

Statutory Interpretation- Then and Now

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A common contemporary opinion, shared by academics and many practicing lawyers, holds that neither judges nor teachers of law have produced an adequate theory of statutory interpretation. Critics of the current situation maintain that the existing approaches are overly complicated and sometimes internally inconsistent. This critical opinion seems to be shared, for example, by three prominent American judges who began their careers as academics: the late Supreme Court justice, Antonin Scalia, and current federal circuit court judges, Guido Calabresi and Richard Posner.¹ They have all criticized existing approaches and they have all made suggestions for improvement.

This negative view is not peculiar to academic lawyers and judges in the United States. It is shared by thoughtful Canadian observers. A recent

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¹ Antonin Scalia, *A Matter of Interpretation* (Princeton: Princeton University Press, 1997) at 16 (“So utterly unformed is the American law of statutory interpretation that not only is its methodology unclear, but even its very objective is.”); Richard Posner, “Statutory Interpretation – in the Classroom and in the Courtroom” (1983) 50:2 U Chicago L Rev 800 at 802 & 817 (describing his attack on current approaches to statutory interpretation as a “Jeremiad” and suggesting a better approach based on judicial “imaginative reconstruction” of the legislative intent). See also Guido Calabresi, *Common Law for the Age of Statutes* (Cambridge, MA: Harvard University Press, 1982) at 146-66 (advocating adoption of a “common law approach” under which judges could modify or even abandon obsolete statutes).

study based on the opinions of the Canadian Supreme Court during the 1990s, for example, concluded that the judges had taken “seven different approaches to statutory interpretation, many of which are inconsistent.”² The author concluded by recommending a fuller consideration of the strengths and weaknesses of each of these seven approaches in search of more satisfactory ways of construing statutes. He is not alone among Canadian commentators in thinking that courts could do better than they have so far.³

This subject is also an appropriate one in a Lecture Series devoted to the history of law. Statutory interpretation itself has a long history. There is nothing new about controversies revolving around the question of how the texts of statutes should be read and applied in contested cases. Interest in statutory interpretation, including its past, is widely shared, and I reacted to the kind invitation to speak in a Lecture Series honoring Professor DeLloyd Guth by considering what light history might shed on this much disputed subject. In my case, the invitation provided an opportunity to examine modern Canadian approaches to this subject and to compare them with those applied in the legal system in force throughout Europe before 1800.⁴

² See David Elliott, “Khosla – Still Searching for that Star” (2009) 33:2 Man LJ 211; see also Geoff R Hall, “Statutory Interpretation in the Supreme Court of Canada: The Triumph of a Common Law Methodology” (1998) 21:1 Advocates’ Q 38; Anver M Emon, “On Statutory Interpretation and the (Canadian) Rule of Law: Interpretive Presumptions as Boundary Setting” (2015) 3:1 Theory & Practice of Legislation 45.

³ See Pierre-André Côté, *The Interpretation of Legislation in Canada*, 4th ed (Toronto: Carswell, 2011) at 469-548 (describing a “Pragmatic Method”); Randal N Graham, *Statutory Interpretation: Theory and Practice* (Toronto: Emond Montgomery Publications, 2001) at 31-41 (describing a “Dynamic Interpretation”); Stéphane Beaulac, *Handbook on Statutory Interpretation: General Methodology, Canadian Charter, and International Law* (Markham, Ont, LexisNexis, 2008) at 1-3.

⁴ Encouraging also is the successful use of a comparative approach reaching across different countries: D Neil MacCormick & Robert S Summers, *Interpreting Statutes: A Comparative Study* (Aldershot: Ashgate Publishing Co 1991).

I. THE EUROPEAN *IUS COMMUNE*

That legal system was the *ius commune*.⁵ An amalgam of Roman law, canon law and general custom, it governed legal education and shaped legal practice in courts throughout Western Europe before the era of Codification.⁶ It was the *ius commune* that furnished the basic source of law in courts and in university law faculties throughout most of Europe, beginning with the recovery of the Roman law's Digest at Bologna in the eleventh century,⁷ and continuing with the expansive growth in the canon law, the law of the church, that began with the compilation of Gratian's *Decretum* in the twelfth century and reached its early maturity with the Gregorian Decretals in the thirteenth.⁸ The *ius commune* was not without influence even in England.⁹

⁵ See Manlio Bellomo & Lydia G Cochrane trans, *The Common Legal Past of Europe 1000-1800*, (Washington, DC: Catholic University of America Press, 1995); Harold J Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, MA: Harvard University Press, 1983) at 85-224.

⁶ The following abbreviations are used herein to refer to the basic texts of the Roman and canon laws:

Dig 1.1.1	<i>Digestum Justiniani</i> , Lib 1, tit 1, lex 1
Cod 1.1.1	<i>Codex Justiniani</i> , Lib 1, tit 1, lex 1
Auth 1.1	<i>Authenticum</i> , Coll 1, tit 1
Dist 1 c 1	<i>Decretum Gratiani</i> , Distinctio 1, can 1
C 1 q 1 c 1	-----, Causa 1, quaestio 1, can 1
X 1.1.1	<i>Decretales Gregorii IX</i> , Lib 1, tit 1, cap 1
VI 1.1.1	<i>Liber Sextus</i> , Lib 1, tit 1, cap 1
<i>Gl. ord.</i>	<i>Glossa ordinaria</i> (standard commentary on texts).
v	reference to word used to mark location in commentary

⁷ See, e.g., Michele Graziadei, "Comparative Law as the Study of Transplants and Receptions" in Mathias Reimann & Reinhard Zimmermann eds, *Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2006) at 441-75.

⁸ Gratian is known as the compiler of the *Concordia discordantium canonum* (c 1140), the first systematic collection, coupled with juristic commentary, of the canons of the medieval and early church. It formed the first half of the *Corpus iuris canonici*, the basic sourcebook of the canon law throughout the period covered by this essay. For a description and coverage of controversial recent developments in our understanding of its compilation, see Anders Winroth, *The Making of Gratian's Decretum* (Cambridge: Cambridge University Press, 2004) and Peter Landau, "Gratian and the Decretum

The *ius commune* provides a suitable subject for examination for another reason. The thirteenth and fourteenth centuries experienced an outpouring of statutes that gradually displaced local customs as the principal source of law on the European continent.¹⁰ It is sometimes assumed that problems of interpreting statutes are a unique product of the huge numbers of statutes that have become typical in modern legal regimes.¹¹ So it may seem. However, although it is certainly true that the scale of statutory change is much greater today than it was in 1300, the problem itself is not new. Medieval rulers and representative assemblies enacted statutes regulating many areas of commercial and social life.¹² New enactments also came from medieval popes and church councils. From the thirteenth century forwards, European courts therefore faced many of the same problems of statutory interpretation that courts face today.¹³ Comparing the approaches to that task taken by these two legal systems might, I thought, produce insights into the possible ways of dealing with an enduring problem.

Gratiani,” in Wilfried Hartmann & Kenneth Pennington eds, *History of Medieval Canon Law in the Classical Period, 1140-1234: From Gratian to the Decretals of Pope Gregory IX* (Washington, DC: Catholic University of America Press, 2008) at 22-54.

⁹ See, e.g., Basil Markesinis, “Our Debt to Europe: Past, Present and Future” in B Markesinis ed, *The Clifford Chance Millennium Lectures: the Coming Together of the Common Law and the Civil Law* (Oxford and Portland, OR: Hart Publishing, 2000) at 37-66.

¹⁰ Armin Wolf, *Gesetzgebung in Europa 1100-1500: Zur Entstehung der Territorialstaaten*, 2d ed (Munich: C H Beck Verlagsbuchhandlung, 1996). It contains a full bibliography listing the printed editions of statutes and a bibliography of modern scholarship on the subject.

¹¹ Calabresi, *supra* note 1 at 3-7.

¹² See Mario Ascheri, *The Laws of Late Medieval Italy (1000-1500): Foundations for a European Legal System* (Leiden: Brill, 2013); Randall Lesaffer, Jan Arriens trans, *European Legal History: A Cultural and Political Perspective* (Cambridge: Cambridge University Press, 2009) at 275-78.

¹³ See Ennio Cortese, “Équité et Justice: La dynamique bipolaire du droit au Moyen Âge” in Bernard d’Alteroche et al eds, *Mélanges en l’honneur d’Anne Lefebvre-Teillard* (Paris: Éditions Panthéon-Assas, 2009) at 299-313.

II. THE *IUS COMMUNE* AND PRINCIPLES OF AUTHORITY

At first sight, however, the starting point of at least the Roman law half of the *ius commune* appears to have been very different from that of modern law. It actually appears to have excluded statutory interpretation. The Emperor Justinian, by whose authority and in whose name the *Corpus iuris civilis* was compiled and promulgated in the 530s, specifically prohibited the creation and use of interpretive commentaries on the laws found within its books.¹⁴ So complete and accurate had been the work of Tribonian and his co-workers, the Emperor asserted, that nothing should be added to or subtracted from it. And if any imperfections were to be found within it, which seemed unlikely, they were to be remedied by recourse to imperial authority, not by consulting the views of jurists. This principle was summed up by the maxim: “The power to interpret the law belongs to the one who establishes the law” – a bedrock principle of the separation of powers.¹⁵ The texts in the Justinianic compilation were meant to be authoritative statements of the law, and the Emperor assumed they had done so fully. No more would be needed. This statement appeared to preclude statutory interpretation in Roman law, and something quite close to that same statement of principle would also appear later in the texts of the medieval canon law.¹⁶

In this case, initial appearances created by these texts turned out to be deceptive. The prohibitions against juristic interpretation did not determine what actually happened. In fact, seeds that sprouted and in time gave rise to a complex body of law of statutory interpretation appeared within the *Corpus iuris civilis* itself. The first book of the Digest contains a separate title devoted to the definition and proper understanding of statutes and other laws.¹⁷ What it contained might even be described as a distant ancestor of the current Federal and Provincial *Interpretations Act* in

¹⁴ See the Constitution *Tanta*, Dig Proem III, nos 18 and 21. Its text with translation is also found in Alan Watson, *Digest of Justinian*, vol 1 (Philadelphia, PA: University of Pennsylvania Press, 1985) at lxi, lxiii.

¹⁵ Cod 1.14.12: “Eius est interpretari cuius est condere”.

¹⁶ C 25 q 2 c 19 (establishing the inviolability of the *statuta patrum*).

¹⁷ Dig 1.3.1-41.

force in Canada.¹⁸ The two embody some quite similar provisions,¹⁹ as well as some that appear to be dissimilar.²⁰ The general characteristic they do share is that both lay out the principles meant to be used in interpreting statutes. Subsequent experience also shows that both of them left a wide opening for creative interpretation by lawyers and judges. It is not off the mark to say that if there ever was a legal system dominated by the views of academic commentators, that system was the European *ius commune*. Whatever the Emperor Justinian himself may have wished, later experience showed that the jurists within the traditions of the *ius commune* did indulge in quite extensive statutory interpretation. They faced many of the same tasks of interpreting statutes that judges do in Canada today, and they responded to the challenge in several ways that invite comparison one to the other.

III. THE PLAIN MEANING RULE

A comparison of these two legal regimes should begin with a feature they shared: the “plain meaning” rule.²¹ The two systems both adopted and made use of it. This rule means simply that judges should look no further than the words of the text itself in interpreting statutes, giving statutory terms the meaning they have in ordinary discourse. Dictionaries and common understandings should be the basic guides. Of course, some room had to be left for obvious drafting errors,²² but under this rule, recourse to scientific complications, policy arguments, speculation about

¹⁸ See *Interpretation Act*, RSC 1985, c 1-21; for juristic commentary on this Act, see M David Keeshan & Valerie Steeves eds, *Federal and Ontario Interpretation Acts* (Toronto: Carswell Publishing, 1996).

¹⁹ E.g., RSC 1985, c 1-23, s 11 (remedial acts to be given liberal construction to assure that they attain their purpose); Dig 1.3.12 (use of analogical reasoning to secure the purpose of the act).

²⁰ E.g., Dig 1.3.31 (the emperor not bound by the texts of the laws).

²¹ It is also described as “the ordinary meaning” or “the literal meaning” of a statute. See *Halsbury’s Laws of Canada*, 1st ed (Markham, ON: LexisNexis Canada, 2008) HLG-58-59.

²² See, e.g., *United States of America v Allard* [1991] SCJ No 30 at 867, [1991] 1 SCR 861, at 867 (SCC); see also the discussion in F A R Bennion, *Understanding Common Law Legislation* (Oxford: Oxford University Press, 2001) 47-52.

probable legislative intent – that is anything extraneous to the generally accepted understanding of the words of a statute itself – is both unnecessary and illegitimate.²³ Only if the words themselves admit of doubt as to their accepted meaning so that they themselves are inherently ambiguous, are judges free to look further. This has been called “the cardinal rule of statutory construction” in the United States,²⁴ and support for that view can also be found in decisions of the Canadian Supreme Court.²⁵

Though subject to academic criticism on both sides of the border, the rule is regularly invoked in modern judicial opinions. Thus, the word “nut” used in the *Canadian Customs Act* has been held to include peanuts despite the fact that several botanists, who testified at length during a court’s hearing on the subject, instructed the court that peanuts are more accurately classed as fruits or vegetables. According to the experts, they were not nuts at all.²⁶ This argument failed. Only if the words used in the statutes were ambiguous, the Exchequer Court held, should recourse be had to anything else in interpreting the act. In common ways of speaking, the meaning of the term “nut” was not ambiguous. It included peanuts and the legislature therefore must have been meant to include them in the *Customs Act*.

The sensible character of this case’s result has not insulated the “plain meaning” approach from criticism. Commentators have repeatedly criticized its overuse, sometimes even its existence.²⁷ They say it rests on a false premise. It supposes that judges can distinguish ambiguous from unambiguous texts. Critics have also said that it overlooks an important feature of legislation, namely that societal norms and broader purposes

²³ So formulated in *Black’s Law Dictionary* 10th ed, v Plain-meaning rule (St. Paul, MN: Thomson Reuters, 2009) 1336.

²⁴ *Western Union Tel Co v FCC*, 665 F 2d 1126 at 1137 (DC Cir 1981).

²⁵ See e.g. *Canada v Antosko*, [1994] 2 SCR 312 at 326-27 (rejecting alternate methods of interpretation “where the words of the statute are clear and plain”). The basic guide to and exploration of this approach, together with the exceptions to it derived from Canadian and English precedents, is E A Driedger, *Construction of Statutes*, 2d ed (Toronto: Butterworths, 1983) 1-87.

²⁶ *R v Planters Nut and Chocolate Co Ltd* [1951] Ex CR 91, 1951 CarswellNat 250.

²⁷ See Sherwin Lyman, “The Absurdity and Repugnancy of the Plain Meaning Rule of Interpretation” (1968-69) 3:2 *Man LJ* 53; William Baude & Ryan D Doerfler, “The (Not so) Plain Meaning Rule” (2017) 84:2 *U Chicago L Rev* 539.

almost always lie behind statutory enactments.²⁸ There can, therefore, be no legitimate reason “to exclude them from consideration” in the process of statutory interpretation. Application of a “plain meaning” rule is a comparatively easy rule for judges to invoke, but at least in the view of its many critics, there can be “no justification” for its use to exclude a more thoughtful judicial approach, one based on a consideration of the law’s underlying purpose. They propose a “modern contextual approach” instead.²⁹ Maybe so, but it is fair to say that academic criticism like this has had only a limited impact on the case law. The “plain meaning” approach to statutory interpretation has been difficult to dislodge from the opinions of judges. They must find it useful.

When we look to the subject’s history, it is clear at once that something like the same rule was applied in the *ius commune*. The general principle was stated clearly in the Roman law Digest. In ordinary circumstances, the Roman held, “it is not right to depart from the meaning of the words without manifest proof that something else had been intended.”³⁰ The canon law contained a similar statement of principle. Statutes were to be applied without regard to the speculations of academic jurists.³¹ They were to be understood “according to the ordinary way of speaking.”³² This approach to statutory interpretation was supported in the most influential medieval treatise on procedural law, one compiled by William Durantis (d 1296).³³ Introductory legal works designed for the use of law students also stated it – later compilations like the commentary on the Roman law’s Institutes by Joannes Schneidewein (d 1569). “Statutes,” he wrote “are to be properly and strictly interpreted”

²⁸ See the lengthy discussion in Pierre-André Côté, Mathieu Devinat & Stéphane Beaulac, *The Interpretation of Legislation in Canada*, 4th ed (Toronto: Thompson Reuters, 2011) at 301-315; see also Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham, ON: LexisNexis Canada, 2014) at §1.20.

²⁹ See *Manulife Bank of Canada v Conlin* [1996] 3 SCR 415 at 438, 1996 CanLII 182 (SCC), L’Heureux-Dubé, J (dissenting).

³⁰ Dig 32.69.1: “Non aliter a significatione verborum recedi oportet, quam cum manifestum est aliud sensisse testatorem.”

³¹ C 25 c 2.11.

³² X 2.1.9 and Panormitanus (Nicholaus de Tudeschis) (d 1445/53), *Commentaria in libros decretalium*, ad id, no 2: “Statuta intelliguntur secundum usum loquendi.” (Venice 1615).

³³ *Speculum iudiciale*, Lib II, Pt 2, tit. *De requisitione consilii*, no 14, v. *Quid si est statutum* (Basel 1574).

by applying their normal meaning whenever suits are brought to enforce their terms.³⁴ Statements to that effect also appeared in the context of the criminal law, where the judicial policy of lenity might have been regarded as more appropriate. The accepted view held that no one should be convicted of a crime without a clear statutory warning that specific conduct constituted a crime. The “plain meaning” approach to statutory construction fit within this category,³⁵ because it assumed that defendants would have read criminal statutes in their commonly accepted sense. So understood, that is what they were obliged to obey.

The same “plain meaning” rule – that statutes should be interpreted as they were commonly understood – was applied outside the criminal context. So, for example, a Genoese statute in the sixteenth century required the loser in a prior lawsuit was obliged to pay the winner’s costs even if the loser had had a legitimate cause for taking the position he had. This provision was challenged in a case that came before the Genoese Rota as contrary to the ordinary rule in the *ius commune* by which the losing party bore the costs of the other party only if loser’s position in the litigation had been unwarranted. Conceding that the Genoese statute “seemed iniquitous”, the judges of the Rota nevertheless upheld its application. The words of the statute themselves contained no ambiguity. For that reason, its words “were not to be receded from.”³⁶ If legislation was to be overturned or changed, it must be the legislator who supplied the adjustment, not the judges. So ran an oft repeated refrain in many European cases.³⁷

³⁴ Schneidewein (Ointomos), In *quatuor libros institutionum imperialium commentarii*, Lib. IV, tit 6, no 20 (Venice 1701).

³⁵ E.g., Octavianus Cacheranus (d 1580), *Decisiones sacri senatus Pedemontani*, Dec 88, no 2: (Frankfurt 1599): “quia ubi non est culpa ibi regulariter non debet esse poena.”

³⁶ Flaminio Cartari (d 1593), *Decisiones Rotae causarum executivarum reipublicae Genuensis*, Dec 1, no 5 (Mainz 1604): “[A] verbis enim statuti recedendum non est.”

³⁷ E.g. Christinaeus Mechlinensis (d 1631), *Practicanum Quaestionum rerumque in supremis Belgarum curiis actarum et observatarum* Lib I, tit 14, dec 62 (Antwerp 1671): assertion that the contrary practice would not be to follow the law but to change it (“non legem sequi sed eam mutare”).

IV. IMPOSSIBLE, ABSURD, CONTRADICTORY, AND INIQUITOUS STATUTES

There were always exceptions to this “plain meaning” understanding of legislation within the *ius commune* itself, just as there are also exceptions in Canada today. This common feature of both laws provides a second subject for comparison – construction of statutes to avoid absurd consequences or manifest injustice. The jurisprudential principle that excludes from the ordinary rule a statute that leads to an iniquitous result has a long history, even in English common law.³⁸ As Sir John Baker recently explained, the English legislature can be presumed to have possessed good intentions in enacting a statute.³⁹ This presumption should, therefore, guide a statute’s interpretation. Where the words of the statute seem to require an iniquitous or unjust result, judges retain a freedom and even an obligation to read them to avoid that consequence. At least in the absence of clear and unambiguous language, legislators should not be presumed to have intended an absurd or an unfair result. More likely, they themselves would have wished judges to go beyond the words of a statute to embrace what their true and just intent had been.

Canadian law seems to have embraced virtually the same principle of statutory construction. Thus, the wording of the *Forest Act*, which allowed logging operators to enter upon and appropriate “any land” for access to their timber was held not to include land already in use as a service road by another logging company.⁴⁰ That cannot have been the legislature’s intent, the court held, for “members of the Legislature are elected by the people to protect the public interest, and that means acting fairly and justly in all circumstances.” Judges thus say that a legislative body may act illogically or even unjustly if it chooses to do so, but in the absence of airtight language, the judges will interpret enacted statutes under the assumption that the legislators did not intend such an untoward result. Limits of legislative oversight – the impossibility of foreseeing all situations

³⁸ Edward Coke (d 1634), *Commentary Upon Littleton* *283b: “Qui haeret in litera haeret in cortice” (He who clings to the letter, clings to the shell).

³⁹ J H Baker, *Introduction to English Legal History*, 4th ed (London: Butterworths, 2002) at 207-12; Bennion, *Understanding*, *supra* note 22 at 103-05.

⁴⁰ *Waugh v Pedneault*, 1948 CarswellBC 96, 1 WWR 14.

that might be covered by general language – must be the explanation for many a statute’s wording. Courts have the power to correct those limitations, and they should.

Like the plain meaning rule, this approach has long been subject to serious criticism.⁴¹ It can be used to override the clear wording of a statute, and thus to threaten the principle of legislative sovereignty. What, after all, constitutes an “absurdity”? It is not an easy term to define. Answering that question leads to a “lengthy and vexed history.”⁴² Perhaps it is unsurprising that the evidence from the history of the *ius commune* shows that its history has indeed been even longer and more vexed than one might suspect. There is nothing new about this problem. The history of this principle of statutory interpretation is well illustrated in the history of the European *ius commune*. It is most familiar to American law students from a source some of you may know, the famous (and controversial) early American case, *Riggs v. Palmer*.⁴³ It held that the young man who had murdered his uncle was not entitled to a share of his estate even though the words of the applicable Statute of Descent and Distribution clearly entitled him to inherit. It appears that the law of Canada is the same.⁴⁴ *Riggs v. Palmer* is usually treated as a controversial decision.⁴⁵ It comes as a surprise, therefore, to discover that an early case from a European court produces an almost identical case. It was a judicial decision from Portugal in the late 1600s, holding that the killer could not succeed to his victim’s estate “even though he was entitled to [do so] by the terms of the statute.”⁴⁶

⁴¹ E.g., Driedger, *Construction of Statutes*, *supra* note 25 at 31: “The mere fact that a result appears to be anomalous is no justification for departing from the clear meaning.”

⁴² Sullivan on Construction, *supra* note 28 at § 10.1. See also Kent Greenawalt, *Legislation: Statutory Interpretation: 20 Questions* (New York: Foundation Press, 1999) at 71-74, arguing that the results are often “too subjective to be made by officials who are not representative.”

⁴³ *Riggs v. Palmer*, 115 NY 506 (1889).

⁴⁴ See *Re Shulman*, 1918 CarswellSask 169, [1919] 1 WWR 62, no 8.

⁴⁵ See e.g., Ronald Dworkin, *Law’s Empire* (Cambridge, MA: Harvard University Press, 1986) at 15-20.

⁴⁶ Georgius de Cabedo (fl 1600), *Practicarum observationum sive decisionum supremi senatus regni Lusitaniae, Pars secunda* Dec 81, no 20 (Antwerp 1620): “Item occisor non succedit occiso etiamsi sit ille proximus vel coniunctus, quamvis ex forma statuti

This was one of the roles that the law of nature played in medieval law. Although it shared some features of a modern constitution, natural law was not treated as allowing judges to invalidate statutes that violated its tenets. In fact, many statutes did violate natural law and were nevertheless enforceable – statutes enacting the rule of primogeniture in the descent of family property, for example.⁴⁷ However, medieval and early modern judges did enjoy a considerable freedom in interpreting statutes according to the tenets of the law of nature. Thus statutes that effected a taking of private property for a public purpose were valid, but they were ordinarily read to require that just compensation be paid to the person from whom the property was taken, even if no such requirement was to be found in the statute.⁴⁸ Taking another’s property without any fault on the part of that person violated a principle of just government. It was a principle grounded in natural law, and when a statute did that, the reasonable and common assumption was that the legislator must simply have omitted the requirement of just compensation by mistake or oversight. No particular ambiguity in the wording of the statute itself had to be discovered for this result to be reached. The rule was applied more broadly to statutes whose wording was general. A statute restricting the inheritance of property to male descendants, for instance, might be interpreted to have no application to situations where a decedent had left only daughters behind.⁴⁹ It could be treated as a *casus omissus*, thus permitting the daughters to take a share of their parent’s estate instead of passing to collateral relatives or the fisc.

deberet succedere.”

⁴⁷ Natural lawyers sometimes drew a distinction between “mutable” and “immutable” parts of that law, allowing more freedom of action to legislators in the former than the latter, but that line was never firm. See, e.g., Joannes Baptista Fenzonius (fl 1630), *Annotationes sive ius municipale Romanae urbis* C 196, nos 99-100 (Rome 1636): “Valida semper sunt statuta, licet repugnent iuri positivo vel iuri naturali mutabili, secus vero si repugarent iuri divino vel iuri naturali immutabili.”

⁴⁸ See R H Helmholz, *Natural Law in Court: A History of Legal Theory in Practice* (Cambridge, MA: Harvard University Press, 2015) at 148-49.

⁴⁹ Andreas Gaill, *Practicarum observationum* Lib II, obs 33, no 10 (Turin 1595).

V. THE PURPOSE OF A STATUTE

A further exception to the plain meaning approach to statutes, common then and common even now, consists of giving weight to legislative purpose – sufficient weight, that is, to overcome a literal reading of specific words and phrases in a statute. If the words of a statute, read literally, lead to a result that conflicts with the just purpose that (one assumes) gave rise to the statute, it would seem perverse to cling to the words instead of the sense of the statute. The words should therefore be interpreted to give effect to its purpose, even in the teeth of its words. This approach is codified in Section 12 of the *Canadian Interpretation Act*, and it has been many times put into effect by the courts.⁵⁰ A statute requiring property owners to contribute to the costs of “widening” a street was thus applied to the case where a street was newly “opened” rather than widened” in a case from the City of Montreal. The judge opined that “the duty of the Court is not philological; it is not to find the meaning of words; it is to find the meaning of statutes.”⁵¹ The reason that led to the statute’s enactment, he concluded, required that payment be made in both situations. Opening a street might not be identical to widening one, but the statute’s true purpose was sufficient to cover both.

Criticism of this approach to statutory interpretation is not wanting, and not simply because it seems incompatible with the plain meaning approach discussed above.⁵² The method seems inappropriate as applied to carefully drafted legislation, it assumes (probably falsely) that the intent of a legislature can be reliably determined, it overlooks the many different purposes a statute may serve, it permits judges to substitute their own opinions of what the law should be for what the legislature intended, and it can work hardship on people who have acted in good faith to comply with applicable statutory terms.⁵³ Like many rules of the law of evidence, it

⁵⁰ See, e.g., the interpretation of Section 19 of the *Wills Act*. Dealing with ademption of bequests, in Law Reform Commission of British Columbia, “Testamentary Intent and Unexpected Circumstances” (1987) Law Reform Commission of British Columbia Working Paper No 57 at 9-10.

⁵¹ *Watson v Maze*, 1898 CarswellQue 450, 15 Que SC 268.

⁵² See, e.g., *Sullivan on Construction*, *supra* note 28 at § 23.51-52

⁵³ See the discussion in Côté, *The Interpretation of Legislation*, *supra* note 3 at 437-52.

has both a good and a bad side. In skilled hands, it does give effect to what the legislators intended but expressed poorly. In unskilled hands, however, the approach can lend itself to judicial overreaching and consequent abuse.

Turning again to history, it should come as no surprise to discover that almost the same rule (and the same problems) existed in the European *ius commune*. In a way, the freedom Continental judges had to search for and follow what they took to be the purpose that lay behind statutes was actually greater than it is under current Canadian law. Judicial speculation about the greater purpose of statutes was encouraged by a text in the Roman law's *Codex* itself. It contains a text ascribing what it called "a mind" to individual statutes, and directs that judges were first to discover what it was and then to apply it in deciding the disputes that came before them.⁵⁴ "To follow the words of the law and not its mind is to offend against the law itself."⁵⁵ So stated the medieval *glossa ordinaria* to the Roman law, and the canon law adopted the same idea under a slightly different formulation.⁵⁶

That seems to have been exactly what European judges did in courts where the *ius commune* applied. A common example was the statute requiring a certain number of witnesses to a will. We have the similar statutes today. In medieval and early modern Europe it was understood that the statute's true purpose had been to guarantee the authenticity of the wishes of a dying man or woman. If that purpose could be served in another way – as by having been written entirely in the handwriting of the person – then it could be said that the statute's larger purpose had been adequately served. Witnesses would not have been necessary, and such an "unwitnessed will" could therefore be considered valid in law.⁵⁷ This proved to be the opening for the holographic will.⁵⁸

⁵⁴ Cod 1.14.5.

⁵⁵ Gl ord ad Cod 1.14.5 v *non dubium*: "Facere fraudem legi est quando quis non venit contra verba legis sed contra mentem."

⁵⁶ See X 1.3.18 and Panormitanus, *Commentaria*, *supra* note 32 at X 1.2.18, no 6 "statutum debet intellegi secundum ius commune." The famous modern criticism of this approach is Max Radin, "Statutory Interpretation" (1930) 43:6 Harv L Rev 863 at 869-70, but *cf* J Willard Hurst, *Dealing with Statutes* (New York: Columbia University Press, 1982) at 32-40, noting its utility.

⁵⁷ Antonius de Gamma (d 1595), *Decisiones supremi senatus regni Lusitanae* Dec 81

The same free-wheeling approach to statutes prevailed in other situations. For example, an Italian city's statute made it a crime to export grain in time of scarcity.⁵⁹ The question that came before a court was whether that statute also covered flour and bread. Under a proper reading of the statutory prohibition, the jurists concluded, it did. The "mind" that lay within the statute – that was the motivation that had led to the statute's enactment – extended to both. Bread and flour were made in part from grain. They were included in the ban. The logic here thus seemed convincing from the point of view of the statute's larger intent. Its extension was admittedly the opposite of the rule of lenity applicable generally to interpreting criminal law, but flour and bread could be considered as grain in a different form, and the preservation of grain for the people in the area affected by a drought had been the true purpose of the statute. Hence it should be extended beyond its words to subject exporters of both to the law's penalties to cover what had been within the "mind" of the statute.

Even the law of the church, a place where one might expect to find a concern for mercy, took over this principle to extend the scope of the reach of a statute in criminal law.⁶⁰ Like the modern Canadian case involving street assessments, invocation of a particular statute's unexpressed but true intent could expand its coverage as well as restrain it. In the English common law, this approach was often described as enforcing "the equity of a statute," an equity that sometimes led to more expansive coverage than the words of the enactment would themselves permit.⁶¹

(Barcelona 1597).

⁵⁸ See R H Helmholz, "The Origin of Holographic Wills in English Law" (1994) 15:2 J of Legal Hist 97.

⁵⁹ See Guido Papa (d 1487), *In augustissimo senatu Gratianopolitano Decisiones*, Dec 373 (Geneva 1667): "Et quia ubi mens legis, idem plus habet quam verba, attendi debet ad mentem sicut ad verba"; see also Joannes Baptista Hodierna (d 1660), *Elaboratae Additiones et Annotationes ad Decisiones Mantuani Senatus Jo. Petri Surdi Decisiones Mantuanae universae*, Dec 139, no 2 (Naples 1632).

⁶⁰ See, e.g., Panormitanus, *Commentaria*, *supra* note 32 at X 3.5.28, no 18.

⁶¹ T F T Plucknett, *Statutes and their Interpretation in the First Half of the Fourteenth Century* (Cambridge: Cambridge University Press, 1922) at 72-81; William D Popkin, *Statutes in Court: The History and Theory of Statutory Interpretation* (Durham, NC and London: Duke University Press, 1999) at 11-18.

VI. OTHER PRINCIPLES OF INTERPRETATION

The discussion so far has scratched the surface of statutory interpretation as it is found in the literature of the European *ius commune*. There is more to say, and it can be said briefly. There were at least four or five other ways in which inroads in the validity and the plain meaning of European statutes were made.

The first was by desuetude. Long-time non-observance of a once validly enacted law could justify its non-enforcement. Thus an ordinance giving the king the right to valuable metal buried within private grounds in the kingdom of Naples was attacked in a sixteenth century dispute, not only because of the seemingly unfair results to which it led, but also because it had long since passed out of active use.⁶² The ordinance was traced back to the reign of Charles II (1285-1309) and had apparently not been renewed or enforced. So it failed because of desuetude.⁶³

The second was by custom - a variant of desuetude, but considered separately by the jurists because it possessed slightly different characteristics. It rested not upon the age of a statute, but rather on shared agreement among those affected by it that a different rule should be applied. The Roman law Digest contained a text stating that "statutes may be repealed not only by vote of the legislature but also by the silent agreement of everyone" (Dig 1.3.32), and so it occurred in practice. A common but unattractive example of custom's force was its effect on statutes permitting appeals from lower to higher tribunals. The widely accepted practice in medieval Europe was to confine this guarantee to civil causes, effectively overriding both natural law principles and specific statutes allowing appeals. As one commentator put it, "throughout almost the entire Christian world, an appeal is not admitted where corporal punishment will be inflicted."⁶⁴ Men and women accused and convicted of

⁶² Mattheus de Afflictis (d 1528), *Decisiones sacri regii consilii Neapolitanae*, Dec 321, nos 9, 12 (Venice 1588). Similar was the effect of applying the maxim "Cessante ratione statuti cessat statutum." See X 2.28.60, as cited in Franciscus de Caperiis (fl 1536) (François de Clapier de Vauvenargues), *Decisiones Provinciae curiae*, C 15, qu 2, no 32 (Lyon 1602).

⁶³ Apparently this remains a part of modern Italian law; see "Statutory Interpretation in Italy" in MacCormick & Summers, *Interpreting Statutes*, *supra* note 4 at 244-45.

⁶⁴ Segismundo Scaccia (fl 17th cent), *De iudiciis causarum civilium criminalium et*

crimes thus lost a right to appeal because of the legal force of what amounted to a contrary agreement among the professional community.

The third was by contradicting a command of God. European governments had no constitutions that allowed judges to “strike down” statutes in the form familiar to us in the United States. Natural law as it was then understood did not serve that role. However, what jurists called “divine law” sometimes could. Thus a statute giving a father the power to legitimate a child born to him in incest or adultery was said to be contrary to the *ius divinum* because it rewarded his turpitude and allowed him to act as judge in his own cause.⁶⁵ Unsurprisingly this principle seems to have been more often invoked by canonists than by civilians. They most often used it to declare the invalidity of secular statutes that threatened the interests of the church – a statute restricting the clerical privilege not to be tried in a secular court, for example.⁶⁶ Canonists thus supposed that the overlap between the canon law and divine commands was greater than it seems today, but the principal itself would have been admitted by both. Much of the ancient Roman law of marriage and divorce, for example, was held to have had been “corrected” by Christian principles.⁶⁷ The extent of the correction was open to doubt, as for example on the contentious question of the control of parents over the marriage of their children. There were unsolved questions, but the possibility of statutory invalidity was admitted as the *communis opinio* among the jurists.

The fourth was by searching inquiry into the circumstances and motives behind a statute’s enactment. This was most often used, it seems, not to override the legislator’s expressed intent, but to suppose that a statute might have been the product of pressure from what we would today describe as a special interest group. Thus, a Florentine statute that Doctors of Law who acted as notaries public or proctors would lose the privileges they held as Doctors had been enacted only “because of the

haereticatum, Lib I c 97 no 62 (Venice 1663): “Patet tercio de consuetudine Hispania et fere totius orbis Christiani, . . . quando venit infligenda pena corporalis, non admittitur appellatio”).

⁶⁵ Nicholaus Boerius (d 1539), *Decisiones*, Dec 127, no 9 (Lyon 1544).

⁶⁶ See e.g., *Decisiones antiquae Sacrae Romanae Rotae*, no 840 (Rome 1509).

⁶⁷ See, e.g., Joannes Grivel (d 1624), *Decisiones senatus Doleni*, nos 8-11 (Atwerp 1618): “[I]n materia matrimonii cum sit spiritualis non attenduntur leges civiles, ne quidem in ipso foro civili, sed ius canonicum”.

importuning of interested persons” and would not be enforced for that reason.⁶⁸ How such a determination was correctly made is difficult to say. The judges had no legislative history to guide them. In practice, however, it served a purpose by preventing overly generous gifts of public property.⁶⁹ Indeed it had a resemblance to the “Public Trust Doctrine” in American law.⁷⁰

The fifth was by failure of specificity. Among the surprises found in the history of the *ius commune* are the cases in which general language in a statute was ignored on the grounds that the enacted law had been insufficiently specific in its coverage. It was regularly tested in the canon law by restricting the scope of papal and episcopal decrees.⁷¹ It meant that unstated exceptions to a statutory enactment were read into general language. Thus a law barring appeals before final judgment could be interpreted to apply only to frivolous appeals, and not to meritorious appeals.⁷² An enactment granting family members a right to decline to give evidence in criminal cases against others in the family was held not to apply to serious crimes like treason or heresy.⁷³ And even the dominical command that those whom God had joined together must not be put asunder by men might be put aside by a similar modification. Fully considered, Jesus might have meant his command to apply only to marital break-ups “done violently and without law or reason.”⁷⁴

⁶⁸ Borgnino Cavalcani (d 1607), *Decisionum fori Fivizanensis aliorumque tribunalium in Italia*, Pt I, Dec 41, no 55 (Venice 1602).

⁶⁹ Its origins and utility are traced by C G Crump, “Eo quod expressa mentio, etc” in H W C Davis ed, *Essays in History Presented to Reginald Lane Poole* (Oxford: Clarendon Press, 1927) 30-45.

⁷⁰ See *Illinois Central Railroad v Illinois*, 146 US 387 (1892).

⁷¹ VI 1.2.1.

⁷² Giacomo Antonio Marta (d 1629), *Tractatus de clausulis cum suis resolutionibus et decisionibus*, cl 12, no 7 (Venice 1612).

⁷³ Umberto Locati, *Opus quod iudiciale inquisitorum dicitur*, c 5 (Rome 1570) (citing Dig 48.4.7, Dig 48.2.4 and Matt 19:29).

⁷⁴ Henricus de Segusio (Hostiensis) (d 1271), *Summa aurea*, Lib I, tit De rescriptis, no 11 (Venice 1574): “Quos Deus coniunxit etc non separet, scilicet violenter sine lege absque ratione, sic modificatur per Isidorum.”

VII. CONCLUSION

At the end of this brief survey of the evidence, it seems sensible to return to current Canadian views on statutory interpretation. They were noted at the start. A recent Canadian critic concluded that today there are “seven different approaches to statutory interpretation, many of which are inconsistent.”⁷⁵ It is worthy of remark – indeed it is unsettling – to have found that almost the same thing proves to have been true for the European *ius commune*. At least by one way of counting, there were at least seven different approaches then, and there are at least seven different approaches now.

What conclusions should we draw from this? “Keep trying” is certainly permissible advice if one applies the tools of logic. Many advances in thought have taken centuries to become widely accepted. Even admitting this possibility, however, the most an observer can say with confidence on the basis of the historical record is that arriving at a clear and consistent approach to statutory interpretation is unlikely to be easy. There is also a further cause for hesitation. Some problems in the law seem to have resisted satisfactory solution for many centuries. Perhaps they are insoluble. Aristotle puzzled about the relation between law and equity, for example,⁷⁶ and we still have not found a fully satisfactory way to mark out distinct spheres between the two.⁷⁷ We have many examples, but we have no definitive way of defining where law stops and equity starts. Statutory interpretation may turn out to be something like that.

⁷⁵ See Elliott, “Khosa – Still Searching” *supra* note 2 at 211.

⁷⁶ Aristotle, W D Ross trans, *Nicomachean Ethics* Lib V § 10, (New York: Oxford University Press, 2009). My thanks to Professor David Strauss for bringing this point to my attention.

⁷⁷ The lack of an adequate remedy in a court of law – the traditional “textbook” test for invoking equitable jurisdiction – is itself a quite uncertain guide. See, e.g., F W Maitland, *Equity* (Cambridge: Cambridge University Press, 1909) at 12.42.

