

# Statutory Interpretation in Arkansas: How Arkansas Courts Interpret Statutes. A Rational Approach<sup>1</sup>



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Over the years courts have announced and adopted a plethora of maxims, rules, and presumptions to guide their attempts to interpret statutes. Lawyers and judges often seem to be confronted by a large crowd of such mandates, each clamoring for attention and claiming priority of place. Most law students, lawyers, and judges yearn for an algebraic process of applying these various rules so that the correct interpretation of a statute can be arrived at by judges and predicted by lawyers with mathematical certainty. The problem is that the court has steadfastly maintained that every canon applies in every case. Furthermore although courts will often reject one canon as irrelevant on the facts of a given case, they have never suggested that any canon was entitled to priority over another as a matter of general principle. The only overarching rule is that the goal of all statutory interpretation, and, therefore, of all canons, is to give effect to the legislature's

intent.

The yearning for mathematical precision and predictability is understandable, but doomed to disappointment. The canons of construction and interpretation are not susceptible to a hierarchical organization. They simply cannot be reduced to arithmetical values. Statutory interpretation is a process of finding the best solution to a problem derived from an unknowable premise. Perhaps the most apt metaphor is to think of the canons as the flags that mark out a slalom course. Their purpose is not to define the straight and narrow path to your destination – they only function to tell you when you are straying out of bounds. The metaphor is also apt, because it is possible to organize the canons in a functionally progressive manner, that allows you to move fairly rapidly to the destination with some assurance that you have not missed a gate halfway through the course.

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1. © Michael W. Mullane. This article is a companion piece to M. W. Mullane, *Statutory Interpretation in Arkansas: How Should a Statute Be Read? When is it Subject to Interpretation? What Our Courts Say and What They Do*, 2004 ARK LAW NOTES 85.

The purpose of this article is to collect and organize those rules used by the Arkansas courts to interpret statutes in a fashion that will help the practicing lawyer and sitting judge efficiently address issues of statutory construction with some confidence that they will arrive at a viable solution.

As already noted, there is no dispute about the goal of all statutory interpretation. The court's purpose is to give effect to the legislative intent. Therefore, we shall begin by considering the rules of construction that directly address and shape the court's pursuit of its ultimate goal.

**I. The goal of statutory interpretation is to give effect to the legislature's intent.**

"The basic rule of statutory construction, to which all other interpretive guides must yield, is to give effect to the intent of the legislature."<sup>2</sup>

It also clear that in Arkansas, once the court determines a statute is subject to judicial interpretation, it will abandon the effort to enforce a statute as written. The interpretive effort is directed towards doing what the legislature meant, not what they said.<sup>3</sup> Like Alice through the looking glass, this approach is exactly the opposite of the court's goal when applying a statute that is not subject to interpretation.<sup>4</sup>

**A. Step one: Do a little basic research. Read the table of contents for the chapter and sub-chapter within which the statute appears.**

The first step, may make the rest of this section of the article superfluous to resolution of a specific problem – if you are lucky. Of the thousands of statutes currently within the Arkansas Code, something less than 600 contain an expression of the legislative purpose or intent.<sup>5</sup>

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2. *Graham v. Forrest City Housing Authority*, 304 Ark. 632, 803 S.W.2d 923 (1991)(citing *Holt v. City of Maumelle*, 302 Ark. 51, 786 S.W.2d 581 (1990) and *In Re Adoption of Perkins/Pollnow*, 300 Ark. 390, 779 S.W.2d 531 (1989)). See also *Knapp v. State*, 283 Ark. 346, 676 S.W.2d 729 (1984) (Courts should construe statutes to give effect to the legislature's intent); and *Holt v. City of Maumelle*, 302 Ark. 51, 786 S.W.2d 581(1990) ("The basic rule of statutory construction, to which all other interpretative guides are really subordinate, is to give effect to the intent of the legislature.").

3. It is worthy of note that "There is a long history of hostility to the notion of legislative intent. Critics argue that there is no such thing for reasons such as that a collective body can have no intent, and even if it could we could not ascertain it." Michael Sinclair, *The Proper Treatment of "Interpretive Choice" in Statutory Decision-Making*, 45 N.Y.L. SCH. L. REV. 389, 393 (2002) (citing: Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 869 70 (1930)); Harry Jones, *Statutory Doubts and Legislative Intention*, 40 COLUM L. REV. 957 (1940); Warren Lehman, *How to Interpret a Difficult Statute*, 1979 WIS. L. REV. 489, 500 (1979); Frank Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983), Ronald Dworkin, *Law's Empire*, 313 et seq. (1986); Kenneth A. Shepsle (with the wonderfully citable caption), *Congress Is a 'They,' Not an 'It': Legislative Intent as Oxymoron*, 12 INTERNATIONAL REVIEW OF LAW AND ECONOMICS 239, 239 (1992); Frank Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV.J.L. & PUB.POL'Y 61 (1994)("Intent is elusive for a natural person, fictive or a collective body.") *Id.* at 68 (a clear statement of the mistake!); and WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION (1994) (Chapter 1 of Professor Eskridge's book is a clear and comprehensive marshaling of attacks on the idea of legislative intent).

4. M. W. Mullane, *Statutory Interpretation in Arkansas: How Should a Statute Be Read? When is it Subject to Interpretation? What Our Courts Say and What They Do*, 2004 ARK. L. NOTES 85, 89-91.

5. Based upon a WestLaw search of the Arkansas Statutes Annotated data base seeking all captions containing the words: "purpose" or "intent." A number of these refer to the purposes to which certain funds or authority may be applied and do not reflect the "legislative intent" or "legislative purpose." For example see: A.C.A. § 5-26-301 (Legislative intent states that the sub-chapter of the criminal code dealing with domestic battering and assault is not intended to supplant any or prevent prosecution under any other existing or future statute); A.C.A. § 2-16-602 (facilitation of state and federal interagency cooperation to promote eradication of the boll weevil); § 2-20-409 (promotion for the soybean industry); and § 3-5-804 (act to be construed to supplement existing legislation pertaining to native wineries and to provide economic relief during periods of curtailed production).

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These rare, but valuable pieces of guidance from the legislature are most often found at the beginning of the pertinent chapter or sub-chapter. They also are often the legislature's attempt to directly address issues raised by the courts in interpreting earlier versions of the same statute.<sup>6</sup>

The direct expression of its intent by the legislature may provide all the guidance you need. On the other hand, it may only serve as a partial answer, or even compound the problem. As discussed below, the problem may not be divining the legislature's goal and expressed means to the end, so much as deciding which of these is to be given priority.

### **B. Step two: Do a little more research. Is the statute subject to strict or liberal construction?**

The courts recognize that they should be

more reluctant to depart from the expressed purpose to achieve its perceived purpose. Such statutes are said to be subject to "strict construction." On the other hand, courts have also acknowledged that the language of other types of statutes should be stretched as far as necessary to achieve the legislature's purpose. Such statutes are said to be subject to "liberal construction."<sup>7</sup> While most statutes are not subject to either strict or liberal construction, a significant minority of statutes are. Assigning statutes to one category or another has progressed in an ad hoc fashion. While this approach follows the finest traditions of the common law, the difficulty in articulating the applicable criteria that distinguishes one from the other has led to Llewellynesque suggestions that they are used more to rationalize results than as an objective application of legal principles.<sup>8</sup>

Because the designation of a particular

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6 See, e.g., Title 9: Family Law; Subtitle 2: Domestic Relations; Chapter 15: Domestic Abuse; Sub-Chapter 1: General Provisions which was enacted in 1991 in response to the Arkansas Supreme Court's decision in *Bates v. Bates*, 1990, 303 Ark. 89, 793 S.W.2d 788, *reh'g denied*, 303 Ark. 89, 795 S.W.2d 359, dissenting opinion 303 Ark. 89, 799 S.W.2d 518. In *Bates* the Supreme Court held the predecessor act unconstitutional because it impermissibly enlarged the jurisdiction of Arkansas' Chancery courts.

#### **A.C.A. § 9-15-101 Congressional declaration of purpose.**

The purpose of this chapter is to provide an adequate mechanism whereby the State of Arkansas can protect the general health, welfare, and safety of its citizens by intervening when abuse of a member of a household by another member of a household occurs or is threatened to occur, thus preventing further violence. The General Assembly has assessed domestic abuse in Arkansas and believes that the relief contemplated under this chapter is injunctive and therefore equitable in nature. The General Assembly of the State of Arkansas hereby finds that this chapter is necessary to secure important governmental interests in the protection of victims of abuse and the prevention of further abuse through the removal of offenders from the household and other injunctive relief for which there is no adequate remedy in current law. The General Assembly hereby finds that this chapter shall meet a compelling societal need and is necessary to correct the acute and pervasive problem of violence and abuse within households in this state. The equitable nature of this remedy requires the legislature to place proceedings contemplated by this chapter under the jurisdiction of the circuit courts.

7. *Laman v. McCord*, 245 Ark. 401, 404, 432 S.W.2d 753, 755 (Ark. Oct 21, 1968) ("Whether a statute should be construed narrowly or broadly depends upon the interests with which the statute deals" (citing *Warfield v. Chotard*, 202 Ark. 837, 153 S.W.2d 168 (1941))).

8. For an early example of both the criticism and a determined effort to find the 'golden thread' see: Earl T. Crawford, *STATUTORY CONSTRUCTION, INTERPRETATION OF LAWS*, p. 240 *et. seq.*

statute as one that is subject to strict or liberal construction colors the basic approach to its interpretation by the courts, we will begin our exposition with a discussion of this subject.

## 1. Strict Construction.

### a. Defined.

"Strict construction means narrow construction and requires that nothing be taken as intended that is not clearly expressed".<sup>9</sup> In other words, a statute subject to strict construction is one in which the court feels obligated to apply it as written, absent an expressed intent to the contrary. This approach has two consequences. First, it disallows the use of inference (but perhaps not common sense). Second, the expression of intent must be clear and, almost necessarily, be found within the statute itself.<sup>10</sup>

The court often adds that strict construction

means to apply the "plain meaning" of the statute.<sup>11</sup> Here care must be taken to note the distinction between how a statute is to be read (i.e., "interpreted" in the old usage) and how it is to be applied (i.e., construed). Subject to two exceptions, statutes are always read by giving each word its *ordinary* meaning, absent a clear intent to use a legal or other specialized meaning.<sup>12</sup> If a statute is narrowly construed, its *plain* meaning will control the application of the statute to the specific circumstances of the case.

### b. When statutes are strictly construed.

Three broad categories of statutes have traditionally been subject to strict construction. They are: criminal statutes<sup>13</sup>, statutes in derogation of the common law<sup>14</sup>, and those that impose burdens or obligations unknown at the common law.<sup>15</sup>

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9. *Elam v. Hartford Fire Ins. Co.*, 344 Ark. 555, 568, 42 S.W.3d 443, 451 (2001); *see also* *Wheeler Const. Co. v. Armstrong*, 73 Ark. App. 146, 41 S.W.3d 822 (2001).

10. The term "strict construction" "has, unfortunately, acquired connotations that may limit its utility in some contexts. As one commentator observes, strict construction has - at least since the 1960s - been used to signal 'a proclivity to reach constitutional judgments that will please political conservatives.'" *DICTIONARY OF MODERN LEGAL USAGES*, 2nd Ed., p. 836 (quoting John H. Ely, *Democracy and Distrust* 1 n.\* (1980)). Here we use it in the traditional sense, as do the Arkansas courts, without implying a political connotation.

11. *See Elam v. Hartford Fire Ins. Co.*, *id.*; *Lawhon Farm Services v. Brown*, 335 Ark. 276, 984 S.W.2d 1 (1998).

12. As discussed in the companion article, although statutory "interpretation" and "construction" originally had distinct meanings, they have come to be ignored in modern usage. I shall continue to use the terms interchangeably in this article. M. W. Mullane, *Statutory Interpretation in Arkansas: How Should a Statute Be Read? When is it Subject to Interpretation? What Our Courts Say and What They Do*, 2004 ARK. L. NOTES 85, 89 n. 22.

13. *See Vergara Soto v. State*, 77 Ark. App. 280, 74 S.W.3d 683 (2002); *Williams v. State*, 347 Ark. 728, 67 S.W.3d 548 (2002); *McHaffey v. Nationwide Mut. Fire Ins. Co.*, 76 Ark. App. 235, 61 S.W.3d 231 (2001) (statute imposing a penalty and attorneys' fees on insurers who wrongfully fail to pay claims is penal in nature); *555, Inc. v. Barlow*, 3 Ark. App. 139, 623 S.W.2d 843 (1981) (imposing penalties on sheriff for failure to make statutory return on execution).

14. *See Simmons First Nat. Bank v. Abbott*, 288 Ark. 304, 705 S.W.2d 3 (1986).

15. *Thompson v. Chadwick*, 221 Ark. 720, 255 S.W.2d 687 (1953).

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### **(1) Strict construction of the penal statutes and the rule of lenity in criminal cases.**

The strict construction of penal statutes is linked to the Rule of Lenity.<sup>16</sup> The Rule Lenity requires all penal statutes be construed to reach the most lenient interpretation from the defendant's standpoint.<sup>17</sup>

The fact that a penal statute is subject to both strict construction and the Rule of Lenity can have some interesting effects. In *Rickenbacker v. Norris*<sup>18</sup> the appellant claimed he was improperly sentenced for a crime to which he pleaded *nolo contendere*. The essence of his appeal was an apparent conflict between two statutes. Because both statutes were penal in nature and subject to strict interpretation, he claimed that the more lenient of the two statutes must be applied. The Supreme Court noted and did not dispute the argument, but held that the more lenient statute did not apply to the appellant.

Although there appear to be no Arkansas appellate decisions following the appellant's argument in *Rickenbacker*, courts in other states have done so. In *Basin Flying Service v. Public Service Commission*<sup>19</sup> the court applied

this principle to a dispute between a state regulatory commission and a private entity, holding: "[w]hen a person is confronted with inconsistent statutes, by one of which he would be subject to duties or restraints, and by the other he would be exempt therefrom, he is entitled to the benefit of the statute most favorable to his freedom of action."<sup>20</sup>

### **(2) Strict construction of non penal statutes.**

Although strict construction is generally thought of as a judicial nod to the primacy of the legislature, as applied in civil cases the rule undoubtedly also derives from the long harbored conviction of judges that legislatures rarely manage to improve on the judicial wisdom exemplified in the common law.<sup>21</sup>

#### **c. Specific statutes that are subject to strict construction.**

##### **1) Statutes that are in derogation of the common law.**

Absent any other consideration, all statutes that change the common law are subject to

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16. *Lawson v. State*, 295 Ark. 37, 746 S.W.2d 544 (Ark., 1988).

17. *U.S. v. Jackson*, 64 F.3d 1213 (8th Cir., 1995). The author's research fails to reveal an Arkansas case defining the Rule of Lenity.

18. \_\_\_ S.W.3d \_\_\_, 2005 WL 730196 (Ark., Mar. 31, 2005).

19. 531 P.2d 1303 (Utah, 1975).

20. *Id.* at 1305.

21. "Over a century ago, British jurisprude Sir Frederick Pollock wrote that canons 'cannot well be accounted for except on the theory that Parliament generally changes the law for the worse, and that the business of the judges is to keep the mischief of its interference within the narrowest possible bounds.'" Stephen F. Ross, *Where Have You Gone, Karl Llewellyn? Should Congress Turn Its lonely Eyes To You?*, 45 VAND. L. REV. 561, 562 (1992) (quoting: FREDERICK POLLOCK, *ESSAYS IN JURISPRUDENCE AND ETHICS* 85 (MacMillan & Co., 1882)).

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strict construction. Over the years the court's have applied this canon to the following statutes:

- (a) Automobile guest passenger statute<sup>22</sup>
- (b) Derogation of rights in private property<sup>23</sup>
- (c) Divorce statutes<sup>24</sup>
- (d) Foreclosure sales<sup>25</sup>
- (e) Garnishment statutes<sup>26</sup>
- (f) Materialmen's Liens<sup>27</sup>
- (g) Public offenses unknown at

- the common law<sup>28</sup>
- (h) Service of process<sup>29</sup>
- (i) Survival actions<sup>30</sup>
- (j) Wrongful Death Actions<sup>31</sup>
- (k) Zoning laws<sup>32</sup>
- (2) Criminal or penal statutes strictly construed with all doubts resolved in favor of the defendant.<sup>33</sup>**
- (3) Adoption statutes.<sup>34</sup>**
- (4) Business taxes and licenses.<sup>35</sup>**
- (5) Eminent domain statutes.<sup>36</sup>**
- (6) Foreclosure statutes.<sup>37</sup>**
- (7) Inheritance taxes.<sup>38</sup>**

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22. Hoffman v. Davis, 239 Ark. 99, 387 S.W.2d 338 (1965).

23. Thompson v. Chadwick, 221 Ark. 720, 255 S.W.2d 687 (1953).

24. Sweeney v. Sweeney, 267 Ark. 595, 593 S.W.2d 21 (1980)(overruled on other grounds, McDermott v. McDermott, 336 Ark. 557, 986 S.W.2d 843 (1999)).

25. Henson v. Fleet Mortg. Co., 319 Ark. 491, 892 S.W.2d 250 (1995).

26. T & T Materials, Inc. v. Mooney, 340 Ark. 646, 12 S.W.3d 635 (2000).

27. Ragsdell v. Gazaway Lumber Co., Inc., 11 Ark. App. 188, 668 S.W.2d 60 (1984).

28. State v. Gallagher, 101 Ark. 593, 143 S.W. 98, 38 L.R.A.N.S. 328 (1912) (practicing medicine without a license).

29. Holt Bonding Co., Inc. v. State, 77 Ark. App. 198, 72 S.W.3d 537 (2002).

30. St. Paul Mercury Ins. Co. v. Circuit Court of Craighead County, Western Div., 348 Ark. 197, 73 S.W.3d 584 (2002).

31. Simmons First Nat. Bank v. Abbott, 288 Ark. 304, 705 S.W.2d 3 (1986).

32. Rolling Pines Ltd. Partnership v. City of Little Rock, 73 Ark. App. 97, 40 S.W.3d 828 (2001).

33. Hunt v. State, 354 Ark. 682, 686, 128 S.W.3d 820, 823 (Ark., 2003) ("In interpreting a penal statute, '[i]t is well settled that penal statutes are strictly construed with all doubts resolved in favor of the defendant, and nothing is taken as intended which is not clearly expressed.'" (quoting Hales v. State, 299 Ark. 93, 94, 771 S.W.2d 285, 286 (1989))); Beulah v. State, 344 Ark. 528, 42 S.W.3d 461 (Ark., 2001); State *ex rel.* Sargent v. Lewis 979 S.W.2d 894 (Ark., 1998). *See also* State v. One 1993 Toyota Camry Vin. No. 4T1SK12EXPU283054, 333 Ark. 503, 969 S.W.2d 663 (1998), extending the principle to statutes requiring forfeitures because they are "penal in nature."

34. Apel v. Cummings, 76 Ark. App. 93, 61 S.W.3d 214 (2001).

35. Arkansas State Licensing Board for General Contractors v. Lane, 214 Ark. 312, 316-7, 215 S.W.2d 707, 710 (1948).

36. Pfeifer v. City of Little Rock, 346 Ark. 449, 57 S.W.3d 714 (2001).

37. Henson v. Fleet Mortg. Co., 319 Ark. 491, 892 S.W.2d 250 (1995).

38. *In re* Clarkson's Estate, 125 Ark. 381, 188 S.W. 834 (1916).

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- (8) **Legislative grants.**<sup>39</sup>
- (9) **Probate court authority and jurisdiction.**<sup>40</sup>
- (10) **Tax exemptions (against the exemption).**<sup>41</sup>
- (11) **Workers Compensation Statute.**<sup>42</sup>

liberty to read into the statute provisions which the legislature did not see fit to incorporate, nor may it enlarge the scope of its provisions by an unwarranted interpretation of the language used."<sup>44</sup>

### b. When statutes are liberally construed.

It is a legal commonplace that remedial statutes are given a liberal construction.<sup>45</sup> The term "remedial" as used here is subject to several alternative, or perhaps, cumulative definitions. The Arkansas Supreme Court has said that "remedial statutes" are those "which do not disturb vested rights, or create new obligations, but only supply a new or more appropriate remedy to enforce an existing right or obligation."<sup>46</sup> Statutes that are intended to create a public benefit are also given a liberal interpretation in favor of the public.<sup>47</sup>

In addition to the foregoing, there are approximately 70 statutes that require strict construction by their own terms.<sup>43</sup>

## 2. Liberal construction.

### a. Defined.

"Liberal construction" is the process of affording "all the relief that its language indicates the legislature intended to grant, the interpretation should not exceed the limits of the statutory intent. [However], a court is not at

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39. Arkansas State Highway Commission v. Southwestern Bell Tel. Co., 206 Ark. 1099, 178 S.W.2d 1002, 1006 (1944) (dissent).

40. Petition of Committee on Professional Ethics of Arkansas Bar Ass'n for Establishment of Trustee Proceedings, 273 Ark. 496, 621 S.W.2d 223 (1981).

41. Morley v. E. E. Barber Const. Co., 220 Ark. 485, 248 S.W.2d 689 (1952); City of Fayetteville v. Phillips, 320 Ark. 540, 899 S.W.2d 57, 100 Ed. Law Rep. 1185 (1995); Pledger v. Mid-State Const. & Materials, Inc., 325 Ark. 388, 925 S.W.2d 412 (1996).

42. By legislative fiat. ARK. CODE ANN. § 11-9-704(c)(3) (Repl.1996). If left to their own devices the Arkansas courts have and, presumably, would continue to view the Worker Compensation scheme as remedial and, therefore, afford it a liberal construction. See note 45 and the accompanying text below.

43. For example, Title 3 of the Arkansas Code Annotated regulating alcoholic beverages has three sections requiring strict construction of a chapter or subsection: § 3-5-1201 [micro breweries], § 3-9-201 [on premise consumption], and § 3-9-408 [Sunday sales].

44. Garrett v. Cline, 257 Ark. 829, 832, 520 S.W.2d 281, 284 (1975)(quoting 76 Am. Jur. 2d, § 6, at p. 880). The Arkansas Supreme Court's most extensive discussion of the meaning of "liberal construction" is found in Massey v. Poteau Trucking Co., 221 Ark. 589, 593, 254 S.W.2d 959, 961(1953). The court specifically rejected suggestions in cases from other jurisdictions that "liberal construction" required "a court . . . to take liberties with what one litigant is entitled to at the expense of another, . . . ." *Id.*

45. Chicago Mill & Lumber Co. v. Smith, 228 Ark. 876, 310 S.W.2d 803 (1958).

46. Harrison v. Matthews 235 Ark. 915, 917, 362 S.W.2d 704 (1962) (quoting State *ex rel.* Moose v. Kansas City & M. Ry. & B. Co., 117 Ark. 606, 174 S.W. 248 (1914).

47. Laman v. McCord, 245 Ark. 401, 404, 432 S.W.2d 753, 755 (Ark. Oct 21, 1968) (citing Employers Ins. Co. of Ala. v. Johnston, 238 Ala. 26, 189 So. 58 (1939); Bankers Life & Cas. Co. v. Alexander, 242 Iowa 364, 45 N.W.2d 258 (1950); Hipp v. Prudential Cas. & Surety Co., 60 S.D. 308, 244 N.W. 346 (1932)).

Other jurisdictions have offered other definitions. Although the Arkansas Supreme Court has yet to overtly adopt these, they are generally accepted and consistent with our Court's general approach. For example, in *Fumarelli v. Marsam Development, Inc.*<sup>48</sup> the New York Court of Appeals held: "remedial" statute provides a remedy where the common-law either provides no remedy or provides an imperfect or ineffective remedy." This principle is consistent with the approach of the Arkansas courts. For example, the Workers Compensation Statutes constituted a major change from the remedies available at common law to workers injured on the job. The Arkansas courts deemed them remedial in nature, and, therefore, subject to a liberal construction. The General Assembly, however, amended the statute to include a provision requiring that it be strictly construed.<sup>49</sup> It is important to realize that this definition encompasses both the original statutes that preempt an existing common law scheme and

all subsequent amendments to the original statutory scheme.

**c. Specific types of statutes subject to liberal construction.**

The following are among the types of statutes that Arkansas courts have held are subject to liberal construction.

- (1) Attorneys' lien statute.<sup>50</sup>
- (2) Election laws.<sup>51</sup>
- (3) Freedom of Information Act.<sup>52</sup>
- (4) Unemployment insurance.<sup>53</sup>
- (5) Wrongful death actions.<sup>54</sup>
- (6) The statute of limitations savings statute.<sup>55</sup>

In addition to the foregoing list there are two statutes that specify the use of liberal construction by the courts.<sup>56</sup>

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48. 92 N.Y.2d 298, 306, 703 N.E.2d 251, 255, 680 N.Y.S.2d 440, 444 (1998).

49. For an example of cases applying a liberal construction, see *Holland v. Malvern Sand & Gravel Co.*, 237 Ark. 635, 636, 374 S.W.2d 822, 823 (1964); *Massey v. Poteau Trucking Co.*, 221 Ark. 589, 254 S.W.2d 959 (1953). The current legislative mandate for strict construction is found in: ARK. CODE ANN. § 11-9-704(c)(3) (Repl.1996) and is discussed in *Liberty Mut. Ins. Co. and Film Transit v. Chambers*, 76 Ark. App. 286, 64 S.W.3d 775 (2002).

50. *Home Ins. Co. v. Jones*, 253 Ark. 218, 219, 485 S.W.2d 190, 191(1972).

51. *LaFargue v. Waggoner*, 189 Ark. 757, 75 S.W.2d 235, 240 (1934).

52. *Laman v. McCord*, 245 Ark. 401, 404, 432 S.W.2d 753, 755 (1968).

53. *Garrett v. Cline*, 257 Ark. 829, 832, 520 S.W.2d 281, 284 (1975).

54. *Aka v. Jefferson Hosp. Ass'n, Inc.*, 344 Ark. 627, 637, 42 S.W.3d 508, 515 (2001) (giving retroactive application to the interpretation of the statute as including deaths of viable fetuses to accomplish the remedial purpose of the statute); *Rhuland v. Fahr*, 356 Ark. 382, 389, 155 S.W.3d 2, 6 (2004).

55. *Forrest City Mach. Works, Inc. v. Lyons*, 315 Ark. 173, 866 S.W.2d 372 (1993); *Long v. Bonds*, \_\_\_ S.W.3d \_\_\_, 2005 WL 19281 (ARK. APP., Jan. 5, 2005).

56. They are the Environmental laws regulating landfill service areas [§ 8-6-1102. *Congressional purpose; liberal construction*] and the statutes authorizing Municipal Port Authorities [§ 14-186-202. *Interpretation*].



**C. Step three: Determining the legislative intent: Which intent, of whom, when? The academic debate.**

We turn from a consideration of the special bias imposed on statutes subject to strict or liberal construction to the actual problem of determining legislative intent. Ironically, absent a pertinent expression of the legislature's intent incorporated in the statute itself, the mandate to 'give effect to the legislature's intent' is itself fraught with ambiguity.

Arkansas courts adhere to what is known as the "intentionalist theory" of statutory interpretation, that is they seek to give effect to the legislative intent.<sup>57</sup> Professors Eskridge, Frickey and Garrett note that the "intentionalist theory" brings with it two problems: whose intent should be considered, and how to determine their intent.<sup>58</sup>

**1. Which intent?**

Most analysts note that a legislature has two intents when it enacts a specific piece of

legislation. First, it has a "purpose" That is, it intends to achieve a goal, solve a problem, or implement a policy. Second, the legislature also has a "specific intent" – the means chosen to achieve that "purpose."<sup>59</sup> If there is a conflict between the goal and means, which should be given priority in the interpretive process?

In *Davis v. Johnson*<sup>60</sup> the Court seemed to think that a statute must be read in light of its overall purpose: "If a statute is to make sense, it must be read in the light of some assumed purpose. A statute merely declaring a rule, with no purpose or objective, is nonsense."<sup>61</sup>

In *Reynolds v. Holland*<sup>62</sup> the Court seemed to focus on the specific intent of the mandate: "The question for the courts is not what would be wise, politic and just, but what did the legislature *really mean to direct*."<sup>63</sup>

*Reynolds* was decided in 1879, *Davis* in 1970. Even though they span almost a century, both decisions coexist happily in our case law. They do not expressly or implicitly overrule one another. Each continues to be cited for the quoted principle.<sup>64</sup> So what is the answer in Arkansas?

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57. *McDaniel v. Herrn*, 120 Ark. 288, 179 S.W. 337, 338 (1915) ("It is a well-established canon of interpretation that the object to be attained and the purpose of the Legislature are to be kept in mind in construing a statute. If the language used in a statute is susceptible of more than one construction, then the meaning must be given to it which is in harmony with the purpose to be attained rather than a construction which would tend to defeat it."); *Ward v. Doss*, \_\_\_ S.W.3d \_\_\_, 2005 WL 675755 (Ark., Mar. 24, 2005) ("The basic rule of statutory construction is to give effect to the intent of the legislature").

58. WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *LEGISLATION AND STATUTORY INTERPRETATION* 214 (2000).

59. *Id.* at 216.

60. *Davis v. Johnston*, 251 Ark. 1078, 479 S.W.2d 525 (1972).

61. *Id.* See also, *McDaniel v. Herrn*, 120 Ark. 288, 179 S.W. 337, 338 (1915) ("It is a well-established canon of interpretation that the object to be attained and the purpose of the Legislature are to be kept in mind in construing a statute. If the language used in a statute is susceptible of more than one construction, then the meaning must be given to it which is in harmony with the purpose to be attained rather than a construction which would tend to defeat it.").

62. *Reynolds v. Holland*, 35 Ark. 56 (Ark. 1879).

63. *Id.* (Emphasis in the original). See also, *Pledger v. Mid-State Const. & Materials, Inc.*, 325 Ark. 388, 395, 925 S.W.2d 412 (1996) ("The primary rule in construing legislation is to ascertain and give effect to the intent of the legislature and when the intent is clear, there is no room for other interpretation or construction.").

64. *Walker v. Alred* is cited in: *Bradley v. Bruce*, 705 S.W.2d 431, 432, 288 Ark. 342, 343-A (1986); *Sweeney v. Sweeney*, 593

Unfortunately, the more cases you read, the fuzzier the problem is like to become. The Arkansas courts have not adopted or adhered to a single semantic scheme that distinguishes between the goal and means of legislation. Not surprisingly, the appellate courts do not use the words "purpose" and "intent" with academic precision when describing their goal in interpreting statutes. In many cases it is unclear if "intent" means the underlying goal or specific means. The same is true of the word "purpose." What does emerge from the cases, however, is that the Arkansas Supreme Court means both, perhaps making the not unreasonable assumption that the legislative means generally bears some relation to its overarching goal.

At first blush, the problem seems deceptively similar. Logic suggests that in the event of a conflict between the purpose and specific intent of the statute, courts should give the legislative purpose priority. The means must serve the end. Therefore, within broad limits, the specified means should be subordinated to the desired goal. If the specific means do not reach the desired result, the means should be interpreted so as to reach the legislative goal. It would make little sense to reinterpret the goal to match the means.

Although this approach is logically impeccable, it is politically incorrect in the true sense of the term. The operative portion of every statute is the language stating the specific intent. If the general purpose is mentioned at all, it is contained in a preamble, and, generally does not purport to mandate or prohibit any

behavior, and therefore does not directly affect the outcome of any particular case. As Professors Eskridge, Frickey and Garrett point out, the legislative expression of its specific intent is most directly supported by the democratic theory of legitimacy, and the further you depart from it the less legitimate the result.<sup>65</sup> The rule of law and the separation of powers both mandate that the courts give great deference to the statutory language, which almost invariably means to the specific intent as opposed to the general purpose.

My research fails to reveal an Arkansas case in which the court articulates an overarching method of resolving the issue. Having thought about the problem, I will venture a simple method of analysis and proceeding that is consistent with the courts' avowed goal of giving expression to the legislative intent, and yet does a minimum of violence to the rule of law and separation of powers.

When looked at from the perspective of legislative purpose versus legislative means, all cases of ambiguity can be resolved into one of four categories. These are situations in which:

1. The purpose is ambiguous, but the means are clear;
2. The purpose is clear, but the means are ambiguous;
3. The means and purpose are both ambiguous; and
4. The purpose and means are both clear, but inconsistent with one another.<sup>66</sup>

We will consider each in turn.

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S.W.2d 21, 26, 267 Ark. 595, 603 (1980) (overruled on other grounds); *Hatcher v. Hatcher*, 580 S.W.2d 475, 477, 265 Ark. 681, 687 (1979); *Walther v. McDonald*, 422 S.W.2d 854, 866, 243 Ark. 912, 936 (1968) (in dissent). *Reynolds v. Holland* is cited in: *Walther v. McDonald*, 422 S.W.2d 854, 856+, 243 Ark. 912, 915+ (1968); *Wasson v. Pyron*, 414 S.W.2d 391, 395, 242 Ark. 518, 525 (1967) (in dissent). *Davis v. Johnson* is cited in: *Little Rock Crate & Basket Co. v. Young*, 681 S.W.2d 388, 389, 284 Ark. 295, 298 (1984).

65. WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *LEGISLATION AND STATUTORY INTERPRETATION* 214 (2000).

66. There is, of course, a fifth possibility: Both the purpose and means are clear and consistent. In this situation, however, there is no need for judicial interpretation.

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### **a. The purpose is ambiguous, but the means are clear.**

In this situation, the courts should operate on the assumption that the legislature has chosen a means well suited to achieving its purpose. This being the case, the court should implement the statutory means as written, trusting that this will accomplish the purpose. Furthermore, in most cases this will render the question of the "ambiguous" purpose moot. In effect, no interpretation is necessary.

### **b. The purpose is clear, but the means are ambiguous.**

In this case, the courts should assume that the legislature would intend the means best suited to achieving its purpose. Therefore, the court should select from among the plausible interpretations of the statutory means that scheme which is most likely to affect the statutory purpose in most cases. Although the court is charged with justly deciding the case before it, the court's role in interpreting the statute is to accomplish the legislative purpose. Legislatures deal with problems in the macro – they intend to find a solution that will fit most, but not necessarily all circumstances. Therefore, in the rare instance presenting unusual circumstances, this may require the court to interpret the statute so as to actually frustrate the legislative purpose in the case before it, in order to accomplish the legislative purpose in the vast majority of cases.

### **c. The means and purpose are both ambiguous.**

Where both the purpose and the means are in doubt, the court should first attempt to establish the legislative purpose. Logically, achieving the purpose should have priority over using a particular means. Therefore, assuming the court can, with some confidence, resolve the ambiguity of purpose, that purpose will then guide the court in resolving the ambiguity of means. In effect the court will have converted the problem from a problem of the 3rd type to one of the 2nd type.

If the court cannot determine the legislative purpose, it should then attempt to resolve the ambiguity of the means. If it is able to determine how the legislature meant the statute to operate, it has succeeded in converting the problem from one of the 3rd type to one of the 1st type.

It is possible that the court is confronted with two equally plausible resolutions – one for the purpose, and one for the means, but that the interpreted means then conflict with the interpreted means. In effect the court has jumped from the frying pan of a 3rd type problem to the fire of the 4th type.

### **d. The unambiguous purpose and unambiguous means are inconsistent with one another.**

At this point, note must be taken of the difference between criminal statutes that are subject to being held void for vagueness<sup>67</sup>, and civil statutes which are not. The constitutional limits on vagueness require that courts give great deference to the express language of the statute, as that is what gives the public notice of what conduct is subject to the criminal sanction. Therefore:

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67. See *Jordon v. State*, 274 Ark. 572, 578, 626 S.W.2d 947, 950 (1982) ("Where a man of average intelligence would not have to speculate as to the meaning of the statute, the constitutional requirement of specificity is met, since fair warning of the proscribed conduct is given." (citing *Rowan v. Post Office Department*, 397 U.S. 728, 90 S. Ct. 1484, 25 L. Ed.2d 736 (1970); *United States v. Harris*, 347 U.S. 612 (1954); *Newton v. State*, 271 Ark. 427, 609 S.W.2d 328 (1981); *Neal v. State*, 259 Ark. 27, 531 S.W.2d 17 (1975)).

Penal statutes, . . . , should be relatively autonomous texts that resemble messages in a bottle. [In civil cases] the case for autonomous text is . . . less compelling. Thus, approaches that emphasize intent, purpose, or imaginative reconstruction may be appropriate. An illustration is a statute directed at an administrative agency. Such a statute might, by design or accident, contain a gap or fail to cover certain details. In that case, either the courts or the agency itself should be allowed to carry out the evident intentions of the legislature as best they can be determined, or to fill in the details in light of their own experience.<sup>68</sup>

Viewed in the context of our present discussion, the same principles suggest that, given a clear purpose conflicting with an unambiguous means, the court should resolve the problem in criminal case differently than the same problem in a civil case.

In the criminal case, the court should apply the means, as written. This is consistent with

Arkansas law that holds criminal cases are subject to strict construction.<sup>69</sup> In those cases where the conduct, although subject to the criminal sanction, is clearly outside the statutory purpose, it may lead to injustice. In such cases the defendant may yet find shelter in prosecutorial discretion, or the good sense of a jury or trial judge.<sup>70</sup>

Only in the last resort, that is where the purpose and means are so adverse and the conduct at issue so clearly within the one but not the other, should the court declare the statute un-enforceable as unconstitutionally vague.

In civil cases the court should interpret the statute to require a means consistent with its unambiguous purpose, unless it is subject to strict construction. As noted above, logic requires that we choose to achieve the legislative purpose rather than giving effect to the expressed means

Outside of the constitutional doctrine that holds some criminal statutes void for vagueness<sup>71</sup>, my research is also unable to provide a bright line description of the point at which the court will conclude that a civil statute's lan-

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68. Peter M. Tiersma, *A Message in a Bottle: Text, Autonomy, and Statutory Interpretation*, 76 TUL. L. REV. 431 (2001).

69. See the discussion above at note 10.

70. Neither the Arkansas Criminal Code nor its case law provides for a *de minimis* defense. For an example of a current codification of this common law defense see 17-A Maine Revised Statutes Annotated § 12. *De minimis infractions*, which provides in part:

1. The court may dismiss a prosecution if, upon notice to or motion of the prosecutor and opportunity to be heard, having regard to the nature of the conduct alleged and the nature of the attendant circumstances, it finds the defendant's conduct:

. . . .  
 B. Did not actually cause or threaten the harm sought to be prevented by the law defining the crime or did so only to an extent too trivial to warrant the condemnation of conviction; or  
 C. Presents such other extenuations that it cannot reasonably be regarded as envisaged by the Legislature in defining the crime.  
 . . . .

See also Model Penal Code § 2.12 and the Hawaii Penal Code 1973, § 236.

71. See note 10.

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guage, intended means, and ultimate goal are so opaque or conflicted as to force the court to abandon the effort and declare the statute is beyond interpretation. The probable answer lies between two poles, both articulated by the Arkansas Supreme Court in *McLeod v. Santa Fe Trail Transp. Co.* where it said: "[t]hat interpretation should be given to the statute to sustain it rather than to defeat it; and it is only where sections are in hopeless conflict that one section should be stricken."<sup>72</sup>

### 2. Whose intent?

Assuming, for the moment, that we are able to resolve the issue of whether the interpretive priority in a particular case should be to give expression to the legislative purpose or the legislature's specific intent, other problems arise. One of the most intractable of these is the simple question: Whose intent?

The legislature is a deliberative body composed of a host of voices, each animated by the individual's values, political commitments, and representative obligations. The simple answer is that of the majority. Unfortunately, the majority may and indeed probably did not have a single purpose or intent. The bicameral nature of our legislature only compounds the

problem. Even assuming a unitary intent on the part of the legislature, how do you know what it is?

As mentioned above, a statute that includes within its text a declaration of either its purpose or specific intent is a rarity. In the majority of cases the court must try to find a voice that speaks for the majority. It would be facetious to suggest that the responsible committee, floor manager, or sponsor speaks for all members who voted to pass the bill.<sup>73</sup>

Moreover, courts are often called upon to resolve problems that were not considered by the legislature.<sup>74</sup> In such cases, the reality is that the legislature had no specific intent as to the circumstances presented by the case. To the extent the problem raises issues as to the policy or goal of the legislation, the majority may never have had a purpose relevant to the case. In such a circumstance it is fair to say the legislature also never had a relevant intent with respect to the means.

To solve this problem, a number of commentators suggest using the device of "imaginative reconstruction." This requires the court to ask: "What would the legislator/ure have done with this problem if they had considered it?"<sup>75</sup> For the academics pursuing the problem in the abstract, this step leads inevitably to the ques-

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72. 205 Ark. 225, 168 S.W.2d 413, 415-6 (1943).

73. See WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *LEGISLATION AND STATUTORY INTERPRETATION* 216 (2000).

74. *Connor v. Blackwood*, 176 Ark. 139, 2 S.W.2d 44, 46 (1928) ("We do not think the framers of the Constitution had in mind any such stupendous advancement in methods of locomotion and means of transportation as exist today. They did not get a vision of the future of their state with its citizens traveling entirely across the state, over a great state highway, a distance of 300 or 400 miles in 10 or 12 hours. Then, with the means at hand, 50 miles was a hard day's journey.").

75. *Looking to Statutory Intertext: Toward the Use of the Rabbinic Biblical Interpretive Stance in American Statutory Interpretation*, 115 HARV. L. REV. 1456 (Mar., 2002) ("Both intentionalism and purposivism often pierce the congressional veil to discover clues regarding intent or resort to 'imaginative reconstruction' of legislative intent." Footnotes omitted.); RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 287 (1985) ("I assume for present purposes that courts are capable of assessing legislative intent, even if it only amounts to 'imaginative reconstruction,' for that is a deep part of contemporary legal practice."); and Richard A. Posner, *Statutory Interpretation – in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 817 (1983)).

tion of who do you reconstruct: a specific individual, a hypothetical reasonable legislator stitched together like a political Frankenstein out of assorted parts, or a group of hypothetical, reasonable people large enough to constitute a majority in the House and Senate?<sup>76</sup>

Nor is this the end of the problem. Should the courts simply adhere to the letter of the law, letting the chips of injustice fall where they may in the present case, sending a copy of its opinion to the legislature leadership in the hopes that a fix will be forthcoming before the next case?

### 3. When?

The written word may be unchangeable, but the intent of humans and their institutions changes. The current debate among Justices and academics about whether the United States Constitution is to be interpreted only in light of the drafters and founding fathers' intent, or should include consideration of lessons learned and societal changes that have occurred over the last two centuries has not gained purchase in the Arkansas courts. Statutes are of course more transitory creatures than are constitutions. They are generally easier to amend, supercede, or repeal. Therefore, the debate is somewhat less voracious when confined to statutory interpretation.

The academics tend to agree that it is only the legislature's intent at the time it enacted the statute that is important. As a matter of logic, this proposition seems both self evident

and unassailable. Perhaps for that reason the Arkansas appellate courts apparently have largely assumed without direct comment that the only relevant intent is that of the legislature when enacting the statute.<sup>77</sup>

### 4. Pulling back from the brink: A rough but practical solution.

There is no agreed upon answer to the foregoing questions. The more you read, the more likely you are to be convinced there is no answer. The practicing lawyer and sitting judge, however, must find a solution. This requires that we jump off the academic train of "Yes, but . . ." sometime before we reach the event horizon of abstract inquiry, and plunge well past the point where our discussion can shine some light on the world as we know it.

The best we can do is to suggest that the court do the best it can do to ascertain the apparent legislative purpose and specific intent. The court should be prepared to admit defeat if the purpose or intent is too opaque or hopelessly at odds with one another. In such case, the court should leave the statute where the parties found it, perhaps with a polite note to the legislature suggesting it reconsider the statute.

Things are not as grim as they may seem. There are some agreed upon principles and at least one case suggesting an innovative approach to resolving some of the most intractable problems dealing with legislative

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76. WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *LEGISLATION AND STATUTORY INTERPRETATION* 219-20 (2000).

77. *Nicholls v. Gee*, 30 Ark. 135 (1875); *Earl Bros. & Co. v. Malone*, 80 Ark. 218, 96 S.W. 1062 (1906); *Doe v. Baum*, 348 Ark. 259, 72 S.W.3d 476 (2002) ("In ascertaining an act's intent, the court examines the statute historically, as well as the contemporaneous conditions at the time of the enactment . . .").

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intent.

It is generally accepted that in the ordinary course a court should seek to determine and give effect to intent of the legislature at the time the statute was enacted.<sup>78</sup> This is a plausible task if it is a case of legislative oversight. The more difficult problem arises when the issue currently confronting the court simply did not exist at the time the legislation was passed. As noted above, one approach to solving the problem of problems never considered by the legislature is the use of "imaginative reconstruction." There are some early cases in which the Arkansas Supreme Court declined opportunities to apply "imaginative reconstruction."<sup>79</sup> In 1994, however, Special Justice Otis H. Turner wrote the opinion in *Bryant v. Mars*<sup>80</sup> explicitly adopting Judge Posner's formulation of "imaginative reconstruction" as a valid reconstructive tool.

[W] are . . . aware of the need for a balancing of interests to give effect to what we perceive to be the intent of the General Assembly. In doing so, a common

sense approach must be taken. *Simmons First Nat'l Bank v. Liberty Mut. Ins. Co.*, 282 Ark. 194, 667 S.W.2d 648 (1984). A useful observation in this regard is offered by Judge Richard A. Posner in his work, *The Problems of Jurisprudence* (Harvard University Press, 1990), at 270, 273:

[J]udges should ask themselves, when the message imparted by a statute is unclear, what the legislature would have wanted them to do in such a case of failed communication. The answer may be "nothing"; or there may be no answer; but the question ought to be asked. .... [I]nterpretation is creative rather than mechanical.... When confronting unclear statutes, judges ... have to summon all their powers of imagination and empathy, in an effort — doomed to frequent failure — to place themselves in the position of the legislators who enacted the

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78. *Bond v. Kennedy*, 213 Ark. 758, 764, 212 S.W.2d 336, 339 (1948) ("In order to arrive at the intention of the legislature the court should examine the statute in the light of the history of its enactment, the contemporary history of the conditions and situation of the people, the economic and sociological policy of the state, its constitution and laws, and all other matters of common knowledge within the limits of their jurisdiction."); *Holt v. Howard*, 206 Ark. 337, 175 S.W.2d 384, 386 (1943) ("We reach the conclusion that appellees' contention violates at least two of the canons of construction; one, extrinsic, and the other, intrinsic. I. *Contemporaneous Circumstances*. "In seeking to ascertain the legislative intent where the language of the statute is ambiguous, the courts will take into consideration all the facts and circumstances existing at the time of, and leading up to, its enactment, such as the history of the times, the habits and activities of the people, the state of the existing law, and the evils to be remedied by the new act." (citing 59 C.J. 1014)).

79. *Connor v. Blackwood, State Highway Commissioner*, 176 Ark. 139, 2 S.W.2d 44, 46 (1928) ("We do not think the framers of the Constitution had in mind any such stupendous advancement in methods of locomotion and means of transportation as exist today. They did not get a vision of the future of their state with its citizens traveling entirely across the state, over a great state highway, a distance of 300 or 400 miles in 10 or 12 hours. Then, with the means at hand, 50 miles was a hard day's journey. Even so, they did not in framing the Constitution deny the right, power, and authority of the state to lay out, construct, repair, and maintain state highways, and, necessarily, bridges or ferries thereon."); *Waters Pierce Oil Co. v. Roberts*, 96 Ark. 92, 131 S.W. 205, 206 (1910) ("Though the placing of this time limitation on the work of the equalization boards may at this day seriously hamper them to an extent not anticipated by the Legislature when it enacted the statute more than two decades ago, still that is a matter for the Legislature to consider now, and not one which appeals to this court in construing the statute. It is our duty to interpret the statute according to settled rules of construction, and not according to what the law should be.").

80. 309 Ark. 480, 830 S.W.2d 869 (1992).

statute that they are being asked to interpret. They cannot only study plain meanings; they must try to understand the problem that the legislators faced.<sup>81</sup>

There were no dissents or concurring opinions.<sup>82</sup> No one, including the court itself, seemed to notice what appears to be a significant departure from what had been the long-standing approach of the Arkansas Supreme Court. The case has not been cited for this principle in the intervening eight years.<sup>83</sup> Nevertheless the case stands for the proposition that a court might try to resolve a lack of legislative prescience by engaging in the thought experiment of asking: "What would the legislature have done if they had thought of this problem?"<sup>84</sup> when it enacted the statute.

I suggest that although imaginative reconstruction may be the only way to address an old statute being applied to a new problem, considerable caution is appropriate. Such an exercise should be constrained by three considerations.

The first consideration should be that the court will not change the purpose of a law as that term is used here. The goal of legislation is the unique and sole prerogative of the legislature. As a corollary to this principle, it is clear that courts should not expand the legislative purpose. Courts may, on the other hand, interpret that language of a statute to give effect to a clearly established purpose that is not ade-

quately expressed by the statutory language.

The second consideration should be judicial deference to the legislative choice of means to accomplish its intended purpose. The court should not modify or extend the plainly expressed intent of a statute even though it will not accomplish the underlying purpose of the legislation in a particular case, absent a compelling public need to make such a change now. In civil cases, such a need should ordinarily be one that transcends the interests of the litigants. I say ordinarily, because at some point the courts must act on their obligation to do justice in the case before it. Such cases should be limited, however, to those where two criteria are met: (1) the outcome for one or both litigants is of overriding importance to their future, and (2) the decision will, by operation of law or circumstance, prove irretrievable if later action by the legislature mandates a different outcome. In such a case, it is incumbent upon the court to do the best it can to discern the overarching purpose of the legislature and interpret the statute so that the purpose is achieved in the instant case. Nevertheless, such cases should be few and far between. Care must be taken lest the equitable exception swallow the rule of deference.

Taken together, these two considerations create an articulable balance between the court's obligation to honor the separation of powers and its obligation to do justice in the case before it. It will not presume to change or

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81. *Bryant v. Mars*, 309 Ark. 480, 485, 830 S.W.2d 869, 871-2 (1992) (interpreting the Freedom of Information Act as not applying to papers held by the Attorney General's Office as opposed to papers held by the Attorney General personally).

82. Justice Newbern did not participate in the decision.

83. The fact that the WestLaw editors failed to include the holding in a head note may partially explain the lack of subsequent application of the principle.

84. *But see* the problems raised in connection with this approach at 5.



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expand the legislature's purpose. It will, when necessary to do justice and consistent with the legislative purpose, interpret the language to extend the means so as to encompass an unforeseen circumstance.

This is an appropriate place to leave the discussion of the issues swirling behind the simple mandate to give effect to the legislative intent. Fortunately, in most cases requiring statutory interpretation there is little serious doubt about the legislative purpose or the general means chosen to accomplish that purpose.

### D. What evidence will the Court consider to determine the legislature's intent?

#### 1. The horse's mouth.

As noted above, the legislature occasionally graces the statute with a statement of its purpose or specific intent. If the statute contains such language, there may be no need to look further. Enacted language is more than legisla-

tive history or a non-binding statement of purpose by a sponsor – it is the law.

#### 2. Other sources of information.

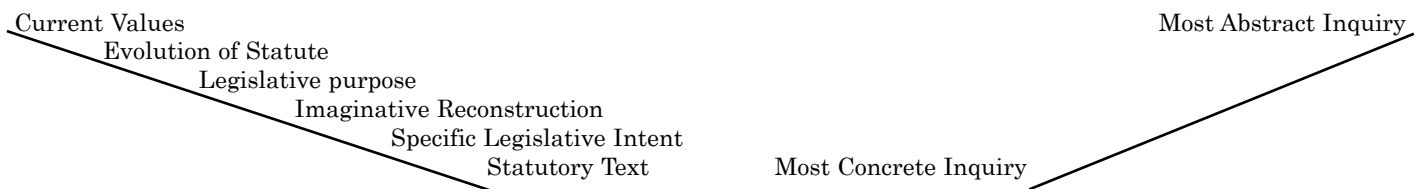
This issue is also a subject of extended debate among the academics. The principles that distinguish the various schools of thought on statutory interpretation have a direct effect upon what sources of information their adherents feel are appropriate. For example, having concluded that the legislative intent is irrelevant, the strict textualists conclude that reference to the legislative history is also irrelevant.<sup>85</sup> Adherents of other schools of thought draw distinctions between the weight that should be given to various sources.<sup>86</sup>

The Arkansas courts have demonstrated a general willingness to consider any information that sheds some light upon the legislative intent.<sup>87</sup> In as much as the determination of legislative intent is a fact finding process, it is appropriate that the court consider all relevant

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85. WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *LEGISLATION AND STATUTORY INTERPRETATION*, 228-30 (2000).

86. Professors Frickey and Eskridge developed the "Funnel of Abstraction" to demonstrate their view of the relative weight customarily given by the U.S. Supreme Court during the 20th century to the various sources of information bearing upon legislative intent. The "... 'funnel' reflects both the multiplicity of considerations and the conventional hierarchy ranking them against one another. For example, because statutory text is the most accessible and formally the most authoritative basis for knowing what statutes require, it is the weightiest evidence." Professors Frickey and Eskridge's funnel is replicated below.



WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *LEGISLATION AND STATUTORY INTERPRETATION*, 240-41 (2000).

87. *Burford Distrib., Inc. v. Starr*, 341 Ark. 914, 916, 20 S.W.3d 363, 365 (2000) ("In attempting to ascertain legislative intent, we look to the language of the statute, the subject matter, the object to be accomplished, the purpose to be served, legislative history, and *other appropriate matters that shed light on the matter*." Citing *Nelson v. Timberline Intern., Inc.*, 332 Ark. 165, 964 S.W.2d 357; and *Board of Trustees v. Stodola*, 328 Ark. 194, 942 S.W.2d 255 (1997)). (Emphasis added).

evidence, giving to each source the weight it deserves.

There are a number of Arkansas cases that include recitations of specific sources of information the court may consider in determining the legislature's intent.<sup>88</sup> They include the following:

1. The language of the statute [other than an express statement of purpose];<sup>89</sup>
2. The whole Act in which the statute

appears;<sup>90</sup>

3. The caption, title, preamble or emergency clause;<sup>91</sup>

4. Interpretations by executive and administrative officers [charged with enforcement of the statute];<sup>92</sup>

5. Official commentary to code;<sup>93</sup>

6. The legislative history;<sup>94</sup>

7. Subject matter of the statute;<sup>95</sup>

8. The object to be accomplished;<sup>96</sup>

9. The remedy provided;<sup>97</sup>

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88. See *Sluder v. Steak & Ale of Little Rock, Inc.*, \_\_\_ S.W.3d \_\_\_, 2005 WL 730194 (Ark., Mar. 31, 2005) for the most expression of the standards sources for information about the legislatures intent. ("Where the meaning is not clear, we look to the language of the statute, the subject matter, the object to be accomplished, the purpose to be served, the remedy provided, the legislative history, and other appropriate means that shed light on the subject. Finally, the ultimate rule of statutory construction is to give effect to the intent of the General Assembly." (quoting: *Kyzar v. City of West Memphis*, \_\_\_ S.W.3d \_\_\_ (January 27, Jan. 27, 2005))).

89. See *Burford Distrib., Inc. v. Starr*, 341 Ark. 914, 916, 20 S.W.3d 363, 365 (2000); *Nelson v. Timberline Intern., Inc.*, 332 Ark. 165, 176, 964 S.W.2d 357, 362 (1998); *ACW, Inc. v. Weiss*, 329 Ark. 302, 313, 947 S.W.2d 770, 775 (1997); *Cheney v. Georgia Pacific Paper Corp.*, 237 Ark. 161, 167, 371 S.W.2d 843, 847 (1963); *Holt v. Howard*, 206 Ark. 337, 175 S.W.2d 384, 385 (1943); *Edwards v. Lodge*, 195 Ark. 470, 473, 113 S.W.2d 94, 97 (1938); *Alltel Mobile Communications, Inc. v. Arkansas Public Service Com'n*, 63 Ark. App. 197, 201, 975 S.W.2d 884, 887 (1998).

90. *ACW, Inc. v. Weiss*, 329 Ark. 302, 313, 947 S.W.2d 770, 775 (1997); *Edwards v. Lodge*, 195 Ark. 470, 473, 113 S.W.2d 94, 97 (1938).

91. *Farm Bureau Mut. Insur. Co. of Arkansas v. Wright*, 285 Ark. 228, 686 S.W.2d 778 (1985)(emergency clause); *Cook v. Bevill*, 246 Ark. 805, 810, 440 S.W.2d 570, 572 (1969)(title); *Morley v. Capital Transp. Co.*, 217 Ark. 583, 232 S.W.2d 641 (1950)(caption, title and preamble); *Roscoe v. Water & Sewer Imp. Dist. No. 3 of Garland County*, 216 Ark. 109, 224 S.W.2d 356 (1949)(title, preamble, and emergency clause); and *State v. White*, 170 Ark. 880, 281 S.W. 678 (1926)(caption).

92. *ACW, Inc. v. Weiss*, 329 Ark. 302, 313, 947 S.W.2d 770, 775 (1997)("[W]ill not be disregarded unless clearly wrong.").

93. *McGrew v. State*, 338 Ark. 30, 991 S.W.2d 588(1999); *Leheny v. State*, 307 Ark. 29, 818 S.W.2d 236, 71 Ed. Law. Rep. 296 (1991); *Lewis v. State*, 267 Ark. 933, 591 S.W.2d 687 (1979); and *State v. Reeves*, 264 Ark. 622, 574 S.W.2d 647 (1978).

94. *Burford Distrib., Inc. v. Starr*, 341 Ark. 914, 916, 20 S.W.3d 363, 365 (2000); *Nelson v. Timberline Intern., Inc.*, 332 Ark. 165, 176, 964 S.W.2d 357, 362 (1998); *ACW, Inc. v. Weiss*, 329 Ark. 302, 313, 947 S.W.2d 770, 775 (1997); *Cook v. Bevill*, 246 Ark. 805, 810, 440 S.W.2d 570, 572 (1969); *Cheney v. Georgia Pacific Paper Corp.*, 237 Ark. 161, 167, 371 S.W.2d 843, 847 (1963); *Prewitt v. Warfield*, 203 Ark. 137, 156 S.W.2d 238, 239 (1941).

95. *Nelson v. Timberline Intern., Inc.*, 332 Ark. 165, 176, 964 S.W.2d 357, 362 (1998); *ACW, Inc. v. Weiss*, 329 Ark. 302, 313, 947 S.W.2d 770, 775 (1997); *Cheney v. Georgia Pacific Paper Corp.*, 237 Ark. 161, 167, 371 S.W.2d 843, 847 (1963); *Alltel Mobile Communications, Inc. v. Arkansas Public Service Com'n*, 63 Ark. App. 197, 201, 975 S.W.2d 884, 887 (1998).

96. *Burford Distrib., Inc. v. Starr*, 341 Ark. 914, 916, 20 S.W.3d 363, 365 (2000); *Nelson v. Timberline Intern., Inc.*, 332 Ark. 165, 176, 964 S.W.2d 357, 362 (1998); *Cook v. Bevill*, 246 Ark. 805, 810, 440 S.W.2d 570, 572 (1969); *Cheney v. Georgia Pacific Paper Corp.*, 237 Ark. 161, 167, 371 S.W.2d 843, 847 (1963); *Holt v. Howard*, 206 Ark. 337, 175 S.W.2d 384, 385 (1943); *Alltel Mobile Communications, Inc. v. Arkansas Public Service Com'n*, 63 Ark. App. 197, 201, 975 S.W.2d 884, 887 (1998).

97. *Cheney v. Georgia Pacific Paper Corp.*, 237 Ark. 161, 167, 371 S.W.2d 843, 847 (1963).

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10. The purpose to be served;<sup>98</sup>
11. The evil to be remedied;<sup>99</sup>
12. The expediency of the act;<sup>100</sup>
13. The consequences of the act;<sup>101</sup>
14. Other Arkansas legislation on the subject;<sup>102</sup>
15. The constitution and laws of the state;<sup>103</sup>
16. The contemporary history of the conditions and situation of the people;<sup>104</sup>
17. The public policy of the state;<sup>105</sup>
18. Matters of common knowledge within the limits of the court's jurisdiction;<sup>106</sup>
19. Decisions interpreting similar statutes in other states, especially those on which our statute is based or that are based upon our statute,<sup>107</sup> and
19. Other appropriate matters that shed light on the matter.<sup>108</sup>

### 3. Forbidden information.

Against this list of things the court will look to in determining legislative intent, we can offer one source that is not to be considered in determining legislative intent:

We have stated numerous times that courts may look to legislative journals and public documents where there is ambiguity, in order to find the intention of the legislature. . . . But this court has never held that a senator or representative may testify giving his or her opinion on the subject; in fact, [we have] made it very clear that extraneous aids were not admissible when they merely encompassed individual views regarding leg-

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98. *Burford Distrib., Inc. v. Starr*, 341 Ark. 914, 916, 20 S.W.3d 363, 365 (2000); *Nelson v. Timberline Intern., Inc.*, 332 Ark. 165, 176, 964 S.W.2d 357, 362 (1998); *Cheney v. Georgia Pacific Paper Corp.*, 237 Ark. 161, 167, 371 S.W.2d 843, 847 (1963); *Holt v. Howard*, 206 Ark. 337, 175 S.W.2d 384, 385 (1943); *Alltel Mobile Communications, Inc. v. Arkansas Public Service Com'n*, 63 Ark. App. 197, 201, 975 S.W.2d 884, 887 (1998).

99. *Holt v. Howard*, 206 Ark. 337, 175 S.W.2d 384, 385 (1943).

100. *Cook v. Beville*, 246 Ark. 805, 810, 440 S.W.2d 570, 572 (1969); *Holt v. Howard*, 206 Ark. 337, 175 S.W.2d 384, 385 (1943).

101. *McDonald v. Wasson*, 188 Ark. 782, 67 S.W.2d 722 (1934).

102. *Prewitt v. Warfield*, 203 Ark. 137, 156 S.W.2d 238, 239 (1941)(Prior legislation); *Edwards v. Lodge*, 195 Ark. 470, 473, 113 S.W.2d 94, 97 (1938)(Other legislation); *Morgan Utilities, Inc. v. Perry County*, 183 Ark. 542, 37 S.W.2d 74, 77 (1931)("The entire section as related to other sections of the Code of which it is a part must be considered as a whole and as thus interpreted, . . .").

103. *Prewitt v. Warfield*, 203 Ark. 137, 156 S.W.2d 238, 239 (1941).

104. *Holt v. Howard*, 206 Ark. 337, 175 S.W.2d 384, 385 (1943); *Prewitt v. Warfield*, 203 Ark. 137, 156 S.W.2d 238, 239 (1941); *Southwestern Bell Telephone Co. v. Arkansas Public Service Com'n*, 69 Ark. App. 323, 329, 13 S.W.3d 197, 200-01 (Ark. App. 2000).

105. *Prewitt v. Warfield*, 203 Ark. 137, 156 S.W.2d 238, 239 (1941)(economic and sociologic policy); *La Farque v. Waggoner*, 189 Ark. 757, 75 S.W.2d 235 (1934)(public policy and general legislative policy); and *Arkansas Tax Comm. v. Crittendon County*, 183 Ark. 738, 38 S.W.2d 318 (1931)(public policy).

106. *Prewitt v. Warfield*, 203 Ark. 137, 156 S.W.2d 238, 239 (1941); *Southwestern Bell Telephone Co. v. Arkansas Public Service Com'n*, 69 Ark. App. 323, 329, 13 S.W.3d 197, 200-01 (Ark. App. 2000).

107. *Jones v. Brinkman*, 200 Ark. 583, 139 S.W.2d 686 (1940).

108. *Burford Distrib., Inc. v. Starr*, 341 Ark. 914, 916, 20 S.W.3d 363, 365 (2000); *Nelson v. Timberline Intern., Inc.*, 332 Ark. 165, 176, 964 S.W.2d 357, 362 (1998); *Holt v. Howard*, 206 Ark. 337, 175 S.W.2d 384, 385 (1943); *Alltel Mobile Communications, Inc. v. Arkansas Public Service Com'n*, 63 Ark. App. 197, 201, 975 S.W.2d 884, 887 (1998).

islative intent. . . . "[I]n ascertaining the meaning of a statute the court will not be governed or influenced by the views or opinions of any or all of the members of the legislature, or its legislative committees or any other person."<sup>109</sup>

## **E. Interpretations by others.**

### **1. Interpretations by the executive branch are highly persuasive authority.**

The executive branch frequently is called upon to interpret a statute before the issue is raised in the courts. The courts have traditionally given considerable deference to such interpretations, especially when made by those

charged with implementing the statute.<sup>110</sup> Although highly persuasive, they are not controlling authorities. If, however, the statute is not ambiguous, the court will give effect to its plain meaning, notwithstanding a pre-existing interpretation to the contrary by an administrative agency.<sup>111</sup> Nor will the courts adopt an executive branch interpretation that it finds clearly wrong based upon its own analysis.<sup>112</sup>

## **F. Canons of construction with general applicability.**

### **1. Presumptions about legislative knowledge, expectations, and intent.**

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109. *Southwest Arkansas Communications, Inc. v. Arrington*, 296 Ark. 141, 146, 753 S.W.2d 267, 269 (1988)(Glaze, J., concurring) (citing and quoting from *Wiseman v. Madison Cadillac Co.*, 191 Ark. 1021, 1025 88 S.W.2d 1007, 1009 (1935)). *See also* *Carr v. Young*, 231 Ark. 641, 645, 331 S.W.2d 701, 704 (1960)(*rev'd on other grounds*, *Shelton v. Tucker*, 364 U.S. 479, 81 S.Ct. 247, 5 L. Ed. 2d 231 (1960))(testimony of Attorney General whose office helped draft the legislation and the sponsoring Senator was inadmissible on issue of legislative intent); *Wiseman v. Madison Cadillac Co.*, 191 Ark. 1021, 88 S.W.2d 1007 (1935); *Hodges v. Dawdy*, 104 Ark. 583, 149 S.W. 656, 659 (1912)(speaking of statements by advocates and opponents of a constitutional amendment during the political campaign which preceded its adoption the court said: "[h]owever persuasive those opinions may be, on account of the learning and distinguished ability of many of the men who expressed them, they are entitled only to the same consideration as if expressed now. The fact that they were expressed as arguments during the campaign adds no force to them as aids in interpreting the meaning of the language used in the amendment."); and *State v. Lancashire Fire Ins. Co.*, 66 Ark. 466, 45 L.R.A. 348, 51 S.W. 633 (1899).

110. *MacSteel Div. of Quantex v. Arkansas Oklahoma Gas Corp.*, \_\_\_ S.W.3d \_\_\_, 2005 WL 1485218 (Ark., May 23 2005); *Cloverleaf Express v. Fouts*, \_\_\_ S.W.3d \_\_\_, 2005 WL 958738, (Ark. App., April 27 2005) ("[A]s a general rule, administrative agencies are better equipped by specialization, insight through experience, and more flexible procedures than are courts to determine and analyze legal issues affecting their agencies; therefore, while not conclusive, the interpretation of a statute by an administrative agency is highly persuasive." Citing: *Lawhorn Farm Servs. v. Brown*, 60 Ark. App. 64, 958 S.W.2d 538 (1997)).

111. *Id.* (citing: *Yamaha Motor Corp. U.S.A. v. Richard's Honda Yamaha*, 344 Ark. 44, 52, 38 S.W.3d 356, 360 (2001)).

112. *Id.* (citing: *Omega Tube & Conduit Corp. v. Maples*, 312 Ark. 489, 850 S.W.2d 317 (1993)). *See also*, *Teasley v. Hermann Companies, Inc.* \_\_\_ S.W.3d \_\_\_, 2005 WL 1463425 (Ark. App., June 22 2005)("We will not substitute our judgment for that of an administrative agency unless the decision of the agency is arbitrary, capricious, or characterized by an abuse of discretion." (citing: *American Standard Travelers Indem. Co. v. Post*, 78 Ark. App. 79, 77 S.W.3d 554 (2002))).

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- a. **The legislature is deemed to know of and expect that the court will apply the rules of construction, absent a clear indication of a contrary intent.**<sup>113</sup>

This maxim is not unique to Arkansas<sup>114</sup> and has been roundly criticized as an unwarranted assumption by the court.<sup>115</sup> Taken on its face, this principle would have us believe that the legislature is aware of the holdings in the cases cited by this article. The advent of term limitations adds weight to the criticism to the extent it limits the depth of institutional memory and the time for individual legislators to gain expertise in specific areas of legislation.

Warranted or not, the assumption is necessary. The process of statutory interpretation is slippery enough without assuming that the leg-

islature is unaware of the fact that the courts will read 'may' to imply 'permissive,' and read 'shall' to mean 'mandatory.' What is more, over time this maxim should become self-fulfilling. Legislators may come and go, but the staff tends to remain. They at least should provide an institutional memory that is capable of learning the court applied rules.

The practical effect of this rule, is that all the other rules will be applied. An interpretation that runs contrary to a canon of construction, is, at least presumptively, contrary to the legislative intent.

- b. **The legislature is presumed to adopt prior Arkansas court interpretations, absent a clear statement to the contrary.**<sup>116</sup>

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113. *Reliance Ins. Co. v. Tobi Engineering, Inc.*, 735 F. Supp. 326, 328 (W.D. Ark. 1990)("It is presumed that the legislature knew the meaning ascribed by the Arkansas Supreme Court to the word, 'may'" and adopted that meaning [in the statute], unless the contrary plainly appears"); *Tune v. Cate*, 781 S.W.2d 482, 483, 301 Ark. 66, 68 (1989)("It is well established that the legislature is deemed cognizant of our decisions respecting statutory interpretation whenever it enacts legislation."); *Smith v. Ridgeview Baptist Church, Inc.*, 257 Ark. 139, 514 S.W.2d 717 (1974)("It is well established that the legislature is deemed cognizant of our decisions respecting statutory interpretation whenever it enacts legislation.").

114. Oddly, the leading case in Arkansas for this proposition, is *Smith v. Ridgeview Baptist Church, Inc.*, 257 Ark. 139, 514 S.W.2d 717 (1974) where the court's pronouncement that the principle ". . . is well established," is not supported by any authority. Nevertheless the court's assertion is correct. *E.g.*, *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 496, 111 S. Ct. 888, 898, 112 L. Ed. 2d 1005, 59USLW 4128, Med & Med GD (CCH) P 39,050 (1991) ("It is presumable that Congress legislates with knowledge of our basic rules of statutory construction, . . .") (cited 13 times for this proposition); *State of Ill., Dept. of Public Aid v. Schweiker*, 707 F.2d 273 (7th Cir. 1983) (cited 16 times for this proposition); *Skorpios Properties, Ltd. v. Waage*, 172 Conn. 152, 155, 374 A.2d 165, 167-68 (1976) ("The General Assembly, and those who frame its legislation, must always be presumed to be familiar with settled rules of statutory construction and the interpretation the courts have placed upon legislation which has been enacted." (quoting *Butera v. Lombardi*, 146 Conn. 299, 305, 150 A.2d 309, 311(1959)) (cited eight times for this proposition); *Ballog v. Knight Newspapers, Inc.*, 381 Mich. 527, 164 N.W.2d 19 (1969) ("We have repeatedly held that in enacting legislation, the legislature is presumed to be acquainted with our statutory rules of construction,") (cited five times for this proposition); *Florida State Racing Comm'n v. Bourquardez*, 42 So.2d 87, 88 (Fla. 1949) (knows that court applies ordinary meanings of words and rules of grammar) (cited 10 times for this proposition).

115. *E.g.*, GREENAWALT, KENT, *STATUTORY INTERPRETATION: 20 QUESTIONS*, (Foundation Press, Turning Point Series: Legislation) 209 (1999).

116. *Books-A-Million, Inc. v. Arkansas Painting and Specialties Co.*, 340 Ark. 467, 470, 10 S.W.3d 857, 859 (2000)("The legislature is presumed to know the decisions of the supreme court, and it will not be presumed in construing a statute that the legislature intended to require the court to pass again upon a subject where its intent is not expressed in unmistakable language."); *J. L. McEntire & Sons, Inc. v. Hart Cotton Company, Inc.*, 256 Ark. 937, 940, 511 S.W.2d 179, 182 (1974)("[T]he General Assembly, in enacting legislation, is presumed to be familiar with the holdings of the Arkansas Supreme Court."); *McLeod v. Santa Fe Trail Transp. Co.*, 205 Ark. 225, 168 S.W.2d 413, 416 (1943)("To aid in the construction of a statute, it is presumed that the Legislature, in enacting the law, did so with the full knowledge of the constitutional scope of its powers, of prior legislation on the same subject, and of judicial decisions under the pre-existing law.") *Rhodes v. Cannon*, 112 Ark. 6, 164 S.W. 752 (1914).

This canon applies to court interpretations of other statutes on the same subject,<sup>117</sup> as well as earlier versions of the same statute. In *West v. Smith*<sup>118</sup>, the Supreme Court held that its prior holdings on an issue would presumptively prevail over federal cases interpreting a borrowed federal statute.<sup>119</sup>

In effect this is a rule of prejudgment, where the court declines to reverse its prior holding. As such it can be decisive and lead to truncated opinions.<sup>120</sup>

**c. A statute that is borrowed from another state is presumed to include judicial interpretations of that statute that exist as of the date of borrowing.**

Arkansas, like many others, has borrowed statutes from its sister states. When it does so,

the legislature is presumed to intend that any existing interpretations of the statute from the courts of its parent state be included in the meaning of the statute as adopted by Arkansas.<sup>121</sup>

**d. Interpretations of a statute borrowed from a model code or uniform laws by the drafters are presumptively correct.**

In *Shultz v. Young*<sup>122</sup> the Arkansas Supreme Court held that the interpretations of the drafters of uniform laws adopted by the Arkansas legislature "should be adopted, unless we are clearly convinced that an erroneous interpretation has been given the Act . . . , or that it is contrary to the settled policy of this State as declared in the opinions of this Court."<sup>123</sup>

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117. *E.g.*, *McLeod v. Santa Fe Trail Transp. Co.*, 205 Ark. 225, 168 S.W.2d 413, 416 (1943).

118. *E.g.*, *Sawyer v. State*, 327 Ark. 421, 938 S.W.2d 843 (1997) ("The legislature is presumed to be familiar with this court's interpretation of its statutes, and if it disagrees with those interpretations, it can amend the statutes. . . . Without such amendments, however, this court's interpretation of the statute remains the law." (Citations omitted)); *Williams v. Edmondson*, 257 Ark. 837, 843, 520 S.W.2d 260, 264 (1975) ("In choosing the words 'proper county' it certainly should be presumed that the legislature knew the meaning ascribed by us to these words in considering the very statute they were amending."). *See also* *Smith v. Ridgeview Baptist Church, Inc.*, 257 Ark. 139, 514 S.W.2d 717 (1974) (prior interpretation of a constitutional provision as affecting a piece of legislation is still binding given legislator's failure to amend the statute in light of the earlier interpretation).

119. 224 Ark. 651, 654, 278 S.W.2d 126, 129 (1955) ("Furthermore, when we enacted Section 20 of Act 555, we had a long line of decisions in Arkansas on the power of the Trial Court to extend the time for filing the bill of exceptions; and this line of decisions had always held that the order of extension had to be made before the expiration of the period as previously fixed. It is far more reasonable to presume that the Arkansas Legislature enacted Act 555 in the light of our own holdings on the power of the Trial Court to extend time, than it is to presume that it enacted Act 555 in the light of particular federal cases – some of which hold one way and some the other.").

120. *Smith v. Ridgeview Baptist Church, Inc.*, 257 Ark. 139, 514 S.W.2d 717 (1974) ("It follows that it becomes unnecessary to discuss appellant's other contention that the trial court had no jurisdiction in that appellee did not comply with the terms of the Administrative Procedure Act. Reversed and remanded.").

121. *McNutt v. McNutt*, 95 S.W. 778 (Ark., 1906); *Beaty v. Humphrey*, 195 Ark. 1008, 115 S.W.2d 559 (1938).

122. 205 Ark. 533, 169 S.W.2d 648 (1943).

123. *Id.* at 651.

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**e. A statute will not be interpreted as changing the common law absent an irreconcilable conflict or clear expression of the intent to do so.**<sup>124</sup>

The common law persists, notwithstanding the cumulative erosion of biennial legislative sessions over the last century and a half. Note that, absent a "clear expression" of legislative intent, something more than an implied repeal or suggestion of inconsistency is necessary to impute a legislative intent to override the common law.

Once over the hurdle of establishing an intent to alter the common law, the statute will be construed strictly.<sup>125</sup> In effect, where a statute modifies the common law, this principle spring loads the system to strictly construe the statute in such a way as to minimize its impact upon the existing law. If a party seeks a liberal interpretation, it has the burden of establishing

the remedial nature of the statute in question.

**f. Repeal by implication.**

Repeal by implication involves the intersection of two general principles. On the one hand, the courts wish to minimize their interference with the statutory law, and, therefore, are reluctant to void an existing statute - repeal is the business of the legislature. On the other hand, the rule of law requires rationally consistent laws.

**(1) Repeal by implication is not favored.**

In *Thomas v. State* the Supreme Court held:

It is . . . well settled that repeal by implication is not favored.<sup>126</sup> Repeal by implication is only recognized in two situations: (1) where the statutes are in

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124. *Steward v. McDonald*, 330 Ark. 837, 841-42, 958 S.W.2d 297, 299 (1997)("We strictly construe statutes that impose duties or liabilities unknown at common law in favor of those upon whom the burden is sought to be imposed, and nothing will be taken as intended that is not clearly expressed"); *Coleman v. State*, 12 Ark. App. 214, 217, 671 S.W.2d 221, 223 (1984)("a statute should not be held to be in derogation of the common law unless there is an irreconcilable repugnance, or unless the statute itself shows that such was the intention and object of the lawmakers."); *State v. One Ford Automobile*, 151 Ark. 29, 235 S.W. 378, 379 (1921)("The rule is that statutes should not be held to be in derogation of the common law unless there is an irreconcilable repugnance, or unless the statute itself shows that such was the intention and object of the lawmakers. . . . And where the Legislature, by statute, carves out of the common law an offense, making it a statutory offense, there is no implied repeal of the common law with respect to other offenses of the same general character." Citation omitted). *State v. International Harvester Co.*, 79 Ark. 517, 96 S.W. 119, 120 (1906)("The principle that penal statutes and statutes which impose burdens and liabilities unknown at common law must be strictly construed in favor of those upon whom the burden is sought to be imposed, and that nothing will be taken as intended that is not clearly expressed, has been so often declared that it is elemental.").

125. *Books-A-Million, Inc. v. Arkansas Painting and Specialties Co.*, 340 Ark. 467, 470, 10 S.W.3d 857, 859 (2000)("Any statute in derogation of the common law will be strictly construed."); *Steward v. McDonald*, 330 Ark. 837, 841-42, 958 S.W.2d 297, 299 (1997)("We strictly construe statutes that impose duties or liabilities unknown at common law in favor of those upon whom the burden is sought to be imposed, and nothing will be taken as intended that is not clearly expressed."); *Hartford Ins. Group v. Carter*, 251 Ark. 680, 686, 473 S.W.2d 918, 921 (1971)("[S]tatutes imposing burdens and liabilities unknown at common law are to be strictly construed in favor of those upon whom the burden is sought to be imposed."); *Wright v. Wright*, 248 Ark. 105, 108, 449 S.W.2d 952, 953 (1970)("We have long recognized the rule that statutes in derogation of the rules of the common law are strictly construed by us."); *State v. International Harvester Co.*, 79 Ark. 517, 96 S.W. 119, 120 (1906)("The principle that penal statutes and statutes which impose burdens and liabilities unknown at common law must be strictly construed in favor of those upon whom the burden is sought to be imposed, and that nothing will be taken as intended that is not clearly expressed, has been so often declared that it is elemental.").

126. See *Manatt v. State*, 311 Ark. 17, 842 S.W.2d 845 (1992), *cert. denied*, 507 U.S. 1005, 113 S. Ct. 1647, 123 L. Ed. 2d 268 (1993); *Uilkie v. State*, 309 Ark. 48, 827 S.W.2d 131 (1992); *Watson v. State*, 71 Ark. App. 52, 26 S.W.3d 588 (2000).

irreconcilable conflict, and (2) where the legislature takes up the whole subject anew, covering the entire subject matter of the earlier statute and adding provisions clearly showing that it was intended as a substitute for the former provision.<sup>127</sup>

**(2) If a statute or amendment is irreconcilable with the statute or an earlier amendment, the latter is repealed by implication.**

This subject is discussed below in the section dealing with canons designed to resolve inconsistencies between two or more statutes.

**(3) If a general statute and particular statute conflict, neither will be presumed to repeal the other.**

A general law does not apply where there is another statute governing the particular subject, irrespective of the date of either the general or particular law. Neither repeals the other. The particular legislation covers the narrower

field where it is applicable.<sup>128</sup> Thus the specific is accepted as an exception to, rather than rejection of the statute having broader application. Note that this principle applies even where the general statute is enacted after the specific.<sup>129</sup>

**(4) If the legislature enacts a statute that deals entirely with the subject matter of an earlier statute, it will be presumed to have intended the repeal of the earlier statute.**

In contrast with the previous principle:

Where a general act takes up the whole subject anew and covers the subject matter included in a prior special act and it is evident that the legislature intended to make the new act contain all the law on the subject, then the general act will be held to repeal the prior special act.<sup>130</sup>

The repeal in this case is general, and included provisions present in the earlier statute but omitted from the later.<sup>131</sup>

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127. 349 Ark. 447, 454, 79 S.W.3d 347, 351(2002).

128. *Lawyer v. Carpenter*, 80 Ark. 411, 97 S.W. 662, 663 (1906) (quoted with approval in *Cheney v. East Tex. Motor Freight, Inc.*, 233 Ark. 675, 680, 346 S.W.2d 513, 515 (1961); and *Howell v. McMillan*, 230 S.W.2d 654, 657, 217 Ark. 430, 433 (1950)).

129. *Chamberlin v. State*, 50 Ark. 132, 6 S. W. 524, 526 (1888)("In the absence of repugnancy or negative words, the more specific statute or provision will control the general, without regard to their order and dates; and the two acts will be interpreted as operating together, the specific provisions qualifying or furnishing exceptions to those which are general"); (quoted with approval in *Dunn v. Ouachita Valley Bank*, 71 Ark. 135, 71 S.W. 265, 266 (1902); and *Cheney v. East Tex. Motor Freight, Inc.*, 233 Ark. 675, 680, 346 S.W.2d 513, 515 (1961)).

130. *Faver v. Cleveland Circuit Court*, 227 S.W.2d 453, 456, 216 Ark. 792, 795, 796 (1950). *See also* *Babb v. City of El Dorado*, 170 Ark. 10, 278 S.W. 649, 650 (1926); and *Lawyer v. Carpenter*, 80 Ark. 411, 97 S.W. 662 (1906).

131. *Brockman v. Board of Directors of Jefferson County Bridge District*, 188 Ark. 396, 66 S.W.2d 619, 621-22 (1933); and *Babb v. City of El Dorado*, 170 Ark. 10, 278 S.W. 649, 650 (1926). *But see* *Graves v. Burns*, 194 Ark. 177, 106 S.W.2d 602 (1937) (the failure to include language from the prior statute in one section of the amended statute found to have resulted from a clerical error).



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**(5) The legislature is presumed to intend no changes in those portions of a statute that are re-enacted without change, absent a clear expression of a contrary intent.**

There are only three Arkansas cases applying this principle directly.<sup>132</sup> In *Shivers v. Moon Distributors*<sup>133</sup> the court applied the canon to engraft prior administrative decisions interpreting the earlier version of the statute onto the new enactment. In *Hendricks v. Hodges, Sec. of State*<sup>134</sup> the court held: "[s]urely the lawmakers have not intended, merely by implication, to change the whole policy of our laws and to repeal other statutes without giving more clear expression of that intention."

**g. It is presumed that a statute or amendment to an existing statute is to apply prospectively only.**

It has long been understood that the legislature is presumed to intend that all its enact-

ments shall apply prospectively, absent an express provision or an unequivocal implication that a retroactive application was intended.<sup>135</sup> An exception to this presumption exists in the case of remedial legislation that enlarges a remedy, but does not affect existing rights, nor impose new obligations. When interpreting such legislation, the court does not require such strict proof of a legislative intent to apply the new law retroactively.<sup>136</sup>

**h. The essential provisions of a statute are presumed to be mandatory, the non-essential provisions are presumed to be directive.**

Absent specific language such as "may," or "shall," those provisions of a statute that are essential to achieving the legislative purpose are deemed to be mandatory in nature. Provisions that are collateral to achieving the legislative purpose are presumed to be directive only.<sup>137</sup>

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132. *Shivers v. Moon Distributors*, 223 Ark. 371, 265 S.W.2d 947 (1954); *State ex rel. Attorney General v. Gus Blass Co.*, 193 Ark. 1159, 105 S.W.2d 853, 858-59 (1937) ("\*\*\* in interpreting the amendatory statute, we ought to follow the well established rules of statutory construction, and one of those rules is that, where a statute is re-enacted in substantially the same form as the old one, the presumption should be indulged that the lawmakers intended no changes other than those clearly expressed in the language of the new statute." (quoting *Hendricks v. Hodges, Sec. of State*, 122 Ark. 82, 182 S.W. 538, 540 (1916))).

133. *Id.*

134. 122 Ark. 82, 182 S.W. 538, 540 (1916).

135. *Dickson v. Fletcher*, \_\_\_ S.W.3d \_\_\_, 2005 WL 730198 (Ark., March 31 2005); *JurisdictionUSA, Inc. v. Loislaw.com, Inc.*, \_\_\_ S.W.3d \_\_\_, 2004 WL 1119571 (May 20, 2004); *Hardin v. Fort Smith Couch & Bedding Co.*, 202 Ark. 814, 152 S.W.2d 1015 (1941).

136. *JurisdictionUSA, Inc. v. Loislaw.com, Inc.*, \_\_\_ S.W.3d \_\_\_, 2004 WL 1119571 (May 20, 2004) ("[I]t has become firmly established that there is no vested right in any particular mode of procedure or remedy. Statutes which do not create, enlarge, diminish, or destroy contractual or vested rights, but relate only to remedies or modes of procedure, are not within the general rule against retrospective operation."); *Harrison v. Matthews*, 235 Ark. 915, 362 S.W.2d 704 (1962).

137. *Ward v. Doss*, \_\_\_ S.W.3d \_\_\_, 2005 WL 675755 (Ark., 2005) (citing: *McElroy v. Grisham*, 306 Ark. 4, 810 S.W.2d 933 (1991); *Taggart & Taggart Seed Co., Inc. v. City of Augusta*, 278 Ark. 570, 647 S.W.2d 458 (1983); *Edwards v. Hall*, 30 Ark. 31 (1875)).

## II. Canons describing the court's overall approach to interpretation.

### A. Use all the rules of construction in every case.

Unlike the last visit to my home by a plumber, the court brings a full tool box to every job.<sup>138</sup> This maxim is a reminder to judge and advocate alike that the court should consider any applicable canon when trying to determine the legislative intent behind a statutory provision.

This maxim is also the threshold to much of the confusion surrounding statutory construction. The problem is that once you are past a relatively small handful of canons, there is no apparent hierarchy that maps out a disciplined approach to the problem. While this state of affairs is good news for the inventive advocate, it makes it difficult to predict outcomes; and leaves lawyer and judge alike looking over their shoulder at the library wondering what they missed. Still things are not so bad as they may

seem. As noted above, although every canon is available to the court in every case, the issue raised in any given case may not call for application of most canons, just as every wrench will not fit every pipe.

### B. Statutes will be given a common sense construction.<sup>139</sup>

The Arkansas courts have not said what they mean by "common sense." The editors of Webster's New Collegiate Dictionary say the phrase means: "sound and prudent but often unsophisticated judgment."<sup>140</sup>

This canon is frequently applied to cases in which the court concludes that the plain meaning or a proffered interpretation of the statute leads to an absurd result.<sup>141</sup> This situation is discussed below in Section VI. Beyond this use, the principle is perhaps best understood as an admonition or safety line, intended to prevent judges from being sucked too far into the abstract analysis to which this subject is so conducive.

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138. *Holt v. Howard*, 206 Ark. 337, 175 S.W.2d 384, 385 (1943) (citing 59 C.J. 944).

139. *Burcham v. City of Van Buren*, 330 Ark. 451, 954 S.W.2d 266 (1997); *Rosario v. State*, 319 Ark. 764, 894 S.W.2d 888 (1995); *Dozier v. Ragsdale*, 186 Ark. 654, 55 S.W.2d 779 (1932); *State v. Chicago Mill & Lumber Corporation*, 184 Ark. 1011, 45 S.W.2d 26 (1931); and *Anderson v. Anderson*, 60 Ark. App. 221, 963 S.W.2d 604 (Ark. App. 1998).

140. WEBSTER'S NEW COLLEGIATE DICTIONARY 227(1975). The secondary definition, which I think it unlikely the court has in mind is: "the unreflective opinions of ordinary men." *Id.*

141. *Waste Management and Transp. Ins. Co. v. Estridge*, \_\_\_ S.W.3d \_\_\_, 2005 WL 1485217 (Ark., June 23 2005) ("We do not engage in an interpretation of statutes that creates an absurd result."); *Arkansas Pub. Serv. Comm'n*, 344 Ark. 188, 40 S.W.3d 273 (2001); *Green v. Mills*, 339 Ark. 200, 4 S.W.3d 493 (1999); *Haase v. Starnes*, 323 Ark. 263, 915 S.W.2d 675 (1996); *Rosario v. State*, 319 Ark. 764, 894 S.W.2d 888 (1995); *Bearden v. Arkansas Dept. of Human Services*, 72 Ark. App. 184, 35 S.W.3d 360 (2000); *Ashing v. State*, 288 Ark. 75, 702 S.W.2d 20 (1986) (*overruled on other grounds*); *Walker v. State*, 304 Ark. 393, 805 S.W.2d 80 (1991)); *Death and Permanent Total Disability Trust Fund v. Whirlpool Corp.*, 39 Ark. App. 62, 837 S.W.2d 293 (Ark. App. 1992). See also *Arkansas Professional Bail Bondsman Licensing Bd. v. Oudin*, 348 Ark. 48, 69 S.W.3d 855 (2002) (construing a regulation of the Professional Bail Bondsman Licensing Board).

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### **C. The legislative intent is to be determined by reading the entire act.<sup>142</sup>**

Although frequently expressed as a rule of interpretation, this canon is probably most useful as a rule for reading a statute.<sup>143</sup> This canon is rarely if ever dispositive of an interpretive issue. There is a closely related canon which requires not only that the entire statute, but that the entire statute is to be given effect.<sup>144</sup>

### **D. Every part of the statute must be given effect if possible.<sup>145</sup>**

"The legislature will not be presumed to

have done a vain and useless thing. Quite the opposite is true."<sup>146</sup> It is this presumption that underlies the canon. An alternative statement of the canon is that the court will ". . . not construe acts of the General Assembly to be meaningless."<sup>147</sup>

This canon is generally applied to reject a proffered interpretation that ignores or renders meaningless some provision of the statute,<sup>148</sup> or renders the entire statute meaningless.<sup>149</sup> Although generally used to weigh the relative merit of competing interpretations, theoretically this canon could also trigger an interpretation in the first instance. A plain meaning that renders meaningless all or some part of a statute is inherently ambiguous.

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142. *First State Bank v. Arkansas State Banking Bd.*, 305 Ark. 220, 223, 806 S.W.2d 624, 626 (1991)("We ascertain the intent of the General Assembly from the language of the whole act."); *Cozad v. State*, 303 Ark. 137, 140, 792 S.W.2d 606, 608 (1990)(A primary rule in statutory construction is to ascertain and give effect to the intent of the General Assembly and this intent is obtained by considering the entire act.); *Ragland v. Alpha Aviation, Inc.*, 285 Ark. 182, 185, 686 S.W.2d 391, 392 (1985)(opinion supplemented on denial of Rehearing 285 Ark. 182, 688 S.W.2d 301(1985)("It is the court's duty to look to the whole act and, as far as practicable, to reconcile the different provisions so as to make them consistent, harmonious and sensible."); *State v. Brown*, 283 Ark. 304, 306, 675 S.W.2d 822, 824 (1984)("A particular provision of a statute must be construed with reference to the statute as a whole." (citing 2A Sutherland, *Statutory Construction* § 46.05)); *Delaplaine Consol. School Dist. No. 7 v. State Board of Education*, 196 Ark. 434, 118 S.W.2d 255, 256 (1938) ("Being parts of the same Act, in order to ascertain the intent of the Legislature they should be construed together and both given effect, if possible."); *State v. Boney*, 156 Ark. 169, 245 S.W. 315, 316 (1922) ("It is a settled rule of construction that an act must be read in its entirety to extract its meaning. . . ."); *Nakdimen v. Ft. Smith & Van Buren Bridge Dist.*, 115 Ark. 194, 172 S.W. 272 (1914).

143. See Mullane, *Statutory Interpretation in Arkansas: How is a Statute to be Read? When is it Subject to Interpretation? What Our Courts Say and What They Do*. 2004 ARK. L. NOTES 85, 87.

144. See the discussion of resolving internal inconsistencies Section IV below.

145. *Robert D. Holloway, Inc. v. Pine Ridge Addition Residential Property Owners*, 332 Ark. 450, 966 S.W.2d 241 (1998)(deciding a constitutional challenge); *Henderson v. Gladish*, 198 Ark. 217, 128 S.W.2d 257 (1939); *Wilson v. Briscoe*, 11 Ark. 44, 6 Eng. 44, 1850 WL 489(Ark.)(1850).

146. *Phillips Petroleum v. Heath*, 254 Ark. 847, 852, 497 S.W.2d 30, 33 (1973). See also *Stapleton v. M.D. Limbaugh Constr. Co.*, 333 Ark. 381, 389, 969 S.W.2d 648 (1998) ("We must also presume that the General Assembly did not intend to pass an act without purpose."); *Reed v. State*, 330 Ark. 645, 649, 957 S.W.2d 174, 176 (1997); *Clark v. State*, 308 Ark. 84, 308 Ark. 453, 824 S.W.2d 345 (1992); and *Death and Permanent Total Disability Trust Fund v. Whirlpool Corp.*, 39 Ark. App. 62, 837 S.W.2d 293 (Ark. App. 1992).

147. *Reeves v. State*, 339 Ark. 304, 310, 5 S.W.3d 41, 44 (1999).

148. See *Phillips Petroleum v. Heath*, 254 Ark. 847, 852, 497 S.W.2d 30, 33 (1973); *Stapleton v. M.D. Limbaugh Constr. Co.*, 333 Ark. 381, 389, 969 S.W.2d 648 (1998).

149. *Death and Permanent Total Disability Trust Fund v. Whirlpool Corp.*, 39 Ark. App. 62, 68, 837 S.W.2d 293, 296-97 (Ark.

**E. Statutes should be construed so that the body of statutory law forms a consistent, harmonious and sensible whole.**

Arkansas Courts have recognized that interpretation is appropriate to resolve inconsistencies between two or more relevant statutes. In recent years Arkansas courts have gone a step further to hold that harmonizing all statutes is not only a theoretical goal, but a judicial duty – a duty that trumps other canons of interpretation.

The history of this phenomenon is interesting and instructive. It all started innocently enough. As early as 1850 the Arkansas Supreme Court adhered to "a leading rule of construction, which requires that all acts of the Legislature shall be so construed, if possible, that one section or clause shall not frustrate, or destroy, but on the contrary, shall explain and support another."<sup>150</sup> From internal consistency the courts took the logical step of acknowledging that statutes on the same subject (statutes in *pari materia*) should be interpreted consistent with one another. By 1923 the Arkansas Supreme Court extended this rule to include statutes passed in the same session.<sup>151</sup> In so

doing, the court said that this rule was based upon the assumption that the legislature intended them to be "harmonious and consistent."<sup>152</sup>

In 1943, the court in *McLeod v. Santa Fe Trail Transp. Co.*<sup>153</sup> said: "[i]t is a cardinal rule of construction that effect must be given, if possible, to the whole statute and every part thereof. To this end it is the duty of the court, as far as practicable, to reconcile the different provisions so as to make them consistent, harmonious and sensible." This simple phrase was to wag a long tale. First it contained the lovely triplet of "consistent, harmonious and sensible." Second, although still confined to considerations of internal consistency, the principle has become a "cardinal rule of construction" and a "duty of the court."<sup>154</sup>

In 1976, the court decided *Shinn v. Heath*.<sup>155</sup> In *Shinn* the court cited *McLeod* for the proposition that when resolving internal inconsistencies it was necessary to: "give effect to every part of a statute. . . ."<sup>156</sup> However, the *Shinn* court also rephrased the *McLeod* mandate, holding: "*it is the court's duty*, as far as practicable, to reconcile the different provisions so as to make them consistent, harmonious and

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App. 1992)("To hold otherwise would be to reach the absurd result of allowing credit only for benefits paid for a permanent total disability which is followed by continued employment by the same employer and a second injury resulting in another permanent total disability. The legislature will not be presumed to have done a vain or useless thing").

150. *Scott v. State*, 22 Ark. 369 (1860).

151. *Arkansas Railroad Commission v. Stout Lumber Co.*, 161 Ark. 164, 255 S.W. 912, 913-914 (1923).

152. *Id.*

153. 205 Ark. 225, 168 S.W.2d 413 (1943).

154. *Id.* at 426 S.W.2d 415.

155. 259 Ark 577, 535 S.W.2d 57 (1976, Ark.).

156. *Id.* at 585, 535 S.W.2d at 62.

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sensible."<sup>157</sup>

In 1984 the court in the *Matter of the Estate of Epperson*<sup>158</sup> again rephrased the principle and cited Shinn for the proposition that: "[w]e have a duty, if possible, to reconcile our state's statutes to make them consistent, harmonious, and sensible."<sup>159</sup> It is not clear on the face of the court's opinion whether the court is saying it has a duty to make each statute internally consistent, harmonious and sensible, or if it is now saying it must make the entire body of statutory law conform to these ideals. *Epperson* involved a conflict between the probate and dower laws.<sup>160</sup> Therefore, it is clear from the context that the court was now saying it had a duty to harmonize one statute with another. Although there was no explicit limitation to statutes on the same subject or passed in the same session, the connection between dower and probate might argue that the court's language was unintentionally overbroad. Certainly the opinion in *Epperson* does not suggest the court was consciously extending a principle of longstanding but limited application to create a judicial duty to harmonize all statutes with one another.

In 1987 the court decided *Darr v. Bankston*.<sup>161</sup> In *Darr* the court again rephrased the principle, and, citing *Epperson*, said: "Arkansas law is well settled that it is this court's duty, if possible, to reconcile our state's statutes to make them consistent, harmonious, and sensible."<sup>162</sup> *Darr* involved an apparent conflict between the probate and child support laws. Hence it is clear that the court has indeed expanded the principle beyond internal consistencies and statutes in pari materia. The court had undertaken a duty to rationalize and harmonize the entire body of statutory law. Even more remarkable is the court's assertion that this duty is indeed foremost among other considerations. The presumptions in favor of applying the plain meaning of the statute and of enforcing the provisions of a specific statute over those of a general statute are implicitly made secondary considerations.<sup>163</sup>

*Darr* has been cited once for the generalized duty to harmonize all statutes. In *Slusser v. Farm Service, Inc.*<sup>164</sup> the court cited *Darr* as supporting its analysis that no conflict existed between the statute controlling a claim for defective seed to the Seed Arbitration

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157. *Id.* (emphasis added).

158. *Matter of Estate of Epperson*, 284 Ark. 35, 679 S.W.2d 792 (1984).

159. *Id.* at 37, 679 S.W.2d 793.

160. *Id.*

161. 327 Ark. 723, 940 S.W.2d 481 (1997).

162. *Id.* at 726, 940 S.W.2d 482-483.

163. *Id.* at 726, 940 S.W.2d 482, ("In support of his argument, David cites only general authority that an unambiguous statute should be applied simply as it is written, and that specific rules in one statute . . . are given over the general rules in another statute . . . ." (Citations omitted)).

164. \_\_\_ S.W.3d \_\_\_, 2004 WL 2549731 (Ark., Nov. 11 2004) ("It is first and foremost our responsibility to harmonize our statutes where possible.").

Committee and the statute governing appeals of the Committee's decisions to the Circuit Court. Unlike *Darr*, however, *Slusser* involved statutes in *pari materia*.

The wisest course would be to roll back the rhetoric to its source in *McLeod*, acknowledging only that the court should harmonize the provisions within a statute, and, when relevant to deciding the case before it, inconsistent provisions between two or more statutes.

#### **F. The court will apply its interpretations consistently.**<sup>165</sup>

The first effect of this rule is that once interpreted by the court, the interpretation becomes part of the text of the statute.<sup>166</sup> The second effect is that, once interpreted, the court is reluctant to re-interpret a statute. The result that a court cannot change or re-interpret its own interpretation may seem like one of those absurdities for which the law is famous. It is, however, both logical and consistent with court's adherence to its role as an interpreter legislation who is not free to legislate. The

court's interpretation of the statute is a discovery of the legislature's underlying purpose and means. It explains, but does not add to or subtract from, the legislative intent. Thus, the court is no more free to change that meaning, than it is to change the meaning of any other legislative enactment. But "reluctant" does not mean "cannot." The court can change its mind about what is the correct interpretation, saying, in effect, we were wrong when we held the statute meant such and so, and now understand that the statute means [and has always meant] this and that. As a practical matter, the longer a particular construction has stood, the less likely it is that the court will depart from the first interpretation.<sup>167</sup>

The final effect is that relief from an interpretation by the court can generally be found only in the General Assembly.<sup>168</sup>

#### **III. Canons used primarily to resolve ambiguities.**

As noted above, the court must resolve ambiguities so that the meaning of a statute can be

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165. *Nation v. Ayres*, 340 Ark. 270, 273, 9 S.W.3d 512, 514 (2000) ("This court has held that a basic rule in construing a statute is to give consistent and uniform interpretations to that statute so that it does not mean one thing at one time and something else at another time."); *Arkansas Dep't of Human Servs. v. Harris*, 322 Ark. 465, 469, 910 S.W.2d 221, 223 (1995) ("A basic rule in construing a statute is to give consistent and uniform interpretations to a statute so that it does not mean one thing at one time and something else at another time. In applying this principle, we have written that when a statute has been construed, and that construction has been consistently followed for many years, such construction ought not be changed.").

166. *Morris v. McLemore*, 313 Ark. 53, 55, 852 S.W.2d 135, 136 (1993) ("When a statute has been construed, and that construction has been consistently followed for many years, such construction ought not be changed."); *Southwest Ark. Communications, Inc. v. Arrington*, 296 Ark. 141, 753 S.W.2d 267 (1988).

167. *Burns v. Burns*, 312 Ark. 61, 847 S.W.2d 23 ("We have construed the statute . . . . This interpretation of the statute has now become a part of the statute itself, and we should not now reinterpret it.").

168. *Moore Inv. Co., Inc. v. Michell, Williams, Selig, Gates & Woodyard*, \_\_\_ S.W.3d \_\_\_, 2005 WL 1164185 (Ark. App., May 8 2005) ("[W]e have stated that if such a marked change is to be made in the interpretation of statutes that have long been the law, it should be done prospectively by the legislature and not retrospectively by the courts."); *E.C. Barton & Co. v. Neal*, 263 Ark. 40, 43, 562 S.W.2d 294, 295 (1978) ("That construction of the statute became as much a part of the statute as the words of the statute itself, and change is a matter that addresses itself to the General Assembly, not this court.").

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known, its effect anticipated, and so that it can be applied consistently. The obligation to apply statutory law consistently to all cases springs from the very core of our concept of the rule of law. The implicit link between the need to resolve ambiguities and the rule of law is, in extreme cases, made explicit when an ambiguous statute is found unconstitutional as a violation of the right to due process of law.<sup>169</sup>

There are a number of traditional devices for resolving inherently ambiguous statutory language. Arkansas courts make use of the following.

### A. Effect must be given to all words.

A primary tool in the resolution of ambiguities is the obligation to "construe the statute so that no word is left void, superfluous, or insignificant; and meaning and effect are given to every word in the statute if possible."<sup>170</sup> This maxim is frequently used as a screening device

to rule out a possible resolution of an ambiguity by noting that it leaves a word or phrase without an effective meaning.

### B. A particular statement is presumed to exclude other matters of the same type or application (*Expressio unius est exclusio alterius*).

The Arkansas Supreme Court has consistently adhered to this common law rule of interpretation. In *Cook v. Arkansas-Missouri Power Corp.* the supreme court held: "the express designation of one thing by the legislature may properly be construed to mean the exclusion of another."<sup>171</sup>

As with all general canons, however, this rule is presumptive rather than conclusive. If the clear intent of the legislature suggests that the list was intended as "illustrative," rather than "exhaustive or exclusive," the canon will not be applied.<sup>172</sup>

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169. *Craft v. City of Fort Smith*, 335 Ark. 417, 424, 984 S.W.2d 22, 26 (1998)("[A] law is unconstitutionally vague under due process standards if it does not give a person of ordinary intelligence fair notice of what is prohibited, and it is so vague and standardless that it allows for arbitrary and discriminatory enforcement." (citing *Grayned v. City of Rockford*, 408 U.S. 104, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972); *Thompson v. Arkansas Social Serv.*, 282 Ark. 369, 669 S.W.2d 878 (1984); *Davis v. Smith*, 266 Ark. 112, 583 S.W.2d 37 (1979); holding a zoning ordinance not unconstitutionally vague as against a pre-enforcement challenge). See also *Handy Dan Imp. Center, Inc. v. Adams*, 276 Ark. 268, 273-75, 633 S.W.2d 699, 702-03 (1982)(finding the Sunday closing law so vague as to what products could and could not be sold on Sunday as to be unconstitutional); and *Davis v. Smith*, 266 Ark. 112, 120, 583 S.W.2d 37, 42 (1979)(holding the statute providing for termination of parental rights unconstitutionally vague). *Davis v. Smith* contains an analysis of the differing standards of vagueness that apply to criminal cases, statutes regulating business, and, falling between the two, a statute dealing with substantial non-penal rights.

170. *Central & Southern Companies, Inc. v. Weiss*, 339 Ark. 76, 80, 3 S.W.3d 294, 297 (1999); *Ford v. Keith*, 338 Ark. 487, 996 S.W.2d 20 (1999).

171. *Cook v. Arkansas-Missouri Power Corp.*, 209 Ark. 750, 753, 192 S.W.2d 210, 211 (1946). See also *Gazaway v. Greene County Equalization Bd.*, 314 Ark. 569, 864 S.W.2d 233 (1993); *State v. Ashley*, 1 Ark. 513, 1 Pike 513, 1839 WL 101 \*10 (Ark.)(1839)("The general rule upon the subject is, 'specification of particulars is an exclusion of generals, or the expression of one thing is the exclusion of another. 'And Lord Bacon remarks, 'that as exception strengthens the force of law, in cases not excepted, so enumeration weakens it, in cases not enumerated.'").

172. *McWhorter v. McWhorter*, 346 Ark. 475, 482, 58 S.W.3d 840, 845 (2001)(holding that the legislature intended a broad definition of "income" when determining child support obligations, and, therefore, the list of sources of income did not preclude a determination that non-listed sources of money were also "income").

**C. A general term that follows specific terms, is presumed to include only those matters of the same type or kind as the specific examples (*Ejusdem generis*).**

"[W]hen general words follow specific words in a statutory enumeration the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.<sup>173</sup> Stated conversely the canon holds that the ". . . well-settled rule of construction is that, 'where general terms or expressions in one part of a statute are inconsistent with more specific or particular provisions in another part, the particular provisions will be given effect as clearer and more definite expressions of the legislative will.'"<sup>174</sup>

As always, however, the canon will not be applied where the evidence suggests the legislative intent was otherwise.<sup>175</sup>

**D. Modifying phrases are presumed to refer**

**only to the preceding item unless it is separated by a comma.**

"[R]eferential and qualifying phrases, where no contrary intention appears, relate only to the last antecedent.<sup>176</sup> "[E]vidence that a qualifying phrase is supposed to apply to all antecedents instead of only to the immediately preceding one may be found in the fact that it is separated from the antecedents by a comma."<sup>177</sup> As with all canons of this type, however, they will not be applied to frustrate the perceived intent of the General Assembly.<sup>178</sup>

**E. The meaning of a word can be determined from the meaning of accompanying words (*Noscitur a sociis*).**

"[T]he doctrine of *noscitur a sociis*, which literally translates to "it is known from its associates," provides that a word can be defined by the accompanying words."<sup>179</sup>

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173. *Hanley v. Arkansas State Claims Com'n*, 333 Ark. 159, 167, 970 S.W.2d 198, 201 (1998), citing *Agape Church, Inc. v. Pulaski County*, 307 Ark. 420, 821 S.W.2d 21 (1991); and *McKinney v. Robbins*, 319 Ark. 596, 892 S.W.2d 502 (1995).

174. *Hodges v. Dawdy*, 104 Ark. 583, 149 S.W. 656, 662 (1912) (quoting 36 Cyc. 1130).

175. *Wiseman v. Affolter*, 192 Ark. 509, 92 S.W.2d 388, 389 (1936) ("The rule of *ejusdem generis* . . . does not control where the plain intent of the Legislature is apparent from the context and would be hindered thereby." (citing *Mason v. Intercity Terminal Ry. Co.*, 158 Ark. 542, 251 S.W. 10 (1923)); *Crabtree v. State*, 123 Ark. 68, 184 S.W. 430 (1916); *City of Ft. Smith v. Gunter*, 106 Ark. 371, 154 S.W. 181 (1913); and *State v. Gallagher*, 101 Ark. 593, 143 S.W. 98, 38 L.R.A. (N.S.) 328 (1912)).

176. *McCoy v. Walker*, 317 Ark. 86, 90, 876 S.W.2d 252, 254 (1994). *See also* *Bell v. Board of Directors*, 109 Ark. 433, 160 S.W. 390 (1913).

177. *Id.*

178. *Langford v. Brand*, 274 Ark. 426, 626 S.W.2d 198 (1981) ("[W]hen the intention of the General Assembly is manifested, 'The court will not permit punctuation to control, but will disregard punctuation or will repunctuate, if necessary, to give effect to what otherwise appears to be the proper and true meaning of the statutes.'" quoting *Koser v. Oliver*, 186 Ark. 567, 54 S.W.2d 411 (1932)).

179. *Hanley v. Arkansas State Claims Com'n*, 333 Ark. 159, 167, 970 S.W.2d 198, 201 (1998). *See also* *Boston v. State*, 330 Ark. 99, 952 S.W.2d 671 (1997); *McKinney v. Robbins*, 319 Ark. 596, 892 S.W.2d 502 (1995).



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### F. A statute should be construed in harmony with statutes *in parimateria*.

"There is a fundamental tenet of statutory construction that requires appellate courts to construe legislative acts relating to the same subject or having the same purpose in harmony if possible."<sup>180</sup>

### G. The court can correct clerical errors.

"Although this court is hesitant to interpret a legislative act in a manner contrary to its express language, this court must do so when it is clear that a drafting error or omission circumvents legislative intent."<sup>181</sup> Because such corrections by definition require a judicial correction to the existing text, rather than an interpretation of the existing language, courts are reluctant to apply this canon absent clear evidence that the error exists and was clerical in nature.<sup>182</sup>

### H. Adding omitted words, correcting words used by mistake, and striking surplus language.

"When a word in a statute is omitted or misused it is the duty of the courts to disregard the error if the context plainly indicates the legislative intent."<sup>183</sup> "Although a statute should be construed to give meaning and effect to every word therein if possible, . . . , unnecessary or contradictory clauses in acts will be deleted and disregarded in order to give effect to the clear legislative intent."<sup>184</sup>

This canon is similar to, but distinguishable from, the preceding canon on correction of clerical errors. This canon focuses upon legislative inadvertence or omission, rather than clerical malfeasance. Like the canon permitting correction of clerical errors, however, it does permit revision of statutory language. Therefore, it is subject to abuse. Nevertheless, as applied this canon rarely draws significant protest from dissenters on the bench or aggrieved legislators.

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180. *Grocery Supply Co. v. Arkansas Tobacco Control Bd.*, 2005 WL 1030120 (Ark. App., Apr. 27, 2005).

181. *Rosario v. State*, 319 Ark. 764, 769, 894 S.W.2d 888, 890 (1995)(supplying an omission later corrected by subsequent amendment)(citing *State v. McLeod*, 318 Ark. 781, 888 S.W.2d 639 (1994); *Neely v. State*, 317 Ark. 312, 877 S.W.2d 589 (1994)).

182. *Town of De Witt v. Stephen*, 173 Ark. 833, 293 S.W. 740 (1927). For an interesting contrast with the court's approach to correcting clerical errors in court judgments see Justice Brown's concurring opinion in *Lord v. Mazzanti*, 339 Ark. 25, 2 S.W.3d 76 (1999)("This is a particularly difficult case, because it is obvious that a clerical error was committed by the trial court in the original decree. But that is no reason for this court to reverse its interpretation of its own rules and throw precedent to the four winds. To do so simply dilutes the common law and places this court in the posture of deciding cases involving our rules on an ad hoc basis. I would not reverse the long line of recent authority on the point that the ninety-day time limit set out in Rule 60(b) applies to clerical errors in Rule 60(a). My preference would be to correct the clear error in the decree at this level by interpreting the obvious ambiguity.").

183. *Dooley v. Hot Springs Family YMCA*, 301 Ark. 23, 26, 781 S.W.2d 457, 458 (1989); *Johnson v. U.S. Gypsum Co.*, 217 Ark. 264, 266, 229 S.W.2d 671, 673 (1950)("[T]here is an obvious omission or typographical error in the wording of the Act. The legislature evidently meant that the transcribed notes shall not be (instead of 'shall be') treated as a bill of exceptions or as depositions . . . , or perhaps that they shall be so treated when (instead of 'until') approved . . . .").

184. *City of Fort Smith v. Tate*, 38 Ark. App. 172, 177, 832 S.W.2d 262, 265 (1992).

First, it is rarely done. It was used perhaps two dozen times during the last century. Second, the courts do this only when the legislative intent is so clearly at odds with the offending language, that there is no reasonable doubt that a mistake occurred. Thus you find language holding that the error must be "palpable," and the correction must be necessary to save the legislative purpose from failing.<sup>185</sup> The majority of occasions on which this canon has been used involved an inconsistency that disappears with the deletion of language, and the language in question was carried over from an earlier version of the statute,<sup>186</sup> or rendered moot by other legislation.<sup>187</sup>

If a portion of an act is found to be unconstitutional, the question arises as to what should be done with the unoffending remainder. In other words, is the remainder severable from the unconstitutional portion?

Our cases over the years have been consistent in examining the severability issue. In determining whether the invalidity of part of the act is fatal to the

entire legislation, we have looked to 1) whether a single purpose is meant to be accomplished by the act; and 2) whether the sections of the act are interrelated and dependent upon each other. . . . [I]t is important whether the portion of the act remaining is complete in itself and capable of being executed wholly independent of that which was rejected. Clearly, when portions of an act are mutually connected and interwoven, severance is not appropriate. . . .

The presence of a severability clause is a factor to be considered but, by itself, it may not be determinative. In *Combs v. Glen Falls Insur. Co.*,<sup>188</sup> we stated that a severability clause may be an aid to the courts in construction of a statute but in the words of Justice Brandeis, it is not "an inexorable command."<sup>189</sup> . . . In *Combs*, we concluded that the clause could not salvage the act of the General Assembly in question, and we voided the entire act.<sup>190</sup>

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185. *Wenrick v. Crater*, 315 Ark. 361, 364, 868 S.W.2d 60, 61 (1993)("[W]hen words have been *palpably* omitted from a statute, we will read the qualifying expression into the sense of the provision plainly implied by the general context of the act *in order to prevent the legislative purpose from failing*." (Emphasis supplied)).

186. *City of Fort Smith v. Tate*, 38 Ark. App. 172, 176-77, 832 S.W.2d 262, 265 (1992)("It appears that the 'full and complete payment' language was inadvertently left in from a time when it had some relevance and, in light of the delimitation on a widow's weekly benefits, it is now meaningless surplusage."); *Dooley v. Hot Springs Family YMCA*, 301 Ark. 23, 26, 781 S.W.2d 457, 458 (1989)("We feel the legislature simply made a mistake and used 'third' instead of 'fourth' and correct it without hesitation. To do otherwise would be to erase [a section of the statute]").

187. *Citizens to Establish a Reform Party in Arkansas v. Priest*, 325 Ark. 257, 264, 926 S.W.2d 432, 436 (1996)("The exception is superfluous in both cases. It is held over from a time when it was necessary to distinguish between presidential and nonpresidential primaries. Once Act 700 of 1989 did away with separate presidential primaries and their corresponding November deadline, the exception . . . was no longer necessary.").

188. 237 Ark. 745, 375 S.W.2d 809 (1964).

189. 237 Ark. at 748, 375 S.W.2d at 810, (citing *Dorchy v. Kansas*, 264 U.S. 286, 44 S. Ct. 323, 68 L. Ed. 686 (1924)).

190. *U.S. Term Limits, Inc. v. Hill*, 316 Ark. 251, 268, 872 S.W.2d 349, 357-58, 62 USLW 2586 (1994)(citations omitted) affirmed *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 115 S. Ct. 1842, 131 L. Ed. 2d 881, 63 USLW 4413 (1995). See also *Hurlock*, 185 Ark. 807, 49 S.W.2d 611, 613 (1932)("This court has frequently held that when a statute is unconstitutional in part, the

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### IV. Canons used primarily to resolve conflicts where the statute at issue is internally inconsistent.

#### A. Every provision must be consistent with the others.

This point serves as both a reason to interpret and as a canon of interpretation. As noted above, courts have held that a statute that is internally inconsistent is "ambiguous," and, therefore, subject to interpretation. The court's obligation to construe statutes that are arguably inconsistent springs from the canon requiring the court to "reconcile provisions to make them consistent, harmonious, and sensible in an effort to give effect to every part."<sup>191</sup> Thus the canon is a direct mandate to action, and therefore, more than mere justification for judicial construction.

As a general point, it is worth noting that most of the interpretative canons mentioned in the preceding section as useful for resolving ambiguities may also be useful in resolving internal inconsistencies. In addition, however, there are several canons that whose primary application is to resolve internal consistencies.

#### B. If necessary to avoid inconsistencies and to apply the statute consistent with the legislative intent, the court may delete, add, or change words.

If it is impossible to find an alternative reading of the statute as written which is both internally consistent and consistent with the legislative intent, more drastic remedies may be in order. "In order to give effect to the real intention, we may correct errors by rejecting certain words and substitute other to reconcile apparent inconsistencies."<sup>192</sup>

*Shinn v. Heath*<sup>193</sup> is such a case.

"[T]o adopt the construction advocated by the appellants would put the two subsections into conflict. . . . In order to give effect to every part of a statute, it is the court's duty, as far as practicable, to reconcile the different provisions so as to make them consistent, harmonious and sensible. [Citation omitted.] To carry out the general purpose and intent of a statute, either civil or criminal, the words 'and' and 'or' are convertible. [Citations omitted.] Subsection (10),

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valid portion of an act will be sustained if complete in itself, and capable of being executed in accordance with the apparent legislative intent.").

191. *Central & Southern Companies, Inc. v. Weiss*, 339 Ark. 76, 82, 3 S.W.3d 294, 298 (1999). *See also* *Brandon v. Arkansas Public Service Com'n*, 67 Ark. App. 140, 992 S.W.2d 834, Util. L. Rep. P 26,706 (1999).

192. *Dooley v. Hot Springs Family YMCA*, 301 Ark. 23, 26, 781 S.W.2d 457, 458 (1989)(citing *Langford v. Brand*, 274 Ark. 426, 626 S.W.2d 198 (1981)). *See also* *Johnson v. U.S. Gypsum Co.*, 217 Ark. 264, 266, 229 S.W.2d 671, 673 (1950)("When a word in a statute is omitted or misused it is the duty of the courts to disregard the error if the context plainly indicates the legislative intent.")(citing *State ex rel. Atty. Gen. v. Chicago Mill & Lumber Co.*, 184 Ark. 1011, 45 S.W.2d 26).

193. 259 Ark. 577, 586-87, 535 S.W.2d 57, 62 (1976).

supra, can be made consistent with subsection (9) by reading the 'or' which follows 'State of Arkansas' as an 'and.'"

Although there are other cases where the court has substituted one word for another to clear up an internal inconsistency<sup>194</sup>, the decision in *Hines v. Mills*<sup>195</sup> lays down the stringent criteria necessary before the court will undertake to "re-write" the statute. In *Hines* the court declined to read "or" for "and" in a statute controlling the investment of a ward's funds in securities by the guardian. There the court held:

It is only permissible to use the words "or" and "and" interchangeably in statutes where the context requires that it be done to effectuate the manifest intention of the Legislature or where not to do so would render the meaning ambiguous or result in an absurdity. [Emphasis added.]<sup>196</sup>

A second note of caution is in order. As discussed above, the court has no doubt that the ordinary meaning of "and" is conjunctive, and

that of "or" is disjunctive. When reading a statute, as opposed to construing it, these meanings are always assigned. The possibility of substituting one for the other arises only after the court determines the statute is subject to interpretation.

Occasionally it is apparent that the inconsistency is the result of a clerical error, in which case the canon permitting correction of such inadvertencies is also available. Indeed the foregoing cases are noteworthy because the court does not suggest, much less attempt to demonstrate, that the error was clerical in nature.

**C. Statutes in *pari materia* should be used to determine which of two inconsistent provisions should be given effect.**

Statutes in *pari materia* can be used to determine which of two conflicting provisions should be ignored and which should be given effect if the court is unable to resolve the internal inconsistencies and cannot determine which of the inconsistent provisions should be enforced by reference to the legislative intent.<sup>197</sup> A variation of this canon is used to resolve ambiguities within a statute.

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194. *Langford v. Brand*, 274 Ark. 426, 428, 626 S.W.2d 198, 199 (1981)("Under familiar rules of statutory construction we must, in order to give effect to the manifest legislative intention, correct errors by rejecting certain words and substituting others in order to reconcile apparent inconsistencies." (citing *Graves v. McConnell*, 162 Ark. 167, 257 S.W. 1041 (1924))). In *Langford* the court was faced with a statute that, on its face, required voter approval of a fire protection district both before and after Quorum Court passage of the enabling ordinance. The court in *Langford* also supported its decision by reference to the canon giving precedence to specific provisions over an inconsistent general provision. *Id.* See also *Williams v. State*, 99 Ark. 149, 137 S.W. 927, 928 (1911)("This construction of the statute makes it necessary to disregard the disjunctive 'or,' or to substitute the conjunctive 'and' therefor. This may be done when essential in order to carry out the manifest intention of the lawmakers."); *Clark v. State*, 155 Ark. 16, 243 S.W. 865 (1922)(substituting "or" for "and" in a criminal statute so that the punishment applied to persons who committed any one of the enumerated acts, rather than only to those who committed them all).

195. 187 Ark. 465, 60 S.W.2d 181 (1933).

196. *Id.*

197. *Lyon v. White River-Grand Prairie Irr. Dist.*, 281 Ark. 286, 292, 664 S.W.2d 441, 443 (1984).

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### V. Canons used to interpret a statute that is inconsistent with another statute. with long-standing law.

As with internal inconsistencies, inconsistencies between two or more statutes have been held to render a statute "ambiguous" and, therefore, subject to interpretation.<sup>198</sup> As noted earlier, statutes in *pari materia* are to be construed consistently with one another.<sup>199</sup> This rule is the decisional aspect of the principle that other statutes on the same subject are relevant to a determination of the legislative intent.<sup>200</sup>

Just as with the canons intended to resolve internal inconsistencies, this rule is effective in excluding interpretations that do not conform to its requirement. On occasion, however, there is no reasonable interpretation of the statute in question that can be read in a harmony with other statutes on the subject. In these cases, resort must be made to other canons. This situation often arises in the context of an amendment or recently enacted statute that conflicts

#### A. The provisions of a specific statute will be presumed to control those of a general statute on the same subject matter.

Where a specific statute conflicts with a general statute dealing with the same subject matter, the plain meaning of the specific is presumed to control that of the general statute.<sup>201</sup>

#### B. Repeal by implication based upon passage of a subsequent statute inconsistent with the existing statute.<sup>202</sup>

If a new statute or amendment cannot be reconciled with an earlier enactment, the legislature will be presumed to have intended to repeal the earlier.<sup>203</sup>

Consistent with the general reluctance to find a repeal by implication, however, "where the provisions of two statutes are in irreconcil-

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198. See *Williams v. City of Pine Bluff*, 284 Ark. 551, 683 S.W.2d 923 (1985).

199. *Thomas v. State*, 349 Ark. 447, 79 S.W.3d 347(2002)("All legislative acts relating to the same subject are said to be in *pari materia* and must be construed together and made to stand if they are capable of being reconciled."); *Monday v. Canal Ins. Co.*, 348 Ark. 435, 441, 73 S.W.3d 594, 597 (2002)("Statutes relating to the same subject are said to be in *pari materia* and should be read in a harmonious manner, if possible."); *Minnesota Min. & Mfg. v. Baker*, 337 Ark. 94, 100, 989 S.W.2d 151, 155 (1999)("Statutes relating to the same subject should be read in a harmonious manner, if possible. . . . All legislative acts relating to the same subject are said to be in *pari materia* and must be construed together and made to stand if they are capable of being reconciled." Citations omitted.); *Vandiver v. Washington County*, 274 Ark. 561,567, 628 S.W.2d 1, 4 (1982)("A universal rule in construing statutes, and a settled maxim of the common law, is that all acts passed upon the same subject are in *pari materia*, and must be taken and construed together and made to stand if capable of being reconciled."); *McFarland v. Bank of State*, 4 Ark. 410, 4 Pike 410, 1846 WL 396, \*2 (Ark.) (1842)("It is a universal rule in the construction of statutes, whether public or private, founded alike in justice and sound policy, that all acts passed upon the same subject, in *pari materia* must be taken and construed together, and made to stand, if they are capable of being reconciled.").

200. See the discussion at p. 25.

201. \$735 in U.S. Currency *v. State*, \_\_\_ S.W.3d \_\_\_, 2005 WL 668605 (Ark. App., March 23 2005)(citing: *Davidson v. State*, 38 Ark. App. 137, 831 S.W.2d 160 (1992)).

202. See also the discussion of repeal by implication in the section and sub-section titled: "Canons of construction with general applicability," and "Presumptions about legislative knowledge, expectations, and intent," *supra* at 92.

203. *Wright v. Story*, 769 S.W.2d 16, 17, 298 Ark. 508, 509 (1989); *Ward School Bus Mfg., Inc. v. Fowler*, 547 S.W.2d 394, 399, 261 Ark. 100, 108 (1977); *Cheshire v. Copeland*, 182 Ark. 425, 32 S.W.2d 301 (1930); *Lybrand v. Wafford*, 174 Ark. 298, 296 S.W. 729 (1927).

able conflict with each other there is an implied repeal by the later one which governs the subject so far as relates to the conflicting provisions and to that extent only."<sup>204</sup>

When the conflict between two statutes is irreconcilable, the question arises as to whether or not the earlier statute is implicitly overruled by subsequent enactment of an inconsistent statute. The Arkansas Supreme Court laid out the guiding principles for resolving this question in the leading case of *Babb v. El Dorado*.<sup>205</sup>

It is a principle of universal recognition that the repeal of a law merely by implication is not favored, and that the repeal will not be allowed unless the implication is clear and irresistible; but there are two familiar rules or classifications applicable in determining whether or not there has been such repeal. One is that where the provisions of two statutes are in irreconcilable conflict with each other there is an implied repeal by the later one which governs the subject so far as relates to the conflicting provisions and to that extent only. . . . The other one is that a repeal by implication is accomplished where the Legislature takes up the whole subject anew and covers the entire ground of the subject-matter of a former statute and evidently intends it as a substitute, although there may be in the old law provisions not embraced in the new. (Citations omitted.)

*Vault v. Adkisson*<sup>206</sup> is an interesting, if unsuccessful, attempt to argue for an implied amendment of a statute occasioned by the invalidation of another. Arkansas had a statute that permitted defendants subject to the death penalty to demand that their trials be severed from those of co-defendants. After the United States Supreme Court decision in *Furman v. Georgia*<sup>207</sup> effectively abrogated the Arkansas death penalty statute, a defendant accused of a crime that, but for *Furman*, would have subjected him to the death penalty argued that he should be entitled to the same right, even though the maximum penalty was now only life imprisonment. The Arkansas Supreme Court refused, holding that it was ". . . being asked to change the wording 'for a capital offense' to 'for an offense punishable by life imprisonment', and such a holding would constitute judicial legislation."<sup>208</sup>

## VI. Avoiding an interpretation that will lead to an absurdity.

The existence of an absurd result is yet another case where a canon is used both as a *de facto* justification for interpretation and as a canon of interpretation. Once again, in the latter role, its primary function is to exclude proffered interpretations of an otherwise ambiguous or inconsistent statute. There appear to be no canons of interpretation specifically crafted to interpret a statute whose literal language leads to an absurd outcome.

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204. *Babb v. City of El Dorado*, 170 Ark. 10, 278 S.W. 649, 650(1926).

205. 170 Ark. 10, 278 S.W. 649, 650 (1926). *See also* *Donoho v. Donoho*, 318 Ark. 637, 887 S.W.2d 290 (1994).

206. 254 Ark. 75, 76, 491 S.W.2d 609 (1973).

207. 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972).

208. *Vault v. Adkisson*, 254 Ark. 75, 76, 491 S.W.2d 609, 610 (1973).

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In 1879 the Arkansas Supreme Court recognized absurdity of the result as a basis for construing a statute.<sup>209</sup> In the same year the Court first used this canon as an interpretive tool in *Reynolds v. Holland*.<sup>210</sup> In *Reynolds* the literal effect of a statute realigning county boundaries would be to leave two sections of land orphaned entirely within the new borders of another county. The court held: "the intent and spirit of the act, and not the literal meaning, must govern, where absurd consequences would otherwise follow."<sup>211</sup>

The author's research reveals that this principle has been used by Arkansas appellate courts something less than 150 times in the 156 years since *State v. Scott*. In the last 10 years it has used the principle approximately 55 times. Although this suggests an increasing rate of usage, if not an epidemic of absurd legislation, in the vast majority of those cases where the court used the principle it did so to reject an

interpretation proposed by a party to the litigation, rather than as a rationale for disregarding the plain language of the statute. Over the last quarter century, this canon has been included as one in a litany of principles applicable to statutory construction in cases where the court did not use it in deciding the case.<sup>212</sup>

The principle that the court will not follow the literal meaning of a statute to an absurd end applies even to those statutes subject to strict construction.<sup>213</sup>

### Conclusion

As noted in the beginning of this article, the canons of interpretation do not provide a formulaic or mechanistic method of interpreting statutory language. They do, however, define the boundaries within which the interpretation must fall.

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209. *Haney v. State*, 34 Ark. 263, 1879 WL 1293 (Ark)(1879)("Renouncing the idea that the general assembly intended to do an absurd and unconstitutional thing, which would be the result of a literal construction, let us inquire if there can be plainly discovered any other fixed and certain intention."). The court went on to find that the absurdity resulted from a clerical error. This aspect of the *Haney* decision is discussed below.

210. 35 Ark. 56 (1879).

211. *Id.* at 3.

212. *Turnbough v. Mammoth Spring School Dist. No. 2*, 349 Ark. 341, 78 S.W.3d 89 (2002); *Western Carroll County Ambulance Dist. v. Johnson*, 345 Ark. 95, 44 S.W.3d 284 (Ark. May 24, 2001); *Burford Distrib., Inc. v. Starr*, 341 Ark. 914, 20 S.W.3d 363 (2000); *St. Paul Fire & Marine Ins. Co. v. Griffin Constr. Co.*, 338 Ark. 289, 293, 993 S.W.2d 485, 487 (1999).

213. *Hice v. State*, 268 Ark. 57, 593 S.W.2d 169 (1980) (applying principle to a penal statute).