariz. Ct. App. 1983), *aff'd*, 683 P.2d 743 (Ariz. 1984).

58. Solan, *supra* note 14, at 125.

59. *Keeler*, 470 P.2d 617.

60. *See* Solan, *supra* note 14, at 126-27; Love, *supra* note 10, at 2398-99.

61. CAL. PENAL CODE § 4 (West 2012).

62. *Keeler*, 470 P.2d at 625-26.

63. Brown, *supra* note 8, at 298-307 (explaining the approaches in a variety of state court judicial opinions that follow this model).

64. State v. Rutley, 171 P.3d 361, 364-65 (Or. 2007).

65. State v. Denby, 668 A.2d 682, 685 (Conn. 1995). This is not necessarily an unusual interpretive move. The United States Supreme Court has made similar moves, once holding

commitment to the MPC. The Ohio Court of Appeals simply held that important criminal law values would not be served by applying the MPC interpretive provisions to a particular criminal statute, and thus interpreted the statute as not intended to come within those provisions.[66]

Professor Darryl Brown sees these cases as clear evidence of "interpretive strategies that avoid or undermine their state codes' MPC culpability presumptions."[67] But the courts in deciding these cases do not cast their decisions in such terms. They seem to say the opposite: that while aware of the MPC statutes on the books, the legislature that enacted a particular criminal statute did not draft it in compliance with the MPC interpretive rules.[68] Professor Brown himself argues that these interpretive moves are the result of a shift in society's criminal law norms.[69] But if norms *have* shifted, and these courts are merely attempting to give effect to statutes as the legislatures that enacted them intended, it is difficult to see these courts' interpretive moves as avoidance and resistance rather than faithful agency in the truest sense.

CONCLUSION

The interpretive problem outlined in this Comment will not arise with most statutes in most cases. This is because most statutes will yield the same conclusions under any interpretive canon. But in hard cases, precisely where a binding interpretive rule is most likely to alter the outcome, interpreters are also most strongly pulled to give weight to the specific aims of a later legislature rather than the more general structural aspirations of a legislature or court in the more distant past. Without evidence that the legislature intended its statute to be interpreted according to a particular interpretive framework, strong interpretive norms drive judges to give effect to specific substantive aims at the expense of interpretive purity.

The purpose of this Comment is not to argue that methodology can never be law-like. I instead seek to show that the adoption of a methodological

that cigarettes were not "drug delivery devices" in the face of unmistakable statutory text. *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000) ("It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" (quoting Davis v. Mich. Dep't of Treasury, 489 U.S. 803, 809 (1989)).

66. State v. Ward, 637 N.E.2d 16, 19 (Ohio Ct. App. 1993) (rejecting a defendant's argument that the court should read a mental state into a criminal statute).

67. Brown, *supra* note 8, at 303.

68. *See, e.g.*, *Denby*, 668 A.2d at 685; State v. Wac, 428 N.E.2d 428, 428-31 (Ohio 1981); *Rutley*, 171 P.3d at 365.

69. Brown, *supra* note 8, at 331-33.

framework depends more on the cooperation of subsequent legislatures than the fidelity of future interpreters.[70] It is possible to create a stable methodological consensus between courts and legislatures such that application of statute *M* to all or nearly all statutes *S* is an accepted norm that carries nearly the weight of law. In that situation, legislatures implicitly adopt, acknowledge, and draft within the legislated or judicially created interpretive framework—perhaps achieving the best of all possible outcomes. Indeed, this has happened before. The evolution of judicial review of agency action through the *Chevron* deference doctrine is an excellent example of the successful evolution of a shared interpretive norm.[71]

The focus of debates over the nature of methodological statutes might therefore benefit from a shift away from arguments over whether methodological statutes are or can be "law" to a discussion more focused on how to make these statutes stick. Methodological statutes seem to benefit from specificity, though specificity by its very nature limits the number of statutes to which methodological guidance might apply. The background norms a methodological statute intends either to cement or to upend also seem to factor importantly into its success. Some methodological statutes, such as those codifying administrative law norms, appear sticky, while others, such as those attempting to modify criminal law norms, seem to slip. A study of the factors contributing to stickiness could prove fruitful, perhaps moving the conversation beyond the conventional account of judicial resistance and closer to one sensitive to the difficulty and complexity that inheres in interpretation step zero.

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70. *Contra* Gluck, *supra* note 12, at 1822–24 (arguing that results from state courts seem to show that courts can impose a binding interpretive framework on the legislature and "stick with it" even in the absence of consensus).

71. Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside: An Empirical Study of Legislative Drafting, Delegation and the Canons*, 65 STAN. L. REV. (forthcoming 2013) (explaining that United States congressional drafters know about and draft according to *Chevron*).

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