Textualism as Fair Notice?

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TEXTUALISM AS FAIR NOTICE?

Benjamin Minhao Chen*

Abstract: The opportunity to know the law is one of the bedrocks of legality. It is also a powerful and attractive reason for giving statutory language the meaning it has in everyday discourse. To do otherwise would be to hide the law from those it governs.

Or so the argument goes. Despite its intuitive force, the fair notice argument for textualism is vulnerable to two challenges. The first challenge is to the notion that fair notice requires congruence between ordinary and legal meaning. There is no normative gauge for determining the time and expense people ought to spend learning their legal obligations or the amount of skill they should be expected to possess. And fair notice is not necessarily impaired by recourse to extratextual sources so long as the rules of interpretation tell officials and citizens which materials to consult and which approach to adopt when reading law. The second challenge arises from the relationship between law, morality, and notice. Social expectations and ethical norms may provide the requisite notice. Alternatively, they may render notice less essential. Fair notice is either superfluous or satisfied where the community regards the proscribed behavior as wrongful and the punishment fitting. Conversely, the demands of fair notice are heightened when the behavior reached by the statute is innocuous or when the sanctions for violation are disproportionate.

The vigor of these two challenges is empirically tested through a survey experiment fielded on a probability sample of the United States adult population by the National Opinion Research Center at the University of Chicago. The results indicate that lay judgments of fair notice are influenced by the severity of the legal consequences. They also suggest that conditional on outcome, judicial reliance on legislative purpose and history offends popular notions of fair notice only when the law tells courts to privilege the ordinary meaning of statutes. The findings call into question conventional wisdom about textualism, fair notice, and the rule of law.

INTRODUCTION .......................................................... 340
I. TEXTUALISM AS FAIR NOTICE ..................................... 342
II. TWO KINDS OF DIFFICULTIES .................................. 350
   A. The Congruence of Legal and Ordinary Meanings .......... 351
   B. Law, Morality, and Notice ....................................... 359
III. A SURVEY EXPERIMENT ........................................... 364
   A. Experimental Design ............................................. 364
   B. Sample and Results ............................................. 371
      1. Descriptive and Correlational Results .................... 372

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INTRODUCTION

A sign reads “No vehicles in the park.”1 An ambulance drives up to the gate, responding to a medical emergency on the premises.2 May it enter? A child rides a bicycle past the bollards.3 Should the child be ticketed? A veteran association wishes to have a tank displayed on the grounds as a tribute to those who fought so that others might live.4 Does the association need to seek an exception? One way of answering these questions is to inquire how English speakers normally understand the word “vehicles.” In ordinary usage, a “vehicle” refers to “a means of carrying or transporting something,”5 or more specifically, “[a] means of conveyance or transport on land, having wheels, runners, or the like; a car, cart, truck, carriage, sledge, etc.”6 On these definitions, an ambulance and a bicycle are both “vehicles” and thus barred from the park.7 A tank would be too, if it were in good working order. Another way of resolving the conundrums posed by the ambulance, the bicycle, and the tank is to ask why the rule against vehicles exists. Is its purpose to reduce noise pollution, in which case there would be little reason to exclude the bicycle and the tank? Or is its purpose to mitigate the risk of collisions, in which the bicycle but not the tank would be prohibited? And if the purpose of the rule is to promote public safety, then the ambulance should, perhaps, be exempted.

How should we arbitrate between these competing approaches? The authority that promulgated the rule may have intended for it to be applied

2. See id.
3. See id.
in a certain fashion. There might be concerns about the potential for arbitrariness if the person who enforces the rules is given too much discretion to construe them. And even if enforcement were uniform, there lurks the danger of the rule-maker’s intent being subverted in the guise of interpretation. In addition, it may seem unfair if those subject to the rule cannot discern its precise boundaries and must therefore guess as to what is permitted and what is forbidden. This last concern has often been cited in favor of giving statutory words and phrases their ordinary meaning, that is, the meaning they convey in everyday conversation. An emphatic articulation of this idea proclaims that “[f]rom the inception of Western culture, fair notice has been recognized as an essential element of the rule of law”: “[b]y seeking to discern the most reasonable, plain meaning of a statute, textualism by its very definition seeks to satisfy th[e] dictate of fair notice.” This line of reasoning—dubbed the fair notice argument for textualism—is elaborated in Part I.

The fair notice argument is as easy to state as it is forceful. How could it ever be fair to punish without warning? But despite its intuitive appeal, the argument turns out, on closer examination, to be deeply problematic. First, suppose the sign had also informed prospective park users that the rule “No vehicles in the park” would be construed liberally and purposively to minimize accidents in the park. Are teenage daredevils fined for riding a skateboard truly denied fair notice? After all, they have already been told how the rule would be read. Second, suppose a wealthy entrepreneur rides a helicopter around the park, shaving some trees along the way, thinking that the helicopter, not being “[a] means of conveyance or transport on land, having wheels, runners, or the like” was not comprehended by the ban on vehicles. Can the entrepreneur, when fined, legitimately complain about the want of fair notice? After all, rule or no rule, the entrepreneur ought to have known better and the fine is, all things considered, rather light given the egregiousness of the conduct. Part II articulates and develops these difficulties for the fair notice argument.

How then do ordinary citizens—the subjects of the law—think about fair warning? Does resorting to extra-statutory indicia of meaning really offend lay notions of fair notice? Do lay judgments of fair notice turn on the nature of the behavior being regulated and the harshness of the punishment meted out? Part III presents the design and results of a survey

8. See Johnson v. United States, 529 U.S. 694, 718 (2000) (Scalia, J., dissenting) (“[T]he acid test of whether a word can reasonably bear a particular meaning is whether you could use the word in that sense at a cocktail party without having people look at you funny.”).
10. See id. at 557.
experiment fielded on a probability sample of adults in the United States. Based on a well-known case decided by the Supreme Court, the experiment tests the fair notice argument where it is at its strongest: in the criminal domain. To presage the findings, the experiment suggests that—conditional on outcome—judicial reliance on legislative purpose and history does not evoke fair notice objections except, perhaps, when the law instructs courts to privilege the ordinary meaning of the statute. Furthermore, legal consequences matter for lay judgments of fair notice. When penalties for breaching the law were heavy, subjects were disinclined to say that fair warning had been given. The survey experiment substantiates the two philosophical difficulties for the fair notice argument. To recapitulate, it does not always violate fair notice to glean statutory meaning from extra-textual resources, especially if the law of interpretation so permits. Moreover, fair notice is not only a matter of interpretation but also the distance between what people imagine the law to be and what it actually says.

How do the empirical results bear on contemporary debates in statutory interpretation? Part IV draws out the normative implications for two recent proposals for reading statutes. The first advocates legislative or judicial initiative in harmonizing interpretive methodology. Agreement on a set of rules for construing statutes, it has been submitted, is more important than the choice of any one rule. The second champions the rule of strict construction redux. The rule of lenity should kick in before any recourse is had to extra-statutory materials. Furthermore, the degree of ambiguity needed for lenity to apply should depend on the punitiveness of the law. Both proposals do find some support in lay understandings of fair notice. Part IV also considers an ancient maxim of legal construction that should, perhaps, be revived on fair notice grounds: optima legum interpres consuetudo. A widely shared and long-standing reading of a statute should be upheld, even if it is not the best reading. Ultimately, the philosophical and quantitative analyses offered in this Article throw doubt on conventional wisdom about the relationship between textualism and fair notice. Fair notice does not ineluctably require textualism.

I. TEXTUALISM AS FAIR NOTICE

Pithily encapsulated, textualism is “[t]he exclusive reliance on text when interpreting text.”12 “[I]n its purest form,” it “begins and ends with what the text says and fairly implies.”13 According to John Manning,

13. Id.
textualists privilege semantic context whereas their adversaries, the purposivists, prioritize policy context. This distinction relates to the kinds of material these jurists consider and the conclusions they draw from the evidence. Because textualists are interested in “the way a reasonable person conversant with relevant social and linguistic practices would have used the words,” they try “to assemble the various pieces of linguistic data, dictionary definitions, and canons into the best (most coherent, most explanatory) account of the meaning of the statute.” In contrast, because purposivists are interested in “the way a reasonable person conversant with the circumstances underlying enactment would suppress the mischief and advance the remedy,” they “examin[e] all available clues to figure out what Congress was really driving at,” deriving aid from “the tenor of the statute, patterns of policy reflected in similar legislation, or statements of purpose found in the legislative history.” This last, extratextual, source is anathema to the textualist, so much so that William Eskridge once described “the new textualism’s most distinctive feature is its insistence that judges should almost never consult, and never rely on, the legislative history of a statute.”

Textualism, however, is not literalism. The ordinary meaning of language, textualists readily acknowledge, is illuminated by context.
Words, for instance, can be ambiguous or vague. A word is ambiguous when it has multiple meanings. The noun “bank,” for instance, might connote a financial institution or the land adjoining a river. A word is vague when the concept or predicate it signifies lacks sharp boundaries. Does the adjective “tall,” for example, apply to a baby giraffe that stands at six feet? Semantic and situational cues may render precise that which was unclear. “The derelict lawyer was sanctioned by the bar association” intimates, on its face, punishment rather than approval. Beyond ambiguity and vagueness, the extension of terms might depend on where, why, and how they are used. A kindergarten teacher instructed to show the children a game should understand that the word “game,” though capacious, excludes activities that involve drinking even if they amuse or entertain. New textualism thus abjures the idea that statutes have plain meanings inscribed “within the[ir] four corners.” Instead, it counsels sensitivity to the time, circumstance, purpose, and structure of an enactment. Today, “[i]n textual interpretation, context is everything.”

Purposivists, for their part, have renounced the creed embodied by Church of the Holy Trinity v. United States, that a thing may be within the letter of the statute and yet not within the statute, because not within

("Textualists, like other users of language, want to know its context, including assumptions shared by the speakers and the intended audience."). According to Tara Leigh Grove, “[m]odern textualists have . . . long insisted that the method is not literalism.” Tara Leigh Grove, Comment, Which Textualism?, 134 HARV. L. REV. 265, 279 (2020). This qualification can, however, be found in an early American treatise on statutory interpretation. JOEL PRENTISS BISHOP, COMMENTARIES ON THE WRITTEN LAW AND THEIR INTERPRETATION 61 (1882) (“[T]he rule of law is distinct, that the courts cannot resort to the opinions of the individual legislators, the legislative journals, the reports of committees, or the speeches made at the time an act was passed; their sole guide being the language, illuminated simply as already shown. They do not close their eyes to what they know of the history of the country and of the law, of the condition of the law at the particular time, of the public necessities felt, and other like things.").

22. See LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 38 (P.M.S. Hacker & Joachim Schulte eds., G.E.M. Anscombe, P.M.S. Hacker & Joachim Schulte trans., 4th ed. 2009) (“Someone says to me, ‘Show the children a game.’ I teach them gambling with dice, and the other says, ‘I didn’t mean that sort of game’. In that case, must he have had the exclusion of the game with dice before his mind when he gave me the order?” (internal citation omitted)).


24. Herrmann v. Cencom Cable Assoc’s., Inc., 978 F.2d 978, 982 (7th Cir. 1992) (Easterbrook, J.) (“Language in general, and legislation in particular, is a social enterprise to which both speakers and listeners contribute, drawing on background understandings and the structure and circumstances of the utterance. Slicing a statute into phrases while ignoring their contexts—the surrounding words, the setting of the enactment, the function a phrase serves in the statutory structure—is a formula for disaster.”); Nicholas S. Zeppos, Justice Scalia’s Textualism: The “New” New Legal Process, 12 CARDOZO L. REV. 1597, 1615 (1991) ("[I]nsofar as the label suggests a simple and literal meaning of the statutory text at issue, it betrays the sophistication and complexity of Justice Scalia’s approach.").

25. SCALIA, supra note 20, at 37.

26. 143 U.S. 457 (1892).
its spirit, nor within the intention of its makers.”

They hold that “[t]he words of a statute, taken in their context, serve both as guides in the attribution of general purpose and as factors limiting the particular meanings that can properly be attributed.” Is there any daylight, then, between contemporary textualists and purposivists since the former are willing to accommodate purpose and the latter profess themselves constrained by text? Some argue that the opposition between the two schools has narrowed to one of degree, rather than kind, becoming “a difference in emphasis rather than a sharp disagreement over methodology.”

For example, textualists and purposivists apparently wrangle over when context should be consulted—before or after arriving at a statute’s clear textual meaning. But Jonathan Molot contends that insofar as “both schools use the same interpretive tools to reach the same interpretive result, it really does not matter if one purports to use context to decide on a textual meaning while the other admits that it is adjusting the text’s meaning to reconcile it with the context.”

In that sense, one could say that “we’re all textualists now,” and purposivists too.

It might thus be suggested that the debate between textualism and purposivism is not only well-worn but passé. But the consensus that text and purpose are both integral to the process of construing statutes is fragile. Textualists chafe at the purposivists’ easy and frequent recourse to legislative history. And though justices of all stripes incant the

27. Id. at 459.

28. HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1375 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994); BARAK, supra note 19, at 19 (“Every meaning that an interpreter gives a legal text must have an Archimedean foothold in the language of the text.”).

29. See, e.g., United States v. Fausto, 484 U.S. 439, 444 (1998) (Scalia, J.) (stating that “[t]he answer [to a question of statutory interpretation] is to be found by examining the purpose of the [statute and] the entirety of its text”).


32. Id. at 37.

33. Id. at 37–38.


36. SCALIA & GARNER, supra note 12, at 369–90; William N. Eskridge, Jr., The New Textualism, 37 UCLA L. REV. 621, 623 (1990) (“The new textualism posits that once the Court has ascertained a statute’s plain meaning, consideration of legislative history becomes irrelevant. Legislative history should not even be consulted to confirm the apparent meaning of a statutory text.”); Molot, supra note
primacy of text, recall the canons, and narrate the zeitgeist surrounding legislation, the same evidence may be admitted to prove different things. At risk of belaboring the point: textualists search for the ordinary meaning of statutory language—how a citizen or legislator of the times would have understood the words used—whereas purposivists seek to imbue the text with a meaning that furthers the objectives sought to be achieved by the legislation. Hence, when Justice Alito, dissenting in Bostock v. Clayton County, recounted the animus borne by American society towards its homosexual members in 1960s, he did so not to divine the intent or purpose of the legislators who passed Title VII in 1964. Instead he did so to illuminate what Congress meant to say when it made it “unlawful . . . for an employer to . . . discriminate against any individual . . . because of such individual’s . . . sex” and what people heard. And while Justice Kavanaugh, also dissenting in Bostock, cited the bills introduced in the 1970s to prohibit workplace discrimination on the basis of sexual orientation, he did so not to show what Congress thought it had accomplished in Title VII but to “further demonstrate the


37. Simmons v. Himmelreich, 578 U.S. 621, 627 (2016) (Sotomayor, J.) (“Absent persuasive indications to the contrary, we presume Congress says what it means and means what it says.”).

38. Yates v. United States, 574 U.S. 528, 545 (2015) (Ginsburg, J.) (“A canon related to noscitur a sociis, ejusdem generis, counsels: ‘[W]here general words follow specific words in a statutory enumeration, the general words are [usually] construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.’”).

39. Bostock v. Clayton County, 590 U.S. __, 140 S. Ct. 1731, 1769 (2020) (Alito, J., dissenting) (“For most 21st-century Americans, it is painful to be reminded of the way our society once treated gays and lesbians, but any honest effort to understand what the terms of Title VII were understood to mean when enacted must take into account the societal norms of that time. And the plain truth is that in 1964 homosexuality was thought to be a mental disorder, and homosexual conduct was regarded as morally culpable and worthy of punishment.”).

40. As Justice Scalia clarified extrajudicially, 

using legislative history to establish what the legislature ‘intended’ is quite different from using it for other purposes. For example, for the purpose of establishing linguistic usage—showing that a particular word or phrase is capable of bearing a particular meaning—it is no more forbidden (though no more persuasive) to quote a statement from the floor debate on the statute in question than it is to quote the Wall Street Journal or the Oxford English Dictionary.

SCALIA & GARNER, supra note 12, at 388; see also Frank H. Easterbrook, The Absence of Method in Statutory Interpretation, 84 U. CHI. L. REV. 81, 91 (2017) (“Like most other textualists, I am willing to consult legislative history as a cue to linguistic usage, even though not as an authoritative guide to meaning.”).


43. Bostock, 140 S. Ct. at 1769 (Alito, J., dissenting).
widespread usage of the English language in the United States.”

In contrast to the foregoing examples, _Guerrero-Lasprilla v. Barr_ probed legislative history for clues as to whether Congress intended the “questions of law” reviewable by a court when a non-citizen is being removed for crimes to include the application of a legal standard to undisputed or established facts. Writing for a majority of the Court, Justice Breyer distilled from the House Conference Report a desire not to “change the scope of review that criminal aliens currently receive [under habeas corpus]” as established in _INS v. St. Cyr._ “Notably,” Justice Breyer continued, “the legislative history indicate[d] that Congress was well aware of the state of the law in the courts of appeals in light of _St. Cyr._” The rival approaches in statutory interpretation thus continue to produce divergent results with palpable consequences for the parties and the public.

If courts are to be faithful agents of the legislature—as all sides now seem to agree—why not implement the statute in a manner that furthers its purpose? Why fixate on the particular words chosen by the legislature to express its will? And why should judges avert their eyes from legislative history? “Where the mind labours to discover the design of the legislature, [shouldn’t] it seize[] every thing from which aid can be derived[?]” Jurists have drawn on constitutional and public choice theory to answer these questions. It is the text of the bill, not the speeches delivered in the House or Senate, that becomes law upon bicameral passage and presentment. “If all the legislators in the halls of Congress or outside, in exactly similar words orally uttered what was in their minds,” wrote Max Radin, “that would not be a statute and therefore no law. They are empowered to make law only in one fashion and that is by voting on

44. _Id._ at 1830 (Kavanaugh, J., dissenting).
46. _Id._ at 1072.
47. _Id._
49. _Guerrero-Lasprilla_, 140 S. Ct. at 1072; _cf._ W. Va. Univ. Hosp., Inc. v. Casey, 499 U.S. 83, 96–97 (1991) (Scalia, J.) (rejecting the argument that expert witness fees were recoverable under a clause allowing recovery of “a reasonable attorney’s fee” since the statute in question was passed to overrule a prior Supreme Court decision which abolished a judicial doctrine permitting equitable fee-shifting).
50. _See_, e.g., _Encino Motorcars v. Navarro_, 579 U.S. __, 138 S. Ct. 1134 (2018) (demonstrating how the outcome of a case can turn on the preference given to semantic as opposed to policy context).
51. _Cf._ Douglas Payne, _The Intention of the Legislature in the Interpretation of Statutes_, 9 _CURRENT LEGAL PROBS._ 96, 105 (1956) (“The proper office of a judge in statutory interpretation is not, I suggest, the lowly mechanical one implied by orthodox doctrine, but that of a junior partner in the legislative process, a partner empowered and expected within certain limits to exercise a proper discretion as to what the detailed law should be.”).
proposed statutes.”

Moreover, even if the legislators were united in suppressing a particular mischief, they might have divided on the kinds of trade-off they were willing to entertain to further their common end. “[N]o legislation pursues its purpose at all costs” and “it frustrates rather than effectuates legislative intent to assume that whatever furthers the statute’s primary objective must be the law.”

And while legislative history might sometimes be helpful, textualists concede, it is also apt to mislead. Stray remarks by a congressperson may be insincere and do not, in any event, represent the mood of the entire chamber. Worse, legislative history is liable to be manufactured. Interest groups unable to have their preferences enacted into law might insert language into the floor speeches and committee reports to subvert judicial interpretation of the bill that did pass. Furthermore, by elevating the “unenacted hopes and dreams” of lawmakers and their constituencies over the ordinary meaning of statutory text, judges unravel political bargains and negate the protections afforded to minority interests by the legislative process.

53. Max Radin, A Case Study in Statutory Interpretation: Western Union Co. vs. Lenroot, 33 CALIF. L. REV. 219, 223 (1945); see also Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) (“The greatest defect of legislative history is its illegitimacy. We are governed by laws, not by the intentions of legislators . . . . If one were to search for an interpretive technique that, on the whole, was more likely to confuse than to clarify, one could hardly find a more promising candidate than legislative history.” (emphasis in original)).


55. In re Sinclair, 870 F.2d 1340, 1342 (7th Cir. 1989) (Easterbrook, J.) (“To decode words one must frequently reconstruct the legal and political culture of the drafters. Legislative history may be invaluable in revealing the setting of the enactment and the assumptions its authors entertained about how their words would be understood.”); see Scalia & Garner, supra note 12, at 388.

56. Manning, supra note 14, at 84 (acknowledging that “textualists generally forego reliance on legislative history as an authoritative source of [a statute’s apparent overall] such purpose, but that reaction goes to the reliability and legitimacy of a certain type of evidence of purpose rather than to the use of purpose as such”).

57. Frank B. Cross, THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION 77 (2008) (“Legislators speak on the floor for a variety of reasons, not the least of which is pandering to their constituents. Relying on such speeches runs the risk of adopting as policy something the individual legislator did not intend to enact, much less the entire Congress.”).

58. Kenneth W. Starr, Observations About the Use of Legislative History, 1987 DUKE L.J. 371, 377 (1987) (“It is well known that technocrats, lobbyists and attorneys have created a virtual cottage industry in fashioning legislative history so that the Congress will appear to embrace their particular view in a given statute.”).


60. See John F. Manning, Second-Generation Textualism, 98 CALIF. L. REV. 1287, 1288–90 (2010) (elucidating a shift in how textualism is defended, away from the factually questionable claim that the legislative process is dominated by interested groups towards the less empirically ambitious
But an old and powerful argument for taking the ordinary meaning of legislative text as the lodestar of statutory interpretative invokes fair notice. Fair warning is so fundamental to the rule of law that it is sometimes described as inhering in the very concept of law itself. "For the law not to be known," one author declares, "is the ultimate injustice." Secret legislation is morally repugnant because it does not give any notice of the demands being laid on subjects. Those punished for violating a hidden decree had no opportunity to avoid the heavy hand of justice. By the same token, requiring citizens to divine the private intentions of lawmakers is a "tyrannical" imposition, akin to Nero’s “trick” of “posting

assumption that any incongruence between a statute and its purpose might be due to political compromise rather than inadvertence or incompetence).

61. See, e.g., Note, supra note 9, at 543–48 (tracing the notion of fair notice back to Athenian Greece); Robert Weisberg, The Calabresian Judicial Artist: Statutes and the New Legal Process, 35 STAN. L. REV. 213, 233 (1983) (explaining that “formalism’s strength rests not only on the democratic principle that statutory commands must limit judicial creativity; it also rests on our belief that the rule of law demands fair notice and certainty, a belief that has special force in the realm of statutes”); William N. Eskridge, Jr. & Philip P. Frickey, Statutory Interpretation as Practical Reasoning, 42 STAN. L. REV. 321, 340 (1990) (“The arguments for textualism are strong ones. . . . [T]extualism appeals to the rule-of-law value that citizens ought to be able to read the statute books and know their rights and duties.”); Bostock v. Clayton County, 590 U.S. __, 140 S. Ct. 1731, 1828 (2020) (Kavanaugh, J., dissenting) (chiding “[a] literalist approach to interpreting phrases such as] disrespect[ing] ordinary meaning and depriv[ing] the citizenry of fair notice of what the law is”); Strawbridge v. Mann, 17 Ga. 454, 458–59 (1855) (“But as a general thing, with respect to the Acts of our own Legislature, I should feel myself rigorously bound down to the words. The words of those Acts are, what the great majority of the people of the State shape their actions by. It is the words only, that are published to them—and when, after they have followed the words of the law, they are told by the Courts that they have not followed the law, they feel, that for them, the law has been turned into a snare. And it is difficult to say that they have not the right so to feel.”); Black-Clawson Int’l Ltd. v. Papierwerke Waldhof-Ashaffenburo A.G. [1975] AC 591 (HL) 638 (Diplock L.J.) (“The acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal consequences that will flow from it. Where those consequences are regulated by a statute the source of that knowledge is what the statute says. In construing it the court must give effect to what the words of the statute would be reasonably understood to mean by those whose conduct it regulates. That any or all of the individual members of the two Houses of the Parliament that passed it may have thought the words bore a different meaning cannot affect the matter. Parliament, under our constitution, is sovereign only in respect of what it expresses by the words used in the legislation it has passed.”).

62. See LON L. FULLER, THE MORALITY OF LAW 49–51 (1964); JOSEPH RAZ, THE AUTHORITY OF LAW 214 (1979); F.A. HAYEK, THE ROAD TO SERFDOM 80 (1994); Christopher Kutz, Secret Law and the Value of Publicity, 22 RATIO JURIS. 197, 211 (2009); Natalie Stoljar, Survey Article: Interpretation, Indeterminacy and Authority: Some Recent Controversies in Philosophy of Law, 11 J. POL. PHILO. 470, 482 (2003); Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972) (“Living under a rule of law entails various suppositions, one of which is that ‘[a]ll persons’ are entitled to be informed as to what the State commands or forbids.”) (quoting Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939)); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 574 (1996) (“Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice . . . of the conduct that will subject him to punishment . . . .”).

edicts high up on the pillars, so that they could not easily be read.”64 And referring them to legislative history “is not unlike the practice of Caligula, who reportedly ‘wrote his laws in a very small character, and hung them up upon high pillars, the more effectually to ensnare the people.’”65 In short, privileging extra-textual indicia of meaning over the plain meaning of the statutory text is reminiscent of the artifices of ancient dictators and is unworthy of a modern liberal democracy.66 Conversely, giving statutory language the meaning it bears in normal discourse ensures that people are apprised of their legal rights and duties.67 Ordinary meaning is thus the “linchpin of statutory interpretation.”68 Following ordinary meaning is “Statutory Interpretation 101.”69

II. TWO KINDS OF DIFFICULTIES

The fair notice argument for textualism is seemingly irresistible.70 “If [people] have to wait until an adjudicator reveals what the rules are, interpreting texts in light of materials that are not readily available or

64. SCALIA, supra note 20, at 17.
65. Flores-Figueroa v. United States, 556 U.S. 646, 658 (2009) (Scalia, J., concurring in part) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *46 (1765)); see Screws v. United States, 325 U.S. 91, 96 (1945) (“Congress did not define what it desired to punish but referred the citizen to a comprehensive law library in order to ascertain what acts were prohibited. To enforce such a statute would be like sanctioning the practice of Caligula who ‘published the law, but it was written in a very small hand, and posted up in a corner, so that no one could make a copy of it.’”) (citation omitted); OFF. OF LEGAL POL’Y, U.S. DEP’T OF JUST., USING AND MISUSING LEGISLATIVE HISTORY: A RE-EVALUATION OF THE STATUS OF LEGISLATIVE HISTORY IN STATUTORY INTERPRETATION 52 (1989) (“If the average citizen is presumed to be aware of the legislative history as well as the statute, are we then enforcing not simply an unknown but almost unknowable laws?”).
66. See, e.g., Michael S. Moore, The Semantics of Judging, 54 S. CAL. L. REV. 151, 186 (1981) (explaining that reliance on “non-linguistic context presupposes that a court’s proper role is to determine what the legislature meant by its utterance, rather than what the words uttered mean” is “a controversial proposition of political theory that values obedience to legislative wishes over the giving of fair notice”).
67. Note, supra note 9, at 543; see Richard H. Fallon, Jr., The Statutory Interpretation Muddle, 114 NW. U. L. REV. 269, 318 (2019) (arguing that for a legal regime to be morally legitimate, judges must respect widely shared intuitions about statutory meaning even though such intuitions are theoretically unfounded); see also DIGGORY BAILEY & LUKE NORBURY, BENNION ON STATUTORY INTERPRETATION 707 (7th ed. 2017) (“[T]here is a close connection between predictability and grammatical construction. If the grammatical meaning were clear the citizen would have all the information needed to decide on action which may have legal consequences.”).
68. WILLIAM N. ESKRIDGE JR., INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION 81 (2016).
70. Raff Donelson & Ivar R. Hannikainen, Fuller and the Folk: The Inner Morality of Law Revisited, in OXFORD STUDIES IN EXPERIMENTAL PHILOSOPHY 6, 16–17 (Tania Lombrozo, Joshua Knobe & Shaun Nichols eds., 2020) (finding that of Fuller’s eight principles, publicity is the one most endorsed by survey respondents).
TEXTUALISM AS FAIR NOTICE?

whose meaning is uncertain and unpredictable . . . they will lack notice of relevant legal requirements until it is too late.” 71 To avoid “ensnaring the people,” legal officials should read statutes like the laypeople do. 72 This principle is easy enough to state but it begs the question: how do laypeople read statutes? The simple answer, it seems, is that most of them don’t. Most people assume, rightly, that some acts are so evil or dangerous they are everywhere prohibited. But few people have the occasion or indeed the inclination to pore over law books. 73 This oft-acknowledged fact is potentially embarrassing for the fair notice argument. 74 If hardly anyone reads statutes, why insist on publication? Why elevate ordinary meaning?

A. The Congruence of Legal and Ordinary Meanings

Now, it might be argued that fair notice is essential to legality as long as there is one person who seeks to educate themselves about the law. 75 “This citizen,” Lon Fuller holds, “is entitled to know,” and because “[they] cannot be identified in advance,” society must take the “trouble . . . to make the laws generally available.” 76 The same reasoning


72. Flores-Figueras v. United States, 556 U.S. 646, 658 (2009) (Scalia, J., concurring in part); see Larry Alexander & Saikrishna Prakash, “Is That English You’re Speaking?” Why Intention Free Interpretation is an Impossibility, 41 San Diego L. Rev. 967, 984 (2004) (“Textualists could be seen as advocating interpreting legal texts as would some sample of average members of the public. Such a method might be thought by some to have rule of law benefits, particularly in giving the average citizen clear notice of what the law means.”).

73. As Lon Fuller mused, “the full text of [more esoteric laws] might be distributed on every street corner and not one man in a hundred would ever read it.” Fuller, supra note 62, at 51. Indeed, studies conducted in Europe in the 1950s and 1960s showed that “quite often knowledge about specific laws is rather poor in those specific groups for which the laws were made” and that public knowledge concerning legal topics is considerably poorer than presumed by the legal authorities and by many scholars. Berlutchinsky, The Legal Consciousness: A Survey of Research on Knowledge and Opinion About Law, in KNOWLEDGE AND OPINION ABOUT LAW 101, 103–05 (Adam Podgorecki, Wolfgang Kaupen, J. van Houtte, P. Vinke & Berlutchinsky eds., 1973) (emphasis in original).


75. Fuller, supra note 62, at 51.

76. Id.
might be advanced to support the paramountcy of statutory language. Giving legal text its ordinary meaning fulfills the expectations of the rare person who does read statutes. But does the conclusion—a rule of ordinary meaning—follow from the premise—fair notice? Fuller adverts to the impossibility of knowing, ex ante, who might take an interest in the laws. This predicament might exist at the founding of a legal order. But it fades as habits and patterns harden over time. Suppose that many years in, we know something about the people who read statutes. They are, say, loath to use the internet and frequently visit their local libraries. Doesn’t this mean that it is sufficient to have enrolled bills exhibited in all the libraries and not enough for them to be only published online? And suppose that these individuals also examine legislative history to figure out a statute’s meaning.\textsuperscript{77} Shouldn’t legal officials then do the same? To summarize, the contention that fair notice is important because some individuals do consult statutes begs the question of how these same people find and understand the law. The intuitive leap from fair notice to ordinary meaning has to survive this empirical chasm.\textsuperscript{78}

But even if we could observe the actual readers of statutes and get inside their minds, it is strange for the importance of fair notice to hinge on the odd person or two who cracks open the statute books. Fuller colorfully illustrates eight principles of legality through the story of Rex, supreme monarch and “bungling” lawmaker.\textsuperscript{79} To Rex’s list of travails we might add the case of the apathetic populace: only one subject in the kingdom has ever displayed any curiosity in the king’s code. Will it do,

\textsuperscript{77} See James A. Macleod, Finding Original Public Meaning, 56 GA. L. REV. 1, 14 n.51 (“Ordinary people might also treat various publicly available sources of information (perhaps even legislative history or legislative history as filtered through popular media) as relevant to determining statutory meaning. In short, ordinary people don’t systematically ignore information relevant to (individual or group) speakers’ intent, as textualists contend judges ought to do when the text is clear on its face.”); cf. Kent Greenawalt, Are Mental States Relevant for Statutory and Constitutional Interpretation?, 85 CORNELL L. REV. 1609, 1663 (2000) (“Readers of laws recognize that they are reading formal prescriptions backed by the coercive power of the state. A great majority of modern statutory language bears little resemblance to the language of ordinary discourse, and even when the language is similar to ordinary discourse, a reader knows that a statutory provision is not the same as a remark made by a next-door neighbor.”).

\textsuperscript{78} See Noel Struchiner, Ivar R Hannikainen & Guilherme da F.C.F. de Almeida, An Experimental Guide to Vehicles in the Park, 15 JUDGMENT & DECISION MAKING 312, 315 (2020) (finding that “people spontaneously consider both a rule’s text and its purpose when determining whether a particular incident constitutes an infraction”); Kevin Tobia, Brian G. Slocum & Victoria Nourse, Statutory Interpretation from the Outside, 122 COLUM. L. REV. 213, 275 (2022) (finding that “across a range of cases, people interpret rules with an intuitive anti-literalism” (emphasis in original)); Macleod, supra note 77, at 45–46 (enumerating the extratextual factors people might “treat[] as relevant to interpreting statutes, regardless of how informed or uninformed one imagines [them] to be” (emphasis in original)).

\textsuperscript{79} FULLER, supra note 62, at 33–38.
then, for emendations to be sent to that one subject by registered mail, the others having displayed a lackadaisical attitude to their own legal education? When accused of secret legislation, could Rex say in his defense: “There is no point in sending copies to you lot. You will not read them”? The answer to both questions must surely be no. This hypothetical demonstrates that whether fair notice is given depends not merely on the realized state of affairs but also on how things might have turned out in a range of possible but unrealized scenarios. In the case of the apathetic populace, fair notice turns on whether uninterested subjects could have found the law had they bothered to try. To ask whether fair notice has been served is to engage in a counterfactual inquiry. The “one [person] in a hundred [who] takes the pains to inform [themselves]” about their rights and duties is a red herring because it ultimately does not matter whether anyone pays attention to the laws. The rule of law is satisfied if those addressed by a statute have a reasonable opportunity to learn it. Such opportunity is available, for example, when the conventions governing the publication and interpretation of statutes are easy to discover and follow. Fair notice may therefore be given by a statute that in theory could be—but in practice is not—seen by anyone.

Take the foregoing to be true. Is the textualist insistence on ordinary meaning then entailed by fair notice, defined as a reasonable opportunity to know the law’s contents? At first blush, the inference is compelling. But a moment’s reflection should give us pause. The intuitive leap from fair notice to ordinary meaning rule proceeds from familiar, casual, encounters with law. The stroller in the park who comes across a prohibition on ball games, say, or a visitor to the hospital who is greeted by a ban on smoking. Common experience suggests that most individuals treat these rules as commands from an authoritative speaker. Without resorting to extraneous indicia of meaning, they confidently attribute to terms and phrases the sense they carry in everyday conversation. It is therefore natural to suppose that hypothetical readers of statutes do the same, and thence, that fair notice requires statutory language be given its ordinary meaning. This generalization, however, suffers from two defects. First, signs in parks and hospitals are usually intended as simple on-the-spot directives to laypeople going about their own business. As such, it is

80. See Philip Pettit, The Robust Demands of the Good 2 (2015) (describing robustly demanding goods); see also Nicholas Southwood, Democracy as a Modally Demanding Value, 49 Noûs 504, 505 (2015) (claiming that self-rule is a modally demanding value).

81. Fuller, supra note 62, at 51.

82. Note, supra note 9, at 557; Thomas R. Lee & Stephen C. Mouritsen, Judging Ordinary Meaning, 127 Yale L.J. 788, 874 (2018) (“A concern for fair notice and protection of reliance interests may well direct us to stop at the top-of-mind sense of a statutory term.”).
silly for anyone to try to interpret these signs by reference to something more than their text. The same, however, may not be said of broad instructions to administrative agencies and complex statutory regimes addressed to sophisticated entities and their high-powered lawyers. The pharmaceutical company trying to bring a new drug to the market is very differently situated from the couple who persist in walking their dogs on a trail.

But even if the extrapolation from trail signs to drug approval schemes were warranted, a second, more fundamental, difficulty remains. If the public construes statutes by giving them their ordinary meaning, then fair notice counsels legal officials to do the same. But there is nothing necessary about such a practice. There could be other conventions for deriving legal meaning from statutory text, legal meaning being, roughly speaking, the “content of the legal norm created by an authoritative pronouncement.” Consider, for instance, the term “person.” As defined by popular dictionaries, a “person,” is a “human,” an “individual,” “a man, woman, or child.” But “person,” in legal usage, encompasses not only “individual human being[s]” but also corporations and partnerships. If everyone is aware—or would have discovered had they looked or asked—that “person” means different things in law than in life, it is neither unfair nor a surprise for legal officials not to give the term its ordinary meaning when it appears in a statute.

Now, assume that

85. Mark Greenberg, The Standard Picture and Its Discontents, in 1 OXFORD STUDIES IN PHILOSOPHY OF LAW 39, 49 (Leslie Green & Brian Leiter eds., 2011); see also Lawrence B. Solum, Communicative Content and Legal Content, 89 NOTRE DAME L. REV. 479, 479 (2013) (distinguishing between communicative content, “the linguistic meaning communicated by a legal text in context,” and legal content, “the doctrines of the legal rules associated with a text”).
87. Id.
89. Id.
90. See 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *122 (1765) (“Persons also are divided by the law into either natural persons or artificial. Natural persons are such as the God of nature formed us; artificial are such as are created and devised by human laws for the purposes of society and government, which are called corporations or bodies politic.”); 1 U.S.C. § 1 (“[T]he word[] 'person' . . . include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.”).
91. See Frederick Schauer, A Critical Guide to Vehicles in the Park, 83 N.Y.U. L. REV. 1109, 1122–23 (2008) (distinguishing between ordinary and plain meaning since technical language may have a
very first page of the code tells readers that “where statutory language is susceptible of two or more readings, the reading that furthers the purpose of the legislature shall be preferred” and that “in discerning the purpose of the legislature regard may be had to the legislative history of the statute.”\footnote{92} Why does it violate fair notice, then, for a court to interpret the law purposively?\footnote{93} If citizens are expected to know the law, why can’t they also be expected to know the law of interpretation?

To sharpen the analysis, consider the kinds of obstacles that might deter or stymie the hypothetical ordinary person trying to figure out the law. The first kind relates to accessibility and the second, to determinacy. Accessibility refers to the cost and difficulty of looking up the relevant legal materials. Some materials may be readily available at the click of a mouse; others may be buried in the archives of the Bodleian Libraries. Determinacy, on the other hand, relates to the number of permissible outcomes that remain once the law of interpretation has been properly applied. The problem of indeterminacy may arise for at least two reasons. One reason is the absence of methodological consensus. The law is indeterminate because the legal community is split on how to construe statutes and competing theories point in opposite directions. Another reason is the elasticity or incoherence of the methods themselves. The law is indeterminate because applying the stipulated method to the designated materials does not produce agreement on the legal meaning of statutes.

The long-running dispute about the admissibility of legislative history helps illustrate these distinctions. Critics object to judicial consideration meaning which is plain to those who are legally trained); \textit{see also} John O. McGinnis & Michael B. Rappaport, \textit{The Constitution and the Language of the Law}, 59 WM. & MARY L. REV. 1321, 1338 (2018) (pointing out that laypeople also realize that legal terms can bear technical meanings which differ from the terms’ ordinary meanings). Indeed, textualists recognize technical language as constituting an exception to the ordinary meaning rule. \textit{SCALIA & GARNER, supra} note 12, at 69 (“Words are to be understood in their ordinary, everyday meanings—unless the context indicates that they bear a technical sense.”).

\textit{92.} I abstract here from the issue of whether legislative bodies may legitimately instruct courts how to interpret statutes, a question which implicates separation of powers rather than fair notice. \textit{SCALIA & GARNER, supra} note 12, at 245. I also acknowledge but will not address here the puzzle of how the instructions given at the beginning of the code are themselves to be interpreted. \textit{See JOSEPH RAZ, BETWEEN AUTHORITY AND INTERPRETATION: ON THE THEORY OF LAW AND PRACTICAL REASON} 286 (2009) (“The legislator can make the mystic code the method of interpretation [for some or all of his acts. All he has to do is express an intention that this be so. But, when he expresses that intention, he will be doing so by an act which will be interpreted as such acts are normally interpreted by the conventions prevailing at the time.”).

\textit{93.} \textit{See} Jeremy Waldron, \textit{The Concept and the Rule of Law}, 43 GA. L. REV. 1, 26 (2008) (“The [general] norms [supposed to govern people’s behavior] should be public knowledge in the sense of being available to anyone who is sufficiently interested, and available in particular to those who make a profession of being public norm-detectors (lawyers, as we call them) and who make that expertise available to anyone who is willing to pay for it.” (emphasis in original)).
of legislative history because it is costly to find and difficult to parse. Legislative history, they allege, is inaccessible. Detractors also argue that legislative history does not meaningfully narrow the interpretive possibilities available. Resorting to a diverse array of committee reports, floor statements, and the like does not improve determinacy and might even erode it. Furthermore, the lack of a governing theory of statutory interpretation—a state of affairs compounded by the inapplicability of stare decisis in this domain—breeds uncertainty and confusion about how legislative history will be treated by the courts. Such unpredictability impairs fair notice.

With these distinctions in mind, it becomes clear that the fair notice argument for textualism and against purposivism ultimately resolves to empirical questions about the accessibility of the materials deemed relevant by the rival approaches and determinacy of the methods themselves. Is legislative history, for example, truly more inaccessible than statutes? Caleb Nelson goes so far as to doubt whether “the textualists’ position on legislative history really reflects special sensitivity to the goal of fair notice, because the most widely used kinds of legislative

94. See, e.g., Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 396–97 (1951) (Jackson, J., concurring) (“Laws are intended for all of our people to live by; and the people go to law offices to learn what their rights under those laws are. . . . Aside from a few offices in the larger cities, the materials of legislative history are not available to the lawyer who can afford neither the cost of acquisition, the cost of housing, or the cost of repeatedly examining the whole congressional history. . . . To accept legislative debates to modify statutory provisions is to make the law inaccessible to a large part of the country.”); OFF. OF LEGAL POL’Y, U.S. DEP’T OF JUST., supra note 65, at 52 (“If the average citizen is presumed to be aware of the legislative history as well as the statute, are we then enforcing not simply unknown but almost unknowable laws?”).

95. See, e.g., SCALIA, supra note 20, at 36 (“In any major piece of legislation, the legislative history is extensive, and there is something for everybody. As Judge Harold Leventhal used to say, the trick is to look over the heads of the crowd and pick out your friends. The variety and specificity of result that legislative history can achieve is unparalleled.”); Alex Kozinski, Should Reading Legislative History Be an Impeachable Offense?, 31 SUFFOLK U. L. REV. 807, 813 (1998) (“Legislative history is often contradictory, giving courts a chance to pick and choose those bits which support the result the judges want to reach.”).

96. CBOCS W., Inc. v. Humphries, 553 U.S. 442, 457 (2008) (“Principles of stare decisis, after all, demand respect for precedent whether judicial methods of interpretation change or stay the same. Were that not so, those principles would fail to achieve the legal stability that they seek and upon which the rule of law depends.”); Sydney Foster, Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology?, 96 GEO. L.J. 1863, 1875–1884 (2008); Evan J. Criddle & Glen Staszewski, Against Methodological Stare Decisis, 102 GEO. L.J. 1573, 1576 (2014).

97. There are other criticisms of judicial resort to legislative history. Prominent among them is the observation that committee reports and floor statements are unlikely to have been read, much less assented to, by the legislators voting on the statute. Moreover, it is the text of the bill—and not the trail of legislative history—that must undergo the rigors of bicameral passage and presentment to become law. Allowing unenacted legislative history to dictate the import of statutory language permits an end-run around the democratic process for making law. See also supra notes 51–55 and accompanying text.
history are now no less available to the citizenry than the statutory texts they purport to explain.”98 Now, studying both the legislation and its history must surely be more expensive and laborious than examining the statutory language alone.99 But this truism has little relevance insofar as textualists and purposivists both admit legislative history, albeit for distinct purposes.100

Does textualism give more definite answers, then, than purposivism? Textualists answer in the affirmative: their prescriptions will “provide greater certainty in the law, and hence greater predictability and greater respect for the rule of law.”101 But purposivists could equally argue the reverse.102 Namely, that textualism “does not actually provide judges with a means of putting aside social values and substantive jurisprudential commitments,”103 and that judges who “speak about words in ‘context’

100. See John F. Manning, Textualism as a Nondelegation Doctrine, 97 COLUM. L. REV. 673, 731–37 (1997) (approving “the use of legislative history to identify the events that precipitated the enactment of legislation”); United States v. Fausto, 484 U.S. 439, 444 (1988) (looking to the Senate Report for the legislative impetus behind the Civil Service Reform Act of 1978); Cont’l Can Co. v. Chicago Truck Drivers, Helpers and Warehouse Workers Union (Indep.) Pension Fund, 916 F.2d 1154, 1156–57 (7th Cir. 1990) (Easterbrook, C.J.) (relying on the speech of the bill’s floor manager to confirm that “substantially all” as used in 29 U.S.C. § 1383(d)(2) had a special legal meaning “present to [the legislators’] minds”).
101. SCALIA & GARNER, supra note 12, at xxix; ESKRIDGE, supra note 68, at 36 (“Although ordinary meaning does not always yield predictable answers to statutory issues, it seems to yield greater predictability than any other single methodology.”) (emphasis in original)).
102. See, e.g., James J. Brudney, Canon Shortfalls and the Virtues of Political Branch Interpretive Agency, 119 W. Va. L. Rev. 1199, 1231–32 (2010) (“[J]udges who regularly rely on the canons have license to employ a systemic kind of discretion, in contrast to judges who regularly invoke legislative history or agency deference.”); Eskridge, supra note 35, at 536 (“In any complex case, there will be several canons on every side of the issue, and the unscrupulous judge will have many cherries to pick under the approach favored by [textualists].”). Already in 1853, Chief Baron Pollock, an English judge sitting on the Court of Exchequer, thought it was by no means evident that “if it were laid down as a general rule, that the grammatical construction of a clause shall prevail over its legal meaning, whether a more certain rule would be arrived at, than if it were laid down that its legal meaning shall prevail over its grammatical construction.” Waugh v. Middleton (1853) 8 Exch. 352, 356. “In my opinion,” he continued,
grammatical and philological disputes, and indeed all that belongs to the history of language, is as obscure and leads to as many doubts and contentions as any question of law, and I do not, therefore, feel sure that the rule, much as it has been commended, is on all occasions a sure and certain guide.
Id. at 356–57.
103. Cary Franklin, Living Textualism, 2020 SUP. CT. REV. 119, 184; see also Anuj C. Desai, Text Is Not Enough, 93 COLO. L. REV. 1, 43 (2022) (“But when semantics yield plausible competing interpretations, the question of how much social context to consider will come to the fore. And because there is no way to reconcile the competing semantic interpretations without social context, and there is no preordained way to determine how much and what social context to consider, courts have to rely on, and thus inevitably will rely on, other modes of analysis.”) (emphasis in original)).
and the ‘structure’ of a statute” yet blind themselves to “what the actual players thought they were doing” are apt to give vent to their own “assumptions, speculation, preferences, and notions of ‘sound public policy.’” 104 These assertions might, perhaps, be testable. 105 An early contribution found that before 1986, justices on the Supreme Court were more likely to vote against their ideological dispositions in employment cases when they relied on legislative history. 106 More recently, an investigation into the use of interpretive tools in the Roberts Court found forty-four cases over a five-and-a-half-term period that had “dueling” opinions justifying opposing results by appealing to the ordinary meaning rule. 107 These quantitative studies do not conclusively prove purposivism to be more determinate than textualism—or vice versa. To muster a coalition, the justices may not faithfully reproduce their reasoning in the opinions they author. Furthermore, whether judges arrive at outcomes contrary to their own predilections is as much a matter of judicial discipline as it is of the announced interpretative method. Last, it may fairly be wondered whether generalization across cases is even meaningful since so much depends on the statutory language and history at issue. The best evidence so far reveals, however, that purposivism fares no worse than textualism in narrowing the range of justifiable outcomes. 108 The rule of law advantages claimed for textualism are thus

104. Patricia M. Wald, The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988–89 Term of the United States Supreme Court, 38 AM. U. L. REV. 277, 304 (1990); see Richard A. Posner, Statutory Interpretation—in the Classroom and in the Courtroom, 50 U. CHI. L. REV. 800, 816–17 (1983) (“Vacuous and inconsistent as they mostly are, the canons do not constrain judicial decision making but they do enable a judge to create the appearance that his decisions are constrained. . . . By making statutory interpretation seem mechanical rather than creative, the canons conceal, often from the reader of the judicial opinion and sometimes from the writer, the extent to which the judge is making new law in the guise of interpreting a statute . . . . The judge who recognizes the degree to which he is free rather than constrained in the interpretation of statutes, and who refuses to make a pretense of constraint by parading the canons of construction in his opinions, is less likely to act wilfully [sic] than the judge who either mistakes freedom for constraint or has no compunctions about misrepresenting his will as that of the Congress.”).

105. Anita S. Krishnakumar, Dueling Canons, 65 DUKE L.J. 909, 990 (2016) (finding that “as interpretive tools, purpose, legislative history, and intent appear no more susceptible to judicial shaping to support competing interpretations than do textualist-favored tools such as the whole act rule, dictionary definitions, and the plain meaning rule”).

106. James J. Brudney & Corey Ditslear, Liberal Justices’ Reliance on Legislative History: Principle, Strategy, and the Scalia Effect, 29 BERKELEY J. EMP. & LAB. L. 117, 137–44 (2008) (finding that liberal justices regularly invoked legislative history in favor of a pro-employer outcome); see also CROSS, supra note 57, at 176 (finding that the invocation of textualist methods did not influence the justices’ votes, once ideology is accounted for).


108. See id. at 990.
contingent and contestable.\textsuperscript{109}

In brief, fair notice does not necessarily imply an equivalence between legal and ordinary meaning. It does not require the legal significance or consequence of statutory language to be determined solely by the sense it bears in everyday discourse.

\textbf{B. Law, Morality, and Notice}

The first challenge to the fair notice argument for textualism, elaborated above, refutes the idea that fair notice necessitates giving statutory text its ordinary meaning and precludes resort to legislative history. But there is a second challenge arising from the insight that fair notice operates against a background of normative expectations and sensibilities. This background tempers the significance of express or actual notice. Even in the absence of any signs or notices, people comprehend that street benches may be freely used but not taken home. And while the person who finds a diamond under a bush may not be cognizant of the fine distinctions between property that is abandoned, property that is lost, and property that is misplaced, they will at least pause and wonder about their legal right to the precious stone.

The normative faculties are developed throughout a person’s upbringing and education.\textsuperscript{110} Starting from an early age, children acquire normative proficiency, learning first to heed instructions by controlling their own desires and then to adopt the perspectives of themselves and others.\textsuperscript{111} They also assimilate the normative expectations society has of them, not by memorizing abstract rules, but by grasping how they should behave in concrete situations.\textsuperscript{112} This can occur through instruction, observation, or trial and error.\textsuperscript{113} Because the learning process is accretive and un-systematized, it may seem invisible and mysterious. As Jeremy Bentham once exclaimed:

\textsuperscript{109}. In addition, Meir Dan-Cohen argues that a statute could simultaneously be a conduct rule addressed to citizens and a decision rule addressed to officials. See generally Meir Dan-Cohen, \textit{Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law}, 97 HARV. L. REV. 625 (1984). In this framework, it is not necessary—and may in fact be salutary—for learned interpretations to diverge from lay understandings of the law. As Dan-Cohen puts it, "[t]he proper relationship between decision rules and their corresponding conduct rules is not a logical or analytical matter. Rather, it is a normative issue that must be decided in accordance with the relevant policies and values." \textit{Id.} at 629. The rule of law ideal does not necessarily tell against acoustic separation between conduct and decision rules, especially when decision rules are more lenient than the corresponding conduct rules. \textit{Id.} at 667–73.


\textsuperscript{111}. \textit{Id.} at 285–87.

\textsuperscript{112}. \textit{See id.} at 287–88.

\textsuperscript{113}. \textit{See id.}
[H]ow a custom itself, is to be known, is a question, which upon the supposition that it is the custom of the people in general . . . seems neither very natural nor very material. How is it to be known? meaning by the people? Why, they know it, by the supposition; they even practise it, it is their custom. ‘How are the people to know what it is they do themselves?’ God knows, unless they know already.  

Bentham was speaking of custom and not law. But obedience to posited law is not all that different from adherence to inherited custom. Christoph Engel argues, for example, that “developing normative proficiency is part and parcel of development as such” and “[t]here is no separate legal proficiency.” And for law to govern behavior, “it is irrelevant whether the addressee knows the wording of the rule . . . . All she must know is what she is expected to do in a concrete situation to which the legal rule applies.” Such knowledge may be transmitted in the form of norms or exemplars. These simplifications help people conform to the law without having to ponder it. A fully socialized citizen also comes to appreciate the intimate connection between the legal and the moral—acts that are immoral are often, though not always, illegal. As the nineteenth-century legal reformer John Austin observed, “some laws are so obviously suggested by utility, that any person not insane would naturally surmise or guess their existence . . . . They see that a particular act would be mischievous, and they conclude that it must be prohibited.” “[M]ost men’s knowledge of the law is mostly of this kind” and outside of their fields of competence, “[e]ven lawyers have no other knowledge than this.”

114. JEREMY BENTHAM, A COMMENT ON THE COMMENTARIES AND A FRAGMENT ON GOVERNMENT 192 (J. Burns & H.L.A. Hart eds., 1977); see Jeremy Waldron, Custom Redeemed by Statute, 51 CURRENT LEGAL PROBLEMS 93, 110 (1998) (“In a purely customary regime, everyone knows the rules, because in a sense their presence in the lives of ordinary people is all that there is to their social reality.”).

115. Engel, supra note 110, at 287.

116. Id.

117. Id. at 287–88.

118. See FULLER, supra note 62, at 49–50 (“It would in fact be foolish to try to educate every citizen into the full meaning of every law that might conceivably be applied to him . . . . The need for this education will, of course, depend upon how far the requirements of law depart from generally shared views of right and wrong.”); Leslie Green, Positivism and the Inseparability of Law and Morals, 83 N.Y.U. L. REV. 1035, 1047 (2008) (arguing that “there is a necessary relation between the scope of law and morality”).

119. 1 JOHN AUSTIN, LECTURES ON JURISPRUDENCE 485 (5th ed. 1885). For Austin, the principle of utility is how people are to ascertain divine will where God has not revealed his command. Id. at 156–57.

120. Id. at 485.
The fact that we can follow the law without studying it matters for how fair notice is conceived. Our normative expectations and sensibilities may furnish the warning required by legality. Or they might prompt us to inquire further into the law’s demands. Consider the hypothetical posed by the philosopher Robert Nozick:

[A] country’s constitutional laws require that at regular intervals an official stamp must be placed on the document stating a law in order to keep it in effect during the coming period. The clerk who is to stamp the law against murder is sick or stuck in a traffic jam, and the first other person to realize this goes out and commits a murder during the three hours before another clerk gets around to putting on the stamp. The murderer claims his act was not illegal at the time, and so he should not be punished, that such punishment would be under retroactive or ex post facto legislation.

This defense is hollow, and the case of the missing stamp shows that “[t]here is no firm moral ban on retroactive punishment without actual warning or legislation, for the crucial question is: did the person know or should he have known he would be punished?”

Nozick “find[s] that nonlawyers agree with this conclusion and reasoning while law students do not.” But it seems that the criminal law does acknowledge the embeddedness of fair notice in a matrix of norms, values, orientations, and practices. Conduct that is malum in se, for example, need not be declared wrong to be so. When an act or omission is intrinsically wrongful, fair notice is either otiose or satisfied. It does

121. Indeed, Roman law permitted “persons under twenty-five years, women, soldiers, and peasants and other persons of small intelligence” to plead ignorance as a defense but only as to the jus civile, the customs and laws of the city of Rome, and not as to the jus gentium which is knowable by natural reason. Edwin R. Keedey, Ignorance and Mistake in the Criminal Law, 22 HARV. L. REV. 75, 80 (1908); see Ronald A. Cass, Ignorance of the Law: A Maxim Reexamined, 17 WM. & MARY L. REV. 671, 685 (1976).


123. Id. at 392.

124. Id.

125. BLACKSTONE, supra note 90, at *54 (“[C]rimes and misdemeanors, that are forbidden by the superior laws, and therefore styled mala in se . . . contract no additional turpitude from being declared unlawful by the inferior legislature; for that legislature in all these cases acts only, as was before observed, in subordination to the great Lawgiver, transcribing and publishing His precepts. So that, upon the whole, the declaratory part of the municipal law has no force or operation at all with regard to actions that are naturally and intrinsically right or wrong.”).

126. Stephen F. Smith, Proportionality and Federalization, 91 VA. L. REV. 879, 901 (2005) (“When the conduct the government seeks to prosecute is necessarily wrongful, the usual reasons given for strictly construing criminal statutes—fair warning, separation of powers, and federalism—will often be viewed as having considerably weakened force.”); REED DICKERSON, THE
not lie in the offender’s mouth to plead want of notice. Thus, it was opined, in the context of prosecutions under Article 134 of the Uniform Code of Military Justice for “conduct to the prejudice of good order and discipline in the armed forces” or “conduct of a nature to bring discredit on the armed forces,” that a servicemember must have or be given adequate notice that his contemplated conduct is punishable. Notice may be shown in different ways. If the act is malum in se, that is, it is inherently wrongful and known to be so by anyone in our society, the notice requirement is met. Common law offenses are of this nature as are those crimes found in most of our penal codes. In the military services, certain acts may be inherently wrongful and known to be so by any reasonable servicemember due to their occurrence in the military context, even though they are not prohibited in the civilian sector.\textsuperscript{127}

The court articulates a nexus between law and morality that serves to provide notice when the text is otherwise silent. It also recognizes that the normative background relevant to fair notice depends on the relevant community. Behavior that is tolerated by society at large may be especially pernicious in peculiar settings or environments—and commonly known to be so.

The normative faculties do not only speak to the wisdom of a contemplated action; they can also induce a person to hesitate and seek advice.\textsuperscript{128} Some activities, while not wrongful in and of themselves, are of the kind regulated by law because they impose significant or unreciprocated risks on others. There is nothing sinister, for instance, about operating a vehicle. Nevertheless, even visitors to a foreign land know to check the applicable licensing scheme should they wish to drive. Complaints that the legal rules were not advertised or too dense for a


\textsuperscript{128}. Cf. BARBARA HERMAN, THE PRACTICE OF MORAL JUDGMENT 77 (1993) (introducing “rules of moral salience” which are “[a]cquired as elements in a moral education” and “enable [an agent] to pick out those elements of his circumstances or of his proposed actions that require moral attention”).

INTERPRETATION AND APPLICATION OF STATUTES 211 (1975) (“A rule of strict interpretation or application seems unjustified where the statute carries a strong probable meaning of criminality (even though it may not be entirely free of doubt) or where an independent warning is unneeded (\textit{malum in se}).”).
tourist to parse will hardly find a sympathetic ear. It is unsurprising therefore that “public welfare offenses” which “depend on no mental element but consist only of forbidden acts or omissions” are usually created to “render[] criminal a type of conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community’s health or safety.”

Someone who takes delivery of a hand grenade not registered to them should not be “surprised to learn that possession of hand grenades is not an innocent act.” In the same vein, the “manifest purpose [of federal narcotics laws] is to require every person dealing in drugs to ascertain at his peril whether that which he sells comes within the inhibition of the statute.” Neither ignorance nor mistake is an excuse. By contrast, the acquisition of food stamps, even at a price below face value, does not ring any moral alarm bells. “A food stamp can hardly be compared to a hand grenade,” nor is its purchase on par with the sale of adulterated drugs.

Indeed, offenses criminalizing otherwise innocent behavior must incorporate an element of scienter to survive due process scrutiny. Hence, a “convicted person” who remained in Los Angeles for more than five days without registering with the police could not be punished under the municipal code where they “did not know of the duty to register and where there was no proof of the probability of such knowledge.” “Were it otherwise, the evil would be as great as it is when the law is written in print too fine to read or in a language foreign to the community.”

The proposition that normative understandings may constitute or obviate notice, if true, qualifies the rule of law argument for privileging ordinary meaning. When the mischiefs or dangers being addressed are

129. Liparota v. United States, 471 U.S. 419, 420, 432–33 (1985); cf. Posters ‘N’ Things, Ltd. v. United States, 511 U.S. 513, 522 (1994) (“Even statutes creating public welfare offenses generally require proof that the defendant had knowledge of sufficient facts to alert him to the probability of regulation of his potentially dangerous conduct.”). Considerations of fair notice bear on the permissibility of defining criminal offenses that lack a scienter requirement, but they do not explain or justify the creation of such offenses. Such offenses may be created to systematize how high-risk conduct is evaluated and punished and to remove the state’s burden to prove intent in cases where the consequences are themselves highly probative of fault. See Laurie L. Levenson, Good Faith Defenses: Reshaping Strict Liability Crimes, 78 CORNELL L. REV. 401, 421 (1993).


133. Liparota, 471 U.S. at 433.

134. Id.


136. Id. at 226, 229.

137. Id. at 230.
obscure or when the law is especially punitive, fair notice could entail circumscription of the interpretive terrain by semantic context. Conversely, attention to policy context becomes less objectionable where the mischief being suppressed or risk being controlled is familiar, and where the sanction is proportionate to the harm inflicted or necessary for the legislative scheme to function. Fair notice, on the conception sketched here, does not always require statutory language to be construed according to the “[pictures that] words . . . evoke in the common mind.”

III. A SURVEY EXPERIMENT

How then do ordinary people judge fair notice in the law? Although lay intuitions and attitudes do not settle fundamental debates about the nature of fair notice, they are nevertheless germane to the sociological legitimacy of the legal system. Law and its institutions will not command respect if citizens feel or believe they have been denied fair warning about the kinds of behavior the state penalizes or the sentences that await offenders. Moreover, empirical facts about how legal outcomes and reasoning are perceived loom to the fore when normative questions are intractable. Consider, for example, the burden imposed on citizens to educate themselves about their legal rights and obligations. Presumably, the burden cannot be too heavy, or law will lose the ability to guide even the most assiduous of its subjects. But neither can it be zero, even in a society that lives under the rule of law. In the absence of any principled a priori basis for determining how much is too much, architects of legal doctrines and institutions may have to fall back on popular conceptions of fair notice.

A. Experimental Design

To canvass public opinion about fair notice in statutory interpretation, I conducted a survey on a representative probability sample of the United States. Embedded in the survey was an experiment evaluating the twin challenges to the fair notice argument for textualism. As part of the survey experiment, respondents were asked to read a vignette adapted from a casebook staple, Smith v. United States, and to say whether the


139. For a warning about how empirical facts about human psychology might be abused by those in power to manipulate individuals into believing they had a fair process when they did not, see Robert J. MacCoun, Voice, Control, and Belonging: The Double-Edged Sword of Procedural Fairness, 1 ANN. REV. L. & SOC. SCI. 171, 188–193 (2005).

defendant in that case had fair notice of the law. The choice of Smith was based on two desiderata. First, it involved the interpretation of a criminal statute. It is thus the kind of case where the pull of the fair notice is at its strongest. Second, previous research uncovered high levels of agreement in favor of the defendant even when people were asked how ordinary readers would understand the provision at issue in Smith. A scenario revolving around Smith would in all probability elicit a sizable number of negative judgments of fair notice.

18 U.S.C. § 924(c)(1) targets anyone who “during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm.” The law specifically prescribes a mandatory sentence of five years upon conviction—thirty if the firearm so used or carried is a “machinegun” or “is equipped with a . . . silencer.” The defendant in the case, John Angus Smith, had traveled from Tennessee to Florida to buy drugs for resale. While in Florida, he tried to barter his MAC-10 machine gun with its equipped silencer for two ounces of cocaine. The transaction was not consummated because the other party was in fact a law enforcement officer. Smith was arrested and charged with drug trafficking. The issue pertinent here was whether the proposed exchange amounted to the “use[]” of a firearm within the meaning of section 924(c)(1).

The district court answered yes, and the United States Court of Appeals.

141. The experiment thus takes an “[a]pplied” rather than an “[a]bstract” approach to ordinary meaning. See Macleod, supra note 77, at 12. That is, the reader is provided both the facts and the statutory language—rather than the facts or the statutory language alone—and asked if “the full extent of the statutory language encompasses the facts at issue.” Id. at 13. As explained by Macleod, “what seems to matter for purposes of notice . . . is what would happen in the following sort of situation: An ordinary person (whether employer or employee) is contemplating some course of action (e.g., firing someone) or event (e.g., getting fired) and consults the statutory provision at issue.” Id. at 69–70 (emphasis added). “An [a]pplied approach tracks that ordinary reader’s answer.” Id.

142. Ward Farnsworth, Dustin Guzior & Anup Malani, Policy Preferences and Legal Interpretation, 1 J.L. & CTS. 115, 128 (2013). Farnsworth and coauthors found that asking people how ordinary readers would understand the statutory language at issue generated answers that were less correlated with respondents’ policy preferences than asking people how they themselves understand the legal text. Id. at 127. Unlike other scenarios, however, the gun use scenario—based on Smith—did not produce a two-way shift. Respondents who were pro-defendant as a matter of policy did not convert to the government’s position when asked which reading of the law they thought to be “a better fit to the ordinary meaning of the statute’s text.” Id. at 122, 125.

143. 18 U.S.C. § 924(c)(1).
144. Id. §§ 924(c)(1)(A)(i), (c)(1)(B)(i).
145. Smith, 508 U.S. at 225.
146. Id. at 225–26.
147. Id. at 226.
for the Eleventh Circuit affirmed.\textsuperscript{149} Declaring that “the plain meaning of
the statute controls ‘unless the language is ambiguous or leads to absurd
results, in which case a court may consult the legislative history and
discern the true intent of Congress,’” the panel held that the trading of
guns for drugs was comprehended by section 924(c)(1)—“the trade not
only facilitates, but also becomes, an illegal drug transaction.”\textsuperscript{150} In
reaching this outcome, the Eleventh Circuit split from the Ninth Circuit’s
decision in \textit{United States v. Phelps}.\textsuperscript{151} In \textit{Phelps}, the Ninth Circuit
discerned from the concededly “sparse” legislative history a Congressional intent to target “persons who chose to carry a firearm as an
offensive weapon for a specific criminal act.”\textsuperscript{152} When carried as a
commodity, a firearm was not used “in relation to” the drug offense.

The position embraced by the Eleventh Circuit prevailed in the
Supreme Court. Writing for a six-justice majority, Justice O’Connor
sought to discern the natural, common meaning of the word “use.”\textsuperscript{153}
Relying on dictionary definitions, she straightforwardly reasoned that “[b]y attempting to trade his MAC-10 for the drugs, [Smith] ‘used’ or
‘employed’ it as an item of barter to obtain cocaine; he ‘derived service’
from it because it was going to bring him the very drugs he sought.”\textsuperscript{154}
This reading of the statute also furthered legislative purpose because
Congress, in enacting the provision, “was no doubt aware that drugs and
guns are a dangerous combination.”\textsuperscript{155} “[A] gun [that] is treated
momentarily as an item of commerce...can be converted instantaneously from currency to cannon” when the need arises.\textsuperscript{156}
Authoring the dissent, Justice Scalia agreed that “[i]n the search for
statutory meaning, we give nontechnical words and phrases their ordinary
meaning.”\textsuperscript{157} But there is, he maintained, a “distinction between how a
word \textit{can be} used and how it \textit{ordinarily is} used.”\textsuperscript{158} “To use an
instrumentality ordinarily means to use it for its intended purpose” which,
in the case of a firearm, is to use it as a weapon.\textsuperscript{159} But even if the issue
were not as clear-cut as Justice Scalia believed it to be, it was, at the very

\textsuperscript{150}. \textit{Id}. at 836–37.
\textsuperscript{151}. \textit{877 F.2d 28} (9th Cir. 1989).
\textsuperscript{152}. \textit{Id}. at 30 (internal quotations marks omitted).
\textsuperscript{154}. \textit{Id}. at 229.
\textsuperscript{155}. \textit{Id}. at 240.
\textsuperscript{156}. \textit{Id}.
\textsuperscript{157}. \textit{Id}. at 242 (Scalia, J., dissenting).
\textsuperscript{158}. \textit{Id}. (emphasis in original).
\textsuperscript{159}. \textit{Id}.
2022] TEXTUALISM AS FAIR NOTICE? 367

at least, “eminently debatable,” and the criminal defendant was entitled to the benefit of the doubt.160

Building on this fact pattern and the statutory arguments it generated, the experimental protocol implemented a $2 \times 2 \times 2$ full factorial, between-subjects, designed to test whether lay perceptions of fair notice are swayed by policy as opposed to semantic justifications, judicial conformance to or deviation from the law of interpretation, and the severity of the legal consequences. The survey instrument began by narrating the story of the fictitious Sammy DeVito, “a member of a drug trafficking ring operating in the United States.”161 Respondents read that:

On the morning of 18 August 2014, Sammy drove from Tennessee to Florida to procure some cocaine. While in Florida, Sammy proposed to trade his gun—a modified MAC-10—for the drug. The MAC-10 is valued by criminals because it is light, compact, and has a high rate of fire. The exchange was supposed to take place in a motel room. Unfortunately for Sammy, federal law enforcement agents were tipped off to the transaction and they arrested him after he entered the motel room carrying the unloaded MAC-10 in a duffel bag.162

They were then asked how many years in prison Sammy should get for his behavior. As respondents had not, at this stage, been introduced to the statutory issue, their answers are indicative of how they assess the gravity of the described conduct. Following this query, respondents were informed that:

Sammy was eventually charged for conspiring and attempting to possess cocaine for the purpose of distribution. He did not contest these charges.

Sammy was also charged for “using” a firearm “during and in relation to any . . . drug trafficking crime.” Title 18 of the United States Code, Section 924(c)(1) prescribes a harsher punishment for anyone who “uses” a firearm “during and in relation to any . . . drug trafficking crime.” The term “uses” is not defined by the statute.

The prosecutor argued that Sammy had violated Section 924(c)(1). According to the prosecutor, Sammy “used” the MAC-10 by trying to exchange it for drugs. Sammy’s defense attorney contended, on the other hand, that because the MAC-10 was brought to the motel room as a commodity, not a weapon, it

160. Id. at 246.


162. Id.
was not “use[d]” in the appropriate sense. Despite their
differences, both sides agreed that the MAC-10 was unloaded and
transported in a duffel bag.163

The following binary question was posed: “Based on what you have
been told so far, would you say that Sammy ‘‘use[d]’’ a firearm by trading
the MAC-10 for cocaine?”164 At this point, respondents had little to go on
other than skeletal facts and the bare text of the statute. The ordinary
meaning of the provision is likely to factor into lay construals of the law.
But moral and political attitudes are also likely to have a bearing on how
people read the law, whether they know it or not.165 The positions favored
by respondents are thus best interpreted as expressions of their own policy
inclinations, bounded by the possibilities of statutory language.166
Because respondents who did not believe Sammy “use[d]” a firearm
would be disposed to deny the existence of fair notice, they were the most
appropriate subjects for the present study.

After the two pre-treatment variables—beliefs about the egregiousness
of the described behavior and whether Section 924(c)(1) extends to gun-
for-drug exchanges—had been recorded, respondents were randomized to
different experimental conditions. The additional, consecutive, sentence
for anyone who “uses” a firearm “during and in relation to any . . . drug
trafficking crime” was stated as thirty years for respondents in the
“heavier sentence” condition and five for those in the “lighter sentence”
condition.167 The governing law of interpretation was then set forth. Some
respondents learned that “[t]he law requires courts to prioritize the
ordinary or usual meaning of the statute in deciding whether it applies.”168

163. Id.
164. Id.
165. Farnsworth et al., supra note 142; Eileen Braman, Law, Politics, and Perception: How
    Policy Preferences Influence Legal Reasoning 161–64 (2009); see also Joshua Furgeson &
    Linda Babcock, Legal Interpretation and Intuitions of Public Policy, in IDEOLOGY, PSYCHOLOGY,
    AND LAW 684 (Jon Hanson ed., 2012). It may well be impossible to banish normative attitudes from
    the interpretation of language, for human communication depends to some extent on shared
    assumptions, values, and beliefs. Dickerson, supra note 126, at 106; see Paul Grice, Studies in
    the Way of Words 25–31 (1991) (deriving maxims of conversational implicatures from the premise
    that “talk exchanges . . . are characteristically, to some degree at least, cooperative efforts; and each
    participant recognizes in them, to some extent, a common purpose or set of purposes, or at least a
    mutually accepted direction”). But sustained discussion of this claim lies beyond the scope of the
    experiment.
    biasing role of goals is . . . constrained by one’s ability to construct a justification for the desired
    conclusion: People will come to believe what they want to believe only to the extent that reason
    permits.”).
168. Id.
That is, “the plain or ordinary or usual meaning of the words or phrases used in the statute should govern, even if it is contrary to the purpose for which the statute was passed.” 169 Others were taught that “[t]he law requires courts to prioritize the purpose of the statute in deciding whether it applies.” 170 That is, “the purpose for which the statute was passed should govern, even if it is contrary to the ordinary or usual meaning of the words or phrases used in the statute.” 171

After being apprised of the controlling interpretative regime, respondents were told how the case was decided based on whether they were assigned to the “semantic” or “policy” justification:

The judge in this case focused on the [ordinary or usual meaning / purpose] of the statute. [Because the everyday meaning of “use” is broad and expansive / Because Congress intended the meaning of “use” to be broad and expansive], the court reasoned, a person “uses” a firearm by trading it for drugs. In reaching this conclusion, the judge relied on [definitions of “use” as “to employ” or “to derive service from.” These definitions are published in common dictionaries / floor speeches by Congresspeople and Senators highlighting the dangers and risks to life created whenever firearms are present in a drug transaction. These statements are published in the Congressional Record]. 172

Respondents belonged to the “conforms to doctrine” condition if the way the case was resolved was consonant with the law of interpretation as explained to them, and to the “deviates from doctrine” condition otherwise. The vignette concluded by informing the reader that “Sammy was ultimately sentenced to [fifteen / forty] years in federal prison; ten years for conspiring and attempting to possess cocaine for the purpose of distribution and [five / thirty] years for the “use[]” of a firearm.” 173 Those allocated to the “lighter sentence” condition found out that Sammy was sentenced to fifteen years in total, five for the “use[]” of a firearm” as compared to forty and thirty years respectively for those allocated to the “heavier sentence” condition.

After finishing the vignette, respondents were asked whether they “believe[d] that Sammy had fair warning of the additional sentence imposed for exchanging a firearm, rather than money or some other good, for drugs.” 174 This is the main outcome variable of the experiment.

169. Id.
170. Id.
171. Id.
172. Id.
173. Id.
174. Id.
Respondents were also polled for their guesses about Sammy's actual knowledge of the law penalizing the "use[]" of firearms in drug trafficking"\(^{175}\) and solicited for their opinions about the accessibility of a dictionary and the Congressional Record to Sammy.\(^{176}\) Manipulation checks were performed near the end of the survey instrument. These checks verified that the manipulations were processed by respondents. A final item captured self-reported political ideology on a one to seven scale, one being "extremely liberal," four being "moderate," and seven being "extremely conservative."\(^{177}\)

In a nutshell, the survey experiment featured a 2×2×2 full factorial, between-subjects design (Figure 1). Respondents were randomized to one of two interpretive regime conditions ("textualist" or "purposivist"), one of two severity of punishment conditions ("lighter sentence" or "heavier sentence") and one of two justification conditions ("semantic" or "policy").\(^{178}\) They were classified as being in the "conforms to the doctrine" condition if they were assigned to a "textualist" interpretive regime and a "semantic" justification or a "purposivist" interpretive regime and a "policy" justification. They were classified as being in the "deviates from doctrine" condition if they were assigned to a "textualist" interpretive regime and a "policy" justification or a "purposivist" interpretive regime and a "semantic" justification. The information respondents received varied based on the conditions they were sorted to. Respondents were then asked whether they "believe[d] that Sammy had fair warning of the additional sentence imposed for exchanging a firearm, rather than money or some other good, for drugs."\(^{179}\)

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175. *Id.* at 8.
176. *Id.* at 8–9. The exact phrasing of the accessibility questions was "In your opinion, how easy would it have been for Sammy to look up the definition of a statutory term in an English dictionary?" and "In your opinion, how easy would it have been for Sammy to look up the legislative debates surrounding the statute in the Congressional Record?" *Id.* Respondents randomized to the "semantic" justification were posed the former question before the latter and vice versa for respondents randomized to the "policy" justification.
177. *Id.* at 10.
178. *Id.* at 4.
179. *Id.* at 7.
B. Sample and Results

The survey was fielded in May 2020 to a representative panel of adults in the United States by the National Opinion Research Center (NORC) at the University of Chicago. NORC’s AmeriSpeak panel is qualitatively different from subjects recruited from online platforms such as Amazon Mechanical Turk or by companies such as Prolific or Toluna, even when samples are constructed to match the demographic profile of the target population. This is because participants in the AmeriSpeak panel are randomly drawn from a sampling frame that covers the adult population of the United States.\textsuperscript{180} Because every household in the NORC National Sample Frame is randomly selected US households are sampled using area probability and address-based sampling, with a known, non-zero probability of selection from the NORC National Sample Frame. These sampled households are then contacted by US mail, telephone, and field interviewers (face to face). The panel provides sample coverage of approximately 97% of the U.S. household population. Those excluded from the sample include people with P.O. Box only...
Sample Frame has a non-zero chance of being invited to participate, the problems of self-selection and non-naivete that might plague convenience pools are mitigated. In addition, because the 2021 respondents for this survey constitute a probability sample of the adult population of the United States, there is a statistical foundation for making population inferences from sample data. Study-specific base sampling weights that account for the probability of selection from the sampling frame and non-response, among other things, are available. Unless otherwise stated, however, analysis is performed on the unweighted data.

1. Descriptive and Correlational Results

Like the Supreme Court, respondents split on whether Sammy had “used a firearm by trading the MAC-10 for cocaine.” A majority of respondents, however, sided with Sammy: 1236 would not say that Sammy “used” a firearm, 781 would say he did, and 4 skipped. Applying the base sampling weights, the sample data imply that 40.4% of the population would hold that Sammy had “used a firearm;” 59.2% would not. Unsurprisingly, compared to respondents who opined that Sammy “used” a firearm, respondents who opined he did not were much more inclined to say that he was not given fair warning of the penalty imposed on gun for drug transactions. 78.2% of respondents in the former category thought fair notice had been given against 31.3% in the latter category.  

addresses, some addresses not listed in the USPS Delivery Sequence File, and some newly constructed dwellings. While most AmeriSpeak households participate in surveys by web, non-internet households can participate in AmeriSpeak surveys by telephone. Households without conventional internet access but having web access via smartphones are allowed to participate in AmeriSpeak surveys by web.


182. Employing weights in the analysis of survey experiments increases the certainty of estimates for population average treatment effects but decreases the power of estimates for sample average treatment effects. Luke W. Miratrix, Jasjeet S. Sekhon, Alexander G. Theodoridis & Luis F. Campos, Worth Weighting? How to Think About and Use Weights in Survey Experiments, 26 POL. ANALYSIS 275, 289 (2018). Weights are eschewed here because there is unlikely to be too much of a discrepancy between sample and population average treatment effects given that the unweighted sample data is largely representative of the overall population. See id. at 288.

183. The standard error on this estimate is 1.5% and the 95% confidence interval is between 37.5% and 43.4%. 95% confidence intervals include the true parameter value ninety-five times out of a hundred realizations of the sample data.

184. The standard error on this estimate is 1.5% and the 95% confidence interval is between 56.2% and 62.1%. 
Respondents’ judgments of fair notice and their interpretations of Section 924(c)(1)—collected at the start of the instrument—were also positively correlated with self-reported ideology as measured on a seven-point scale. It is highly improbable that these correlations are the product of chance.

2. Analysis of Experiment

After reading the entire vignette, 993 respondents held that “Sammy had fair warning of the additional sentence imposed for exchanging a firearm, rather than money or some other good, for drugs” while 1016 did not (Table 1).

<table>
<thead>
<tr>
<th>Yes, Sammy “use[d]” a firearm</th>
<th>Yes, Sammy had fair warning</th>
<th>No, Sammy did not have fair warning</th>
<th>Skipped</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes, Sammy “use[d]” a firearm</td>
<td>606</td>
<td>169</td>
<td>6</td>
</tr>
<tr>
<td>No, Sammy did not “use[]” a firearm</td>
<td>385</td>
<td>845</td>
<td>6</td>
</tr>
<tr>
<td>Skipped</td>
<td>2</td>
<td>2</td>
<td>0</td>
</tr>
</tbody>
</table>

Table 1: Cross-tabulation of all subjects’ interpretations of section 924(c)(1) and judgments of fair notice.

The remainder of the analysis will be confined to respondents who did not think that section 924(c)(1) extended to Sammy’s conduct, omitting non-responses. Descriptively, these respondents’ opinions about how the law ought to punish conduct like Sammy’s varied widely, with sentences ranging from one year to thirty-three years. The median response was ten years. For our purposes, it suffices to note that 841 respondents thought that Sammy’s conduct should attract a penalty of no greater than fifteen years, 395 respondents thought it should attract a penalty of more than fifteen but no greater than forty years, and no one thought it should attract a penalty of more than forty years in prison. It is thus safe to presume that a total sentence of forty years was seen by these respondents as numerically and substantively heavier than a total sentence of fifteen years.

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185. Recall that one on the scale is “Extremely liberal,” four is “Moderate,” and seven is “Extremely conservative.” Legal Decisions Survey, supra note 161, at 10.

186. Kendall’s τ coefficient is 0.120 (p=0.000) for the relationship between judgments of fair notice and self-reported ideology and 0.065 (p=0.001) for the relationship between interpretations of section 924(c)(1) and self-reported ideology.
years.

As it turns out, the severity of the punishment had a noticeable effect on lay judgments of fair notice (Figure 2). When subjects were told that the sentence prescribed by law for the “use[] of a firearm” was five years in prison, 37.2% thought Sammy was fairly warned. The same figure stands at 25.8% for subjects who were told that the sentence was thirty years, a statistically significant drop of 11.4 percentage points ($p=0.000$, two-sided t-test).

Is the influence of sentence length on lay judgments of fair notice a function of how severely subjects would have the law punish the defendant? The answer seems to be no. Judgments of fair notice are coded
as one if they are positive and zero if they are negative. An ordinary least squares regression of judgments of fair notice on the severity of the punishment, the sentence subjects proposed, measured in years, and the interaction between the two variables does not pick up any heterogeneity between those who were harsh and those who were lenient (Table 2).\(^{187}\) The coefficient on the interaction term is very close to zero and not statistically significant (0.002, \(p=0.846\)). Whether subjects thought Sammy had fair notice does not appear to depend on their own views of his drug trafficking activities.

<table>
<thead>
<tr>
<th>Judgment of Fair Notice</th>
</tr>
</thead>
<tbody>
<tr>
<td>Constant</td>
</tr>
<tr>
<td>0.372***</td>
</tr>
<tr>
<td>(0.020)</td>
</tr>
<tr>
<td>Heavier sentence</td>
</tr>
<tr>
<td>-0.114***</td>
</tr>
<tr>
<td>(0.026)</td>
</tr>
<tr>
<td>Sentence proposed by subject</td>
</tr>
<tr>
<td>-0.001</td>
</tr>
<tr>
<td>(0.002)</td>
</tr>
<tr>
<td>Heavier sentence:</td>
</tr>
<tr>
<td>Sentence proposed by subject</td>
</tr>
<tr>
<td>0.002</td>
</tr>
<tr>
<td>(0.003)</td>
</tr>
<tr>
<td>Observations</td>
</tr>
<tr>
<td>1230</td>
</tr>
<tr>
<td>R(^2)</td>
</tr>
<tr>
<td>0.016</td>
</tr>
<tr>
<td>Adjusted R(^2)</td>
</tr>
<tr>
<td>0.013</td>
</tr>
</tbody>
</table>

Table 2: Estimated coefficients from an ordinary least squares regression of binary judgments of fair notice on an indicator variable for the severity of the punishment, a continuous variable for the sentence proposed by subjects, and the interaction of both variables. Judgments of fair notice are coded as one if they are positive and zero if they are negative. The reference category for severity of punishment is “lighter sentence.” The sentence proposed by subjects is measured in years and centered. Observations are limited to subjects who would not say that Sammy “use[d]” a firearm. Robust standard errors are computed using the

\(^{187}\) The sentences proposed by subjects are centered by subtracting the mean from individual observations. Robust standard errors are computed using the HC2 sandwich estimator. Cf. Winston Lin, *Agnostic Notes on Regression Adjustments to Experimental Data: Reexamining Freedman’s Critique*, 7 ANNALS APPLIED STAT. 295, 296 (2013).
In contrast to the severity of the punishment, the justification relied on by the court had no discernable effect on how subjects evaluated fair notice (Figure 3). When the court relied on dictionary definitions to hold that the term “use” had a broad and expansive meaning, 31.8% of subjects opined that fair notice had been given. When the court relied on legislator’s floor speeches to hold that Congress intended the term “use” to have a broad and expansive meaning, 30.8% expressed the same opinion—a statistically insignificant decrease ($p=0.695$, two-sided t test).

The political tenor of the statutory interpretation debate hints that ideology ought to matter; conservative subjects should be more amenable
to a semantic justification and liberal subjects to a policy justification. One might imagine, for instance, that conservative subjects who construed the provision narrowly at first would take exception to judicial reasoning grounded in legislative history or statutory purpose. But no such patterns are revealed by the data. Judgments of fair notice are coded as one if they are positive and zero if they are negative. They are then regressed on the justification for the decision, ideology, measured on a seven-point scale, and the interaction between the two variables (Table 5). Overall, more conservative subjects were inclined to say there was fair warning while more liberal subjects were disposed to say there was not. This correlation is statistically significant (0.037, p=0.001). But the policy justification did not produce differing reactions in conservative as compared to liberal subjects. The estimated coefficient on the interaction between policy justification and ideology is close to zero and statistically insignificant (-0.004, p=0.785).

<table>
<thead>
<tr>
<th>Judgment of Fair Notice</th>
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<tbody>
<tr>
<td>Constant</td>
<td>0.319***</td>
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<tr>
<td></td>
<td>(0.019)</td>
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<tr>
<td>Policy justification</td>
<td>-0.011</td>
</tr>
<tr>
<td></td>
<td>(0.026)</td>
</tr>
<tr>
<td>Ideology</td>
<td>0.037***</td>
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<td></td>
<td>(0.011)</td>
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<tr>
<td>Policy justification:</td>
<td>-0.004</td>
</tr>
<tr>
<td>Ideology</td>
<td>(0.016)</td>
</tr>
</tbody>
</table>

Observations 1222
R² 0.015
Adjusted R² 0.012

**Note:** *p<0.05  **p<0.01  ***p<0.001

Table 3: Estimated coefficients from an ordinary least squares regression of binary judgments of fair notice on an indicator variable for justification, a continuous variable for ideology, and the interaction of both variables. Judgments of fair notice are coded as one if they are positive and zero if they are negative.

188. Ideology scores are centered by subtracting the mean from individual observations. Robust standard errors are computed using the HC2 sandwich estimator.
negative. The reference category for justification is “semantic justification.” Ideology is measured on a one to seven scale, one being “Extremely liberal,” four being “Moderate,” and seven being “Extremely conservative.” The ideology variable is centered. Observations are limited to subjects who would not say that Sammy “use[d]” a firearm. Robust standard errors are computed using the HC2 sandwich estimator.

Are the null results attributable to the inattentiveness of respondents rather than ambivalence as to how the decision was justified? The data indicate they are not. The same pattern obtains even when attention is restricted to the 691 subjects who correctly recalled the justification given by the court.

![Figure 4](imageurl)

*Figure 4: Judgments of fair notice among the 1230 subjects who would not say that Sammy “use[d]” a firearm, grouped by conformity to doctrine. Error bars show 95% confidence intervals.*
Moreover, the judge’s conformance to or deviation from the controlling doctrine of interpretation did not have a discernible effect on whether subjects believed Sammy to have been fairly warned (Figure 4). 32.6% of subjects found fair notice when the judge conformed to the prevailing interpretive regime compared to 29.9% when the judge deviated. This difference is not statistically significant ($p=0.307$, two-sided t-test).

Given the length and complexity of the scenario, there may be reason to doubt whether all subjects were alert to the disparity between the stated law of interpretation and the court’s interpretive method. The manipulation checks were multiple-choice questions presenting four mutually exclusive options. If all subjects guessed at random between these options, then approximately 77 out of 1230 of them could be expected to pass the two manipulation checks applicable here. In fact, 317 of them correctly remembered the justification given by the court and the prevailing law of interpretation. Though higher than would be produced by chance alone, this number is barely more than a quarter of the subjects included in the preceding analysis. Still, conformance to or deviation from the law of interpretation did not appear to impact the judgments of these 317 subjects ($-0.001; p=0.977$, two-sided t-test).

Does the approach mandated by the law of interpretation influence how ordinary people evaluate judicial departures from legal orthodoxy? It seems, for example, that focusing on textual cues is acceptable even when the governing paradigm is to further legislative purpose. After all, “the best evidence of Congress’s intent is the statutory text.”

On the other hand, emphasis on policy objectives not apparent on the face of the law might be exceptionable when the prevailing rule is to give statutory language the meaning it has in everyday discourse.

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189. The standard error is 2.6% and the 95% confidence interval is between -7.9% and 2.5.
190. The standard error is 0.052 and the 95% confidence interval is between -0.104 and 0.101.
To explore these possibilities, subjects are divided along two dimensions. First, whether they were informed that “[t]he law requires courts to prioritize the ordinary or usual meaning of the statute in deciding whether it applies” or that “[t]he law requires courts to prioritize the purpose of the statute in deciding whether it applies.” Second, whether the judge conformed to or deviated from the law of interpretation. The

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192. Recall that the explanations given to respondents are that “the plain or ordinary or usual meaning of the words or phrases used in the statute should govern, even if it is contrary to the purpose for which the statute was passed” or that “the purpose for which the statute was passed should govern, even if it is contrary to the ordinary or usual meaning of the words or phrases used in the statute,” as the case may be. Legal Decisions Survey, supra note 161, at 7.
percentage of subjects in each group who thought Sammy was fairly warned is computed for all respondents who would not say that Sammy “use[d]” a firearm (Figure 5). While deviation from the law of interpretation generated lower average judgments of fair notice for subjects randomly assigned to both textualist (\(p=0.279\), two-sided t-test) and purposivist (\(p=0.712\), two-sided t-test) regimes, this fluctuation could very well be due to sampling chance rather than systematic difference. In addition, judicial invocation of legislative history and intent resulted in higher average judgments of fair notice—34.1% compared to 27.1%—when the law required courts to prioritize the purpose rather than the ordinary or usual meaning of the statute.\(^{193}\) This rise is just shy of conventional levels of statistical significance (\(p=0.058\), two-sided t-test). It should also be noted that privileging semantic context under a textualist regime did not engender proportionately more judgments of fair notice than elevating policy context under a purposivist regime. To be sure, the 3.1 percentage point gap between the two groups is not statistically significant (\(p=0.395\), two-sided t-test).\(^{194}\) But it cuts against the notion that elevating unenacted purpose over enacted text is ipso facto unfair, even as to a criminal defendant. Narrowing the subject pool to those who passed all relevant manipulation checks does not alter the qualitative conclusions, except that adherence to doctrine under a purposivist rather than textualist regime produced greater average judgments of fair notice to an extent that is statistically significant.\(^{195}\)

3. **Summing Up**

In sum, 31.3% of subjects who would not say that Sammy “use[d]” a firearm within the meaning of Section 924(c)(1) nevertheless believed he had fair notice of the punishment. This percentage, however, varied depending on the severity of the punishment. When the offense carried a penalty of five years in prison, 37.2% of subjects thought fair warning had been given. When it carried a penalty of thirty years, only 25.8% thought the same. However, the justification offered by the court, whether grounded in semantic or policy considerations, did not influence subjects. Neither did adherence to or departure from the binding interpretive

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193. The standard error is 7.8% and the 95% confidence interval is between -14.3% and 0.2%.
194. The standard error is 3.7% and the 95% confidence interval is between -10.3% and 4.1%.
195. As the number of subjects in each group might be too small for the central limit theorem or the normal approximation to the binomial distribution to hold, comparisons are made using Boschloo’s test. A form of randomization inference, Boschloo’s test does not rely on assumptions about the underlying distribution of the true parameter and is by construction uniformly more powerful than Fisher’s exact test. R.D. Boschloo, *Raised Conditional Level of Significance for the 2x2-Table When Testing the Equality of Two Probabilities*, 24 Statistica Neerlandica 1 (1970).
regime. The data do suggest that judicial reliance on legislative history and purpose was perceived as being fairer or at least equally fair under a purposivist rather than textualist regime. In any case, reliance on a policy justification under a purposivist regime did not appear to provoke more complaints of unfair surprise than reliance on semantic justification under a textualist regime.

Finally, it is necessary to acknowledge some limitations. All research methods have their weaknesses and strengths, and survey experiments are no exception. The randomization of subjects to different conditions establishes internal validity.196 It is sound to infer that the differences observed between groups were caused by purposeful manipulations in the vignette. But subjects’ answers to the survey do not always mirror how they might react to a case they hear about on the news or how they might feel if they were the defendant in the case. The generalizability of the survey experiment to more natural environments—external validity—cannot be taken for granted.197 Moreover, the survey addressed a single controversy: Smith. Although Smith is precisely the kind of case that triggers fair warning concerns, it may be worthwhile to replicate the experiment in other legal and, perhaps, non-criminal settings.

IV. VINDICATING FAIR NOTICE

The results of the survey experiment show that appeals to ordinary meaning and dictionary definitions are not perceived as being intrinsically fairer than recourse to statutory purpose and legislative history. More palpably, lay judgments of fair notice are shaped not only by the character of the proscribed behavior but also by the severity of the punishment meted out. What do the empirical findings imply for the fair notice argument for textualism?

A. Substance and Procedure

First, substantive outcomes seem to matter more than choice of interpretive approach for lay perceptions of fair notice. Consensus or uniformity of legal method does not necessarily promote fair notice and

196. WILLIAM R. SHADISH, THOMAS D. COOK & DONALD T. CAMPBELL, EXPERIMENTAL AND QUASI-EXPERIMENTAL DESIGNS FOR GENERALIZED CAUSAL INFERENCE 53 (2002) (describing internal validity as referring to “inferences about whether observed covariation between A and B reflects a causal relationship from A to B in the form in which the variables were manipulated or measured”).

197. Id. at 38 (describing external validity as “the validity of inferences about whether the causal relationship holds over variation in persons, settings, treatment variables, and measurement variables”).
TEXTUALISM AS FAIR NOTICE?

might even impair it.

Henry Hart and Albert Sacks famously lamented that “American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation.” 198 This unsatisfactory state of affairs has inspired numerous proposals for bringing order and uniformity to the domain of statutory interpretation. In describing law as the product of collaboration and contestation between rational institutional actors, William Eskridge and Philip Frickey extol the advantages of a normative schema that “tells lower court judges, agencies, and citizens how strings of words in statutes will be read, what presumptions will be entertained as to statutes’s scope and meaning, and what auxiliary materials might be consulted to resolve ambiguities.” 199 Such an interpretive regime, they explain, not only promotes the rule of law but also facilitates coordination between the legislative and judicial branches of government. 200 In this regard, the canons of construction—rules and maxims that guide the judicial reading of statutes—“may be understood as conventions, similar to driving a car on the right-hand side of the road; often it is not as important to choose the best convention as it is to choose one convention, and stick to it.” 201 Nicholas Rosenkranz has drawn on similar arguments in proposing that Congress enact the Federal Rules of Statutory Interpretation. 202 Like Eskridge and Frickey, Rosenkranz considers that “[i]n most cases, the particular choice of rule will be less important than that some clear rule be chosen.” 203 Selecting a rule and sticking to it has the “[uncontroversial] theoretical merits” of “provid[ing] a rule-of-law boon to the public, while lowering the costs of drafting statutes to the legislature.” 204 According to Rosenkranz, Congress has both the

198. HART & SACKS, supra note 28, at 1169 (“The hard truth of the matter is that American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation.”); see also SCALIA, supra note 20, at 14 (“The state of the science of statutory interpretation in American law is accurately described by [Henry Hart and Albert Sacks] . . . .”); KENT GREENAWALT, STATUTORY AND COMMON LAW INTERPRETATION 43 (2013) (“The often quoted comment of Henry Hart and Albert Sacks . . . remains true for our federal courts.”); Charles Fried, Five to Four: Reflections on the School Voucher Case, 116 HARV. L. REV. 163, 181 (2002) (“[I]n cases turning on the construction of statutes there may be agreement about a particular interpretation of a particular statute, but a more enduring disagreement about the general method for interpreting statutes—for example, about the use of legislative history.”).


200. Id.

201. Id. at 67.


203. Id. at 2157.

204. Id. at 2142.
constitutional authority and the institutional capacity to develop an interpretive regime for federal statutes.\(^{205}\) Besides urging legislative intervention, legal scholars have also turned to the venerable doctrine of precedent for a solution. Why is it, Sydney Foster asks, that judges are criticized for not acquiescing in prior resolutions of substantive legal questions but not for persisting in their own idiosyncratic philosophies of statutory interpretation? Contending that stare decisis advances the rule of law and the legitimacy of courts, Foster calls for lower courts to be bound by the pronouncements of higher courts on questions of interpretive methodology.\(^{206}\) And the Supreme Court, Foster submits, ought normally to abide by its own precedents on the subject matter.\(^{207}\)

Resisting these novelties, Evan Criddle and Glen Staszewski argue that freezing an interpretive regime in time may confound the expectations of past legislatures and frustrate the preferences of future ones.\(^ {208}\) In addition, flexibility may be a virtue in statutory interpretation. The continuing vitality of a range of interpretive approaches and resources enables courts to reach normatively desirable outcomes in individual cases and “make[s] our legal system more responsive.”\(^ {209}\) To the point that uncertainty might defeat reliance interests, Criddle and Staszewski note, first, that the federal courts have never declared themselves bound by precedent on how they undertake the reading of law. Hence, to the extent that legal actors and subjects have relied on judicial expositions of statutory interpretive theory, such reliance is baseless. Moreover, “most people...place much greater value on substance than procedure.”\(^ {210}\) Ultimately, “[t]o the extent that private citizens or public officials could legitimately rely on judicial consideration of certain information, such as the plain meaning of the text or the reasoned views of administrative agencies, those expectations tend to be reflected in existing legal doctrine.”\(^ {211}\) The traditional rationales for stare decisis are hence less persuasive when it comes to interpretive methodology rather than

\(^{205}\) Id. at 2102–38, 2143–47.

\(^{206}\) Foster, supra note 96, at 1869.

\(^{207}\) Id. at 1884.

\(^{208}\) Criddle & Staszewski, supra note 96, at 1581–87.

\(^{209}\) Id. at 1594; see Ethan J. Leib & Michael Serota, The Costs of Consensus in Statutory Construction, 120 YALE L.J. ONLINE 47, 49 (2010) (“Interpretive diversity makes each judge work hard to find compromises, render the strongest argument utilizing all credible sources available, and take seriously all types of arguments to achieve the best result within the range of permissible interpretations.”).


\(^{211}\) Criddle & Staszewski, supra note 96, at 1594.
The empirical findings of this Article inform this debate in two ways. Assuming legislatures or the courts were to establish uniform rules for construing statutes, the lay notions of fair warning tested here do not arbitrate between textualism and purposivism. Conditional on outcome, a textualist justification fared no better than a purposivist one. The experimental results thus tell against the seductive intuition that fidelity to text promotes fair notice while veneration of purpose diminishes it. In the eyes of the populace, judicial reliance on extratextual indicia of statutory meaning does not offend fair notice, especially if the law expressly instructs courts to do so. Viewed from this perspective, the choice of an interpretive regime may indeed be less important than simply having one. At the same time, however, the experimental data corroborate the not-infrequent assertion that ordinary people care less about abstract rules of interpretation and more about concrete outcomes. In contrast to the severity of the punishment imposed, judicial deviation from the governing interpretive regime had no perceptible impact on lay judgments of fair warning. It seems then that neither the Federal Rules of Statutory Interpretation nor stare decisis in the realm of statutory interpretation will enhance the rule of law value of fair notice—at least in the public eye. Indeed, the opposite could be the result if judges would otherwise exercise their latitude in ways that cohere with popular beliefs, attitudes, and expectations.

B. The Rule of Strict Construction Redux

Second, lay perceptions of fair notice are influenced by the severity of the punishment contemplated by the law. To the extent that the rule of lenity is grounded in fair notice, its application should be sensitive to the legal consequences prescribed by the statute in question and not just the statute’s ordinary meaning.

It is a rule, “almost as old as the common law itself,” that penal statutes are to be construed strictly. Writing in 1765, William Blackstone explicated this principle by recounting that:

the statute 1 Edw. VI., c. 12, having enacted that those who are convicted of stealing horses should not have the benefit of clergy,

212. Id.

213. See Wooden v. United States, 595 U.S. __, 142 S. Ct. 1063, 1082 (2022) (Gorsuch, J., concurring) (“Lenity works to enforce the fair notice requirement by ensuring that an individual’s liberty always prevails over ambiguous laws.”).

214. SCALIA, supra note 20, at 29; see also United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820) (Marshall, C.J.).
the judges conceived that this did not extend to him that should steal but one horse, and therefore procured a new act for that purpose in the following year.\footnote{Blackstone, supra note 90, at *88 (emphasis omitted).}

There is a literal—if not moral—difference between stealing a horse and stealing horses, and fair notice militates against reading the plural to include the singular.\footnote{See Scalia & Garner, supra note 12, at 130; see also Sessions v. Dimaya, 584 U.S. __, 138 S. Ct. 1204, 1225 (2018) (Gorsuch, J., concurring in part and concurring in the judgment). Note that the United States Code provides that “words importing the plural include the singular.” 1 U.S.C. § 1.} Interpretations like the one described, which may be “stigmatized as automatic[,] have resulted from the conviction that it is fairer in a criminal statute to take a meaning which would jump to the mind of the ordinary man at the cost even of defeating other values.”\footnote{Hart, supra note 1, at 611.} On a contemporary formulation, the rule of lenity instructs that “[a]mbiguity in a statute defining a crime or imposing a penalty should be resolved in the defendant’s favor.”\footnote{S. Calia & Garner, supra note 12, at 296; see also Lee & Mouritsen, supra note 82, at 858. This rule is justified on both fair notice and separation of powers grounds. See United States v. Santos, 553 U.S. 507, 514 (2008).} The rule does not, of course, compel judges to give statutory language a cramped or unnatural reading.\footnote{See, e.g., Lockhart v. United States, 577 U.S. 347, 361 (2016) (“But the arguable availability of multiple, divergent principles of statutory construction cannot automatically trigger the rule of lenity.”); United States v. Brown, 333 U.S. 18, 25–26 (1948) (“The canon in favor of strict construction is not an inexorable command to override common sense and evident statutory purpose. It does not require magnified emphasis upon a single ambiguous word in order to give it a meaning contradictory to the fair import of the whole remaining language.”).} Only when “after all the legitimate tools of interpretation have been applied, ‘a reasonable doubt persists,’”\footnote{See, e.g., Lockhart v. United States, 577 U.S. 347, 361 (2016) (“The arguable availability of multiple, divergent principles of statutory construction cannot automatically trigger the rule of lenity.”).} does the criminal defendant win.\footnote{Moskal v. United States, 498 U.S. 103, 108 (1990).} Leni

The modern rule of lenity has evolved from its historical roots in two
respects. First, lenity does not intervene to preclude the consideration of legislative history and statutory purpose. In the nascent years of the doctrine, “[c]ourts interpreted criminal statutes narrowly... but to the extent that the dispute was over the meaning of a statutory word, limited investigation occurred into the legislature’s intended meaning of that word.”

For example, the Supreme Court held in United States v. Wiltberger that there was no federal jurisdiction over a homicide perpetrated on an American merchant vessel lying in the River Tigris in China where the statute only punished manslaughter “on the high seas.”

The law provided elsewhere for federal jurisdiction over murders committed “upon the high seas, or in any river, haven, basin or bay.”

Though it was improbable that Congress meant to punish the one crime when it occurred on certain bodies of water but not the other, “probability,” Chief Justice Marshall cautioned, “is not a guide which a court, in construing a penal statute, can safely take.”

But as American courts started consulting legislative history and other extratextual materials to expound statutes, lenity was relegated to a lesser role, entering the fray only after all indicia of meaning had been exhausted and found wanting. Thus, in Callanan v. United States, a divided Supreme Court held that consecutive sentences could be imposed for the substantive crime of obstructing commerce by extortion and conspiracy to commit the same, even though the statute outlawed both offenses in the same breath, prescribing “[a] fine[ ] [of] not more than $10,000 or imprisonment of not more than twenty years, or both.”

Although the dissent thought the statute could, “as a matter of English language[,]... fairly be read as imposing a single penalty for each interference or threatened interference with interstate commerce by any or all of the prohibited means,” the majority rebuffed the application of the rule of lenity. Per Justice Frankfurter, the rule “only serves as an aid for resolving an ambiguity; it is not to be used to beget one.” It “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

224. 18 U.S. (5 Wheat.) 76 (1820).
225. Id. at 103.
226. Id. at 99.
227. Id. at 105.
228. Solan, supra note 223, at 107.
230. Id. at 588 n.1 (quoting 18 U.S.C. § 1951 (1948)); id. at 597.
231. Id. at 601 (Stewart, J., dissenting).
232. Id. at 596 (Frankfurter, J.).
lenient to wrongdoers.” In recent times, Justice Scalia wrestled mightily to return the courts to their former practice. For him, “[w]here it is doubtful whether the text includes the penalty, the penalty ought not be imposed.” To resolve any misgivings by looking beyond the statutory language to extraneous sources undermines the fair notice rationale of the rule. But the dominant paradigm is still to consign lenity to a rule of “last resort,” “reserved . . . for those situations in which a reasonable doubt persists about a statute’s intended scope even after resort to ‘the language and structure, legislative history, and motivating policies’ of the statute.”

The modern rule of lenity also diverges from the old rule of strict construction in giving no formal consideration to the harshness of the law. One nineteenth-century treatise on statutory interpretation explained that it is “essential to [the] justice and humanity [of the penal law] that it be expressed in language [all] can easily comprehend; that it be held obligatory only in the sense in which all can and will understand it[,] . . . this consideration press[ing] with increasing weight according to the severity of the penalty.” Another similarly recited that “statutes which subject one to a punishment or penalty . . . are to be construed strictly. . . . [T]he degree of strictness will depend somewhat on the severity of the punishment they inflict.”

Thus, the 1810 case of The Enterprise held that a vessel and its cargo were not forfeit even though the ship had been loaded in contravention of an act providing that:

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no ship or vessel of the character of the Enterprise shall receive a clearance, unless the lading shall be made under the inspection of the proper revenue officers, subject to the same restrictions,
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233. Id.
239. JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF STATUTORY CRIMES § 193, at 186 (2d ed. 1883).
240. 8 F. Cas. 732 (C.C.D.N.Y. 1810).
regulations, penalties, and forfeitures, as are provided by law for
the inspection of merchandise imported into the United States,
upon which duties are imposed, any law to the contrary
notwithstanding.\footnote{241 Id. at 734–36.}

“When the sense of a penal statute is obvious,” Circuit Justice
Livingston expounded, “consequences are to be disregarded; but if
doubtful, they are to have their weight in its interpretation.”\footnote{242 Id. at 734.} It was
murky whether clearances were to be withheld for the covert loading of a
ship or whether the act also contemplated more punitive measures, set
forth elsewhere. The incertitude “produced by the unusual and not very
luminous phraseology of th[e] section, [wa]s greatly increased by a
consideration of the very heavy and disproportionate punishment which
[would] follow” if the statute were given the import urged by the
government.\footnote{243 Id. at 735.} Moreover, there was confusion as to what the enhanced
penalties were since section fifty of the collection law addressed the
landing rather than the inspection of goods.\footnote{244 Id. at 735–36.} These doubts militated
against condemnation.\footnote{245 Id. at 736.} By contrast, contemporary renditions of lenity
do not admit that the construction of a statute might depend upon the
consequences that attend violation. “The rule ‘applies only when, after
consulting traditional canons of statutory construction, [the court is] left
Shabani, 513 U.S. 10, 17 (1994)); see also Barber v. Thomas, 560 U.S. 474, 488 (2010).} That is, only “where text, structure, and
history fail to establish that the [g]overnment’s position is unambiguously
correct” does the court “apply the rule of lenity and resolve the ambiguity in
[the defendant’s] favor.”\footnote{247 United States v. Granderson, 511 U.S. 39, 54 (1994).} A statute does not become more ambiguous
simply because it lays down a heavier sentence.\footnote{248 Granted, however, that extreme breadth or harshness may render a candidate reading of the
statute implausible and even absurd, thereby enhancing the attractiveness of less syntactically
plausible alternatives.}

As summarized by Shon Hopwood, “[t]he Supreme Court’s current
version of lenity is significantly weaker than the historical rule of strict
construction.”\footnote{249 Shon Hopwood, Restoring the Historical Rule of Lenity as a Canon, 95 N.Y.U. L. REV. 918, 931 (2020).} Yet, “[s]trict construction is,” in Hopwood’s view,
“normatively superior to the modern rule” and ought therefore to be
entrenched as a canon of statutory interpretation.\textsuperscript{250} Reprising the fair notice argument, Hopwood contends that

[w]hen the intended audience is the general public, legislative history—an ‘obscure and inaccessible source of legal knowledge for lay audiences’—does not help communicate a statutory term’s meaning. . . . Because only the text of the statute is the law, fair warning should be provided by the text in language that laypeople can understand.”\textsuperscript{251}

The historical rule is also a better guardian of liberty than the modern one.\textsuperscript{252} By calibrating the threshold for ambiguity to the severity of the consequences, strict construction shields defendants from “unfairly harsh sentences” in a way that lenity does not.\textsuperscript{253}

The survey experiment indicates that the punitiveness of the law does matter for lay judgments of fair notice, even though judicial invocation of legislative purpose and history might not. Insofar as the rule of lenity is justified on grounds of fair warning, regard must be had to the nature of the conduct prohibited and the magnitude of the sanctions prescribed. Indeed, courts already seem to be more forgiving when the statute might otherwise sweep in innocent behavior. \textit{Williams v. United States},\textsuperscript{254} for instance, held that the deliberate passing of a bad check did not violate 18 U.S.C. § 1014, which made it illegal to

knowingly mak[e] any false statement or report, or willfully overvalu[e] any land, property or security, for the purpose of influencing the action of [certain enumerated financial institutions, among them banks whose deposits are insured by the Federal Deposit Insurance Corporation], upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan.\textsuperscript{255}

The majority thought that a check was not a statement and “simply a draft drawn on a bank and payable on demand.”\textsuperscript{256} Moreover, “‘false statement’ is not a term that, in common usage, is often applied to characterize ‘bad checks.’”\textsuperscript{257} But “[e]qually as important,” is the fact that

\textsuperscript{250} Id.
\textsuperscript{251} Id. at 934, 936 (quoting David S. Louk, \textit{The Audiences of Statutes}, 105 \textsc{Cornell} L. \textsc{Rev.} 137, 177 (2019)).
\textsuperscript{252} Id.
\textsuperscript{253} Id.
\textsuperscript{254} 458 U.S. 279 (1982).
\textsuperscript{255} Id. at 282 (quoting 18 U.S.C. § 1014).
\textsuperscript{256} Id. at 285 (quoting U.C.C. § 3-104(2)(b) (\textsc{Am. L. Inst. & Unif. L. Comm’n 1977})) (internal quotations omitted).
\textsuperscript{257} Id. at 286.
a contrary result “would make a surprisingly broad range of unremarkable conduct a violation of federal law.... [I]t means that any check, knowingly supported by insufficient funds, deposited in a federally insured bank could give rise to criminal liability, whether or not the drawer had an intent to defraud.”258 Rejecting this implication, five justices invoked the rule of lenity in favor of the defendant while simultaneously affirming that the rule “does not give courts license to disregard otherwise applicable enactments.”259 The dissent, by contrast, thought the “plain language” of the statute to be “sweeping.”260 Writing for three other colleagues, Justice Marshall was critical of the Court’s reliance on the technical definition of a check and its blindness to the realities of commercial life. But tellingly, his opinion began and ended by reminding the reader that the defendant, “Williams, who was a bank president, did not, nor could he, make any credible argument that he was unaware that his conduct was wrongful.... There is no question that Williams, a bank president, knew that his check-kiting scheme was wrongfu.l261

More recently, *Yates v. United States*262 affirmed that the disposal of undersized fish caught in defiance of federal conservation regulations did not fall under 18 U.S.C. § 1519 which provides a fine or twenty years’ imprisonment for

knowingly . . . destroy[ing] . . . any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States.263

The Court examined the structure and text of the law and applied the canons of ejusdem generis and noscitur a sociis to cabin the breadth of the term “tangible object.”264 A four-justice plurality also found support in the rule of lenity.265 Per Justice Ginsburg, “[t]hat interpretative principle [was relevant] where the harsher interpretation of the law “exposes individuals to 20-year prison sentences for tampering with any physical object that might have evidentiary value in any federal investigation into any offense, no matter whether the investigation is pending or merely contemplated, or whether the offense subject to investigation is criminal

258. Id.
259. Id. at 290.
260. Id. at 293 (Marshall, J., dissenting).
261. Id. at 293, 305.
263. Id. at 531 (quoting 18 U.S.C. § 1519).
264. Id. at 530.
265. Id. at 547–48.
or civil.”

Against this position, the dissent contended that “[l]enity offers no proper refuge from [a] straightforward (even though capacious) construction” of “tangible objects.” Noting the plurality’s discomfort with “the disproportionate penalties § 1519 imposes if the law is read broadly,” Justice Kagan, joined by Justices Scalia, Kennedy, and Thomas intimated that the “real issue” was “overcriminalization and excessive punishment in the U.S. Code.” But judges should express their anxiety “in lectures, in law review articles, and even in dicta,” and not by “replac[ing] the statute Congress enacted with an alternative of [their] own design.”

Williams and Yates suggest that judicial inquietude about fair notice does result in statutes being construed more narrowly than their linguistic meanings might attest. Although it is black letter law that the rule of lenity “cannot dictate an implausible interpretation of a statute, nor one at odds with the generally accepted contemporary meaning of a term,” and is only engaged when the court can make “no more than a guess as to what [the legislature] intended,” judges appear to be willing to deviate from ordinary meaning—or to find ambiguity—when the conduct being outlawed is “unremarkable” or the result draconian. Conversely, when the rule of lenity is passed over, the neglect, Scalia and Garner venture, is borne out “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.”

Scalia and Garner maintain that “a fair system of laws requires precision in the definition of offenses and punishments,” and hence that a criminal defendant should receive the benefit of any ambiguity in language. The evidence presented here augurs in favor of a

266. Id. at 548 (emphasis in original).
267. Id. at 566 (Kagan, J., dissenting).
268. Id. at 569.
269. Id. at 570.
273. Yates, 574 U.S. at 548.
274. SCALIA & GARNER, supra note 12, at 301. Compare United States v. Yermian, 468 U.S. 63, 63 (1984) (holding a statute punishing “[w]hoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully makes any false . . . statements” did not require knowledge that false statement was within the jurisdiction of any department or agency of the United States), with Liparota v. United States, 471 U.S. 419, 419 (1985) (holding a statute punishing “[w]hoever knowingly uses . . . or possesses coupons or authorization cards in any manner not authorized by [the statute] or the regulations” required knowledge of illegality of the use or possession).
275. SCALIA & GARNER, supra note 12, at 301.
holistic standard for determining when lenity should apply, one that is attuned to social norms and expectations. The proposition that the legal meaning of a statute may vary based on its severity or proportionality will not endear itself to those textualists who hold that “[a] text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means.” But such variability implements ordinary notions of fair warning.

C. Optimus Legum Interpres Consuetudo

Abstracting from the experimental results, if ordinary people’s expectations of the law are shaped by custom and practice, then fair notice may dictate that a statute be given its commonly held meaning in preference to its true ordinary meaning.

The first American treatise on statutory interpretation instructed that “[o]f a similar value [as judicial precedent] in regard to the construction of statutes is usage, or the construction which custom or practice has put on them. Optimum legum interpres consuetudo.” Custom is the best interpreter of the law. In putting forth this maxim, the author referred to Cicero and also repeated Lord Coke who held: “It is the common opinion . . . and communis opinio is of good authoritie [sic] in law. A communi observantia non est recedendum.” From common practice there should be no departure. In the United States, the Supreme Court, in 1803—days after handing down Marbury v. Madison—dismissed the contention that Supreme Court Justices could not be legislatively directed

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276. SCALIA, supra note 20, at 23.

277. It could be argued that a sliding scale standard for the rule of lenity undermines, rather than vindicates, fair notice because judges may differ as to the wrongfulness of relevant conduct or the severity or proportionality of the legal consequences and thus render conflicting decisions. There are two replies to this challenge. First, insofar as courts are already taking these additional considerations into account when invoking the rule of lenity, making them explicit has at least the virtue of honesty. Second, even if reasonable people might disagree about the egregiousness of an act or the harshness of a sentence, such judgments are, in all likelihood, more patterned and less eclectic than guesses about whether the statutory provision at issue is in “equipoise,” Johnson v. United States, 529 U.S. 694, 713 n.13 (2000), or “grievous[ly] ambig[u]ous[,]” Barber v. Thomas, 560 U.S. 474, 488 (2010). Under such circumstances, a thumb on the scale makes application of the rule of lenity more, not less, predictable, even if it cannot eliminate all inconsistency.


280. 5 U.S. (1 Cranch) 137 (1803).
to preside on the circuit courts, having not been commissioned as circuit judges.\textsuperscript{281} “To this objection,” said Justice Paterson,

it is sufficient to observe, that practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction.\ldots This practical exposition is too strong and obstinate to be shaken or controlled.\textsuperscript{282}

Six years later, the Supreme Court agreed that a deed acknowledged before a justice of the supreme court of Pennsylvania was proved “before one of the justices of the peace of the proper county or city where the lands lie.”\textsuperscript{283} Chief Justice Marshall began by noting that were this the first occasion for construing the Act of Pennsylvania of 1715, the court would be bound to hold that a justice of the supreme court not being a justice of the county, the deed at issue was not properly proved and hence not legally recorded. But the universal construction placed on the statute by the bar and bench of Pennsylvania prevailed.\textsuperscript{284} “[I]n construing the statutes of a state on which land titles depend, infinite mischief would ensue, should this court observe a different rule from that which has been long established in the state,” asserted the Chief Justice.\textsuperscript{285} “[I]n this case, the court cannot doubt that the courts of Pennsylvania consider a justice of the supreme court as within the description of the act.”\textsuperscript{286} Similarly, the New York Court of Chancery held that a comptroller’s deed, executed to a purchaser at a tax sale, was not void even though it had not been done “in the name of the people of the state” as mandated by statute.\textsuperscript{287} The comptroller’s deeds had been issued in the same form for “more than a quarter of a century.”\textsuperscript{288} The Chancellor conceded that “Lord Coke’s expression\ldots that common opinion is good authority in law does not apply to a mere speculative opinion in the community as to what the law upon a particular subject is.”\textsuperscript{289}

when such opinion has been frequently acted upon, and for a great length of time, by those whose duty it is to administer the law, and important individual rights have been acquired or are dependant [sic] upon such practical construction of the law, this

\textsuperscript{281} Stuart v. Laird, 5 U.S. 299, 309 (1803).
\textsuperscript{282} Id.
\textsuperscript{283} McKeen v. Delancy’s Lessee, 9 U.S. 22, 32 (1809).
\textsuperscript{284} Id. at 33.
\textsuperscript{285} Id. at 32.
\textsuperscript{286} Id.
\textsuperscript{287} Bank of Utica v. Mersereau, 3 Barb. Ch. 528, 576 (N.Y. Ch. 1848) (emphasis omitted).
\textsuperscript{288} Id.
\textsuperscript{289} Id. at 577.
expression of the learned commentator upon Littleton is entitled to great weight.\textsuperscript{290}

Characterizing the non-conformity of the deed to the statutorily prescribed form as “a mere technicality,” the chancellor declared “[t]he maxim that custom is the best interpreter of the law . . . applicable to th[e] case.”\textsuperscript{291}

But despite its ancient pedigree and favorable reception by American courts in the nineteenth century,\textsuperscript{292} this canon of statutory construction has fallen silent. \textit{Optimus legum interpres consuetudo}—advising judges to look to the contemporaneous and continuous practice of government departments to ascertain statutory meaning and legislative intent\textsuperscript{293}—was subsumed into the \textit{Chevron} doctrine and thereby “overthrown.”\textsuperscript{294} In establishing judicial deference to executive interpretations of statutes, \textit{Chevron v. Natural Resources Defense Council}\textsuperscript{295} drew on cases that applied the traditional maxims but “completely and entirely forgot[]” their true meaning.\textsuperscript{296} Beyond administrative interpretations of law, \textit{optimus legum interpres consuetudo} has made few, if any, decisive appearances in recent memory. In \textit{Brogan v. United States},\textsuperscript{297} Justice Scalia denied that \textit{opinio communis}, common opinion, could operate to narrow the literal scope of a criminal statute.\textsuperscript{298} The statute examined in \textit{Brogan}, 18 U.S.C. § 1001, forbade the “mak[ing] of any false, fictitious or fraudulent statements or representations” concerning “any matter within the

\textsuperscript{290} Id.
\textsuperscript{291} Id.
\textsuperscript{292} See Bank of U.S. v. Halstead, 23 U.S. 51, 62–63 (1825) (“And if any doubt existed, whether the act of 1792 vests such power in the Courts, or with respect to its constitutionality, the practical construction heretofore given to it, ought to have great weight in determining both questions.”); \textit{see also} Boyd v. United States, 116 U.S. 616, 622 (1886) (recognizing the maxim \textit{consuetudo est optimus interpres legum} but rejecting its application to the facts at hand).
\textsuperscript{293} \textit{See}, e.g., \textit{Brown v. United States}, 113 U.S. 568, 571 (1884) (“This contemporaneous and uniform interpretation is entitled to weight in the construction of the law, and in a case of doubt ought to turn the scale.”); \textit{United States v. Hill}, 120 U.S. 169, 182 (1887) (“With this long practice, amounting to a contemporaneous and continuous construction of the statute, in a case where it is doubtful whether the statute requires a return of the disputed fees, . . . a court seeking to administer justice would long hesitate before permitting the United States to go back, and not only as against the clerk, but as against the surety on his bond, reopen what had been settled with such abundant and formal sanction.”).
\textsuperscript{294} Aditya Bamzai, \textit{The Origins of Judicial Deference to Executive Interpretation}, 126 \textit{Yale L.J.} 908, 1000 (2017) (quoting Bates & Guild Co. v. Payne, 194 U.S. 106, 111 (1904) (Harlan, J., dissenting)).
\textsuperscript{296} Bamzai, \textit{supra} note 294, at 1000.
\textsuperscript{297} 522 U.S. 398 (1998).
\textsuperscript{298} Id. at 407–08.
Defendant James Brogan was a union officer who had accepted unlawful cash payments from a company whose employees were represented by the union. Federal agents from the Department of Labor and Internal Revenue Service learnt of these payments after a search of the company’s headquarters. But when they questioned Brogan whether he had received any money or gifts from the company while serving as a union officer, Brogan answered “no.” Brogan was later tried and convicted of making a false statement in a matter within the jurisdiction of a federal department or agency.

On appeal to the Supreme Court, Brogan submitted that the law did not reach a bare denial of wrongdoing: the “exculpatory no.” A number of federal appellate courts previously held that an exculpatory no did not come within § 1001’s prohibition on false statements. Moreover, the Department of Justice had maintained a policy against prosecuting exculpatory noes. About two decades earlier, in Nunley v. United States, the Solicitor General petitioned the Court to vacate a § 1001 conviction for an exculpatory no, proceedings having been instituted without the approval of the Assistant Attorney General. Approval would normally have been refused. Post-Nunley, and at the time Brogan was charged, the United States Attorney’s Manual spelled out that “[w]here the statement takes the form of an ‘exculpatory no,’ 18 U.S.C. § 1001 does not apply regardless who asks the question.”

Neither circuit precedent nor prosecutorial practice availed Brogan. Speaking for the majority, Justice Scalia reasoned straightforwardly, that “[b]y its terms, 18 U.S.C. § 1001 covers ‘any’ false statement—that is, a false statement ‘of whatever kind.’ The word ‘no’ in response to a question,” he continued, “assuredly makes a ‘statement.’” In dissent, Justice Stevens called on the Court to “show greater respect for the

299. Id. at 400 (quoting 18 U.S.C. § 1001 (1988)).
300. Id. at 399.
301. Id. at 400.
302. Id. at 398.
303. Id. at 400.
304. Id. at 401.
305. Id.
308. Id.
309. Id. at 415 (quoting U.S. Dep’t of Just., U.S. Att’ys’ Manual § 9-42.160 (1988)).
310. Id. at 400 (majority opinion) (quoting United States v. Gonzales, 520 U.S. 1, 5 (1997) (internal citation omitted)).
Textualism as Fair Notice? 397

virtually uniform understanding of the bench and the bar that persisted for decades.”311 But Justice Scalia thought *communis opinio* inapposite.312 “[C]ommunis error facit jus . . . is not the normative basis of th[e] Court’s jurisprudence,” and the “plain language of § 1001 admits of no exception for an ‘exculpatory no.'”313

Textualism, at least as espoused by Justice Scalia, accords little significance to communal interpretation as against ordinary meaning. To be fair, the old English authorities addressing *optimus legum interpres consuedo* and *communis opinio* acknowledged that usage could not override clear statutory language. For example, Lord Brougham conceded in *Magistrates of Dunbar v. Duchess of Roxburghe*314 that “no usage is of any avail” where the “statute . . . speak[s] a language plainly and indubitably differing from the purport of the usage.”315 But if ordinary people follow the law through observation, imitation, and trial and error, holding them to the precise letter of the statute—even if it is its ordinary meaning—could occasion surprise. Fair notice may well require *consuetudo legum interpres consuetudo* to be dusted off and restored among the canons of statutory construction.

CONCLUSION

Textualism has been urged on several grounds. It is said to be mandated by the separation of powers. When courts attribute a legal meaning to a statute based on legislative purpose as gleaned from committee reports, sponsor statements, and floor debates, they permit an end-run around the constitutional process of bicameral passage and presentment.316

311. *Id.* at 420 (Stevens, J., dissenting).
312. *Id.* at 408 (majority opinion).
313. *Id.*
314. (1835) 6 Eng. Rep. 1462; 3 Cl. & Fin. 335 (HL).
315. *Id.* at 1469; 3 Cl. & F. at 354; see Sheppard v. Gosnold (1672) 124 Eng. Rep. 1018, 1023; Vaugh. 159, 170 (“[I]f usage hath been against the obvious meaning of an Act of Parliament, by the vulgar and common acceptance of the words, than it is rather an oppression of those concern’d, [sic] than an exposition of the Act.”); R. v. Hogg (1787) 99 Eng. Rep. 1341, 1345; 1 T.R. 721, 728 (KB) (Sir Nash Grose) (“[U]usage . . . ought not to be attended to in construing an Act of Parliament, which cannot admit of different interpretations.”); FORTUNATUS DWARRIS, A GENERAL TREATISE ON STATUTES; AND THEIR RULES OF CONSTRUCTION 702 (1835) (“The words of a statute are to be taken in their ordinary and familiar signification and import, and regard is to be had to their general and popular use; for *jus et norma loquendi* is governed by usage; and the meaning of words, spoken or written, ought to be allowed to be as it has constantly been taken to be—*loquendum est ut vulgus*. But if the usage have been, to construe the words of a statute contrary to their obvious meaning by the vulgar tongue, and the common acceptance of terms, such usage is not to be regarded, it being rather, say the books, an oppression of those concerned, than a construction of the statute.” (internal citations omitted)).
Textualism is also advertised as a device for insulating law from politics. By making semantic meaning paramount, textualism inhibits judges from giving vent to their own predilections and prejudices. But one of the most intuitive and seductive arguments for textualism is that of fair warning: giving statutory language its ordinary meaning ensures that everyone can know the law and obey it.

After developing two philosophical difficulties for this argument, the Article presented experimental results that call into question the fair notice justification of textualism. First, it is not obvious why fair notice is violated if citizens are informed in advance that statutes will be construed purposively, and that legislative history will be consulted in the process. Defenses of textualism in the face of this objection reduce, ultimately, to empirical claims about the determinacy of the method vis-à-vis its competitors, claims that are not only disputable but, perhaps, not susceptible of definitive resolution. Whether semantic or policy context forecloses more interpretive possibilities is a question that cannot be answered in the abstract. At any rate, the survey experiment detected no signs that resorting to statutory purpose and history offended ordinary notions of fair warning. Second, fair warning is not given by statutes in isolation. We can heed the law without learning it because of the normative sensibilities and expectations acquired as part of our assimilation into society. Fair notice thus operates against a background of norms, values, orientations, and practices. Some acts are known to be wrongful and the legally prescribed sentence, if proportionate, should not come as a surprise. Others may be perceived as innocuous, and the law will have to be unequivocal in penalizing them if it is not to trap the unwary. The survey experiment demonstrated that the severity of punishment influenced lay judgments of fair warning.

The evidence adduced thus far lends some color to the idea that, from the perspective of fair notice, having a stable interpretive regime could be more important than the choice of any particular one. It also bolsters the case for returning lenity to its historical roots by demanding greater clarity of more punitive statutes. The theory and data canvassed here might not ultimately amount to a fair notice argument against textualism. But they should give us pause before accepting the relationship between textualism and fair notice as a necessary or even probable one.