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The Value of Intuition in Judging: A Case Study

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If you were to ask legal readers to rate the value of intuition in deciding close cases, I suspect that most of them would not put it toward the top of their list. Surely that would be true for self-described textualist judges, who would probably give it only a slim role, if it has any at all. They prefer to concentrate on words and syntax and context (verbal context, not situational context) and to weigh all the cues and clues. Intuition is just too squishy, subjective, unconstraining, and prone to manipulation (as if textualism were not[1]).

At any rate, I've done a little experiment that tries to gauge the weight that readers give to intuitive reasons for a United States Supreme Court decision. Obviously, I can't poll the justices; I can only report on readers' assessments of the points they made. I don't claim that the study is earthshaking, conclusive, empirically beyond reproach (for one thing, the sample size is small), or able to be generalized to all cases. I claim only that the results are striking enough that they ought to give pause to those who would discount the significance of a judge's *reasoned* intuition about statutory purpose and sensible results.

Note, by the way, the emphasis on "reasoned" intuition. I don't mean a gut reaction. I mean a considered judgment, a rational inference, that is not grounded in textual analysis alone. For the statute involved in my study, for instance, the Court majority thought that Congress's purpose was obvious—and explained why. As you'll see, readers agreed.

THE CASE: *UNITED STATES V. HAYES*[2]

The case is fascinating for the sheer number of ways in which the Court tried to sort out a drafting muddle.

Hayes had been convicted of battery against his wife in West Virginia. The crime did not require, as an element, that the battery be against a spouse; that is, Hayes was convicted of generic, or simple, battery. He was then prosecuted under the federal Gun Control Act of 1968, 18 U.S.C. § 922(g)(9), which prohibits the possession of a firearm by someone convicted of a "misdemeanor crime of domestic violence."

Here is the Act's baffling definition of those words:

> [T]he term "misdemeanor crime of domestic violence" means an offense that—
>
> (i) is a misdemeanor under Federal, State, or Tribal law; and
>
> (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, *committed by a current or former spouse, parent, or guardian of the victim* . . . .[3]

And here is the question: does the italicized *committed by* language modify *offense*, back in the lead-in to the list, so that a domestic relationship is not required as an element of the underlying offense? Or does the *committed by* language modify *use . . . of physical force* in (ii), so that a domestic relationship is an element of the offense? A 7–2 majority chose the first alternative: it didn't matter that Hayes had been convicted in state court of generic battery. The federal statute still applied.

MY EXPERIMENT

On a survey form, I listed for potential readers the points of reasoning that the majority and minority opinions put forward. For my own purposes—readers did not see this—I noted in bold whether those points were essentially textual (**T**) or nontextual (**NT**). Again, I removed those designations before sending the form to readers, but they are crucial to my contentions in this article about the importance of nontextual arguments.

You might want to look at that form now, on pages 36–37. You'll see nine points listed under the majority opinion and ten under the minority opinion, the dissent. For #5 in the first set and for #7 and #8 in the second, there is no designation because the opinion was dismissing, not advancing, that point. For the lenity points in the two opinions (#9 and #10), you may disagree with my designation **T & NT**, since textualists do recognize the rule of lenity.[4] True, the rule starts with textual analysis, but it becomes a nontextual rule of fairness to defendants when textual analysis is unavailing.

Now, I had originally intended to do a pilot test and then a larger one. But the results of the pilot seemed to me so decisive that I decided to stop and present them for your consideration.

I used the listserv of the Legal Writing Institute to solicit 12 volunteers, the first 12 to respond. So these were all legal-writing professors—meaning that they all teach legal research, writing, and analysis. And they turned out to be veterans, averaging 19 years of teaching, with just one having less than 5. I asked six of the professors to mark what they regarded as the two strongest reasons set out in both opinions; I asked the other six to mark,

Footnotes

1. *See* Joseph Kimble, *What the Michigan Supreme Court Wrought in the Name of Textualism and Plain Meaning: A Study of Cases Overruled, 2000–2015*, 62 WAYNE L. REV. 347 *passim* (2017) (coding 81 overrulings by a textualist court majority and finding that the results were ideologically conservative in 96.3% of the cases); Joseph Kimble, *The Doctrine of the Last Antecedent, the Example in* Barnhart*, Why Both Are Weak, and How Textualism Postures*, 16 SCRIBES J. LEGAL WRITING 5, 28–37 (2014–2015) (summarizing 6 empirical studies, and citing 11 other scholarly examinations, that show the strong ideological bent in Justice Scalia's opinions).
2. 555 U.S. 415 (2009).
3. 18 U.S.C. § 921(a)(33)(A).
4. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 296–302 (2012).

for both, the three strongest reasons. Don't ask me why I did it two ways. In the end, I counted only the two strongest reasons cited by each of the 12 readers.

THE RESULTS

On pages 37 and 38, you'll find two charts, one for readers' votes on the Court majority's reasoning and one for votes on the minority's reasoning. The left columns, with the heading "Reasons," list the different points of reasoning according to the numbers on the survey form. The 12 columns in the middle show how the professors voted. I entered "1" if a professor marked a reason as their top choice—what they thought was the opinion's strongest point. I entered "2" if the professor marked it as (in their view) the opinion's second-strongest reason. I then assigned two points for a "1" vote and one point for a "2" vote.

Just to see how it works, take the first horizontal line in the majority opinion. That's reason #1 on my form that the participants used. It got two "1" votes (= 4 points) and two "2" votes (= 2 points), for a total of 6. Obviously, I was trying to determine, however roughly, whether there was anything like a strong winner among the reasons.

And indeed there was, at least for the majority opinion—reason #7. That was one of the two purely nontextual reasons. It had to do with Congress's "manifest purpose" in passing the statute. You can read the summary on the form for yourself, but essentially, had the majority not ruled the way it did, the law would have been a dead letter in the great majority of states—well over two-thirds—because they had no criminal statutes that specifically proscribed *domestic* violence. That result would have defeated the statute's purpose: prohibiting domestic abusers from having firearms.

Reason #7 got twice as many points as any of the textual reasons (##1, 2, 4, and 6). In fact, it got as many points as all the textual reasons put together. The very least you can say is that textual reasons were no more important than nontextual reasons. Of course, you would probably also say that courts put them together to decide a case. But can we please think twice about the modern-day exclusive and obsessive focus on textual analysis? Sound decision-making demands more; it demands that all sensible arguments and considerations be taken into account.

As for the minority opinion, one of the nontextual reasons, #9, having to do with the practical difficulty of the majority's approach, placed third in the voting. It scored 6 points—far fewer than the 23 points total for the textual reasons (##1 through 6), but still significant. To my mind, though, and consistent with the voting, it was weaker than nontextualist reason #7 for the majority.

THE TACIT REDRAFTING

By now, from looking over the form, you have a fair idea of the arguments made by the majority and minority. Both sides agreed that (and this is putting it mildly) the statute is "not a model of the careful drafter's art."[5] So how do their interpretations tacitly fix or adjust the drafting? Let's return to the statute:

> [T]he term "misdemeanor crime of domestic violence" means an offense that—
> (i) is a misdemeanor under Federal, State, or Tribal law; and
> (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, *committed by a current or former spouse, parent, or guardian of the victim* . . . .

On one possible view, the majority's interpretation effectively moves the ambiguous *committed by* language into the lead-in, so that *committed by* modifies *offense*:

> [T]he term "misdemeanor crime of domestic violence" means an offense *committed by a current or former spouse, parent, or guardian of the victim* . . . that—
> (i) is a misdemeanor under Federal, State, or Tribal law; and
> (ii) has, as an element, the use or attempted use of physical force . . . .

That would be a clumsy redraft, though, because the victim's "current or former spouse, parent, or guardian" is just one in a list of possibilities. (Note the ellipsis after *victim*.)

As a better drafting alternative, the majority's interpretation involves moving the ambiguous modifier into a new item (iii) and adding two words (in brackets):

> [T]he term "misdemeanor crime of domestic violence" means an offense that—
> (i) is a misdemeanor . . . ; and
> (ii) has, as an element, the use or attempted use of physical force . . . ; [and]
> (iii) [is] *committed by a current or former spouse, parent, or guardian of the victim* . . . .

On the other side, the minority does acknowledge that the word *committed* in item (ii) of the statute can go.[6] Thus:

> (ii) has, as an element, the use or attempted use of physical force . . . ~~*committed*~~ *by a current or former spouse, parent, or guardian of the victim* . . . .

This redrafting defeats majority argument #2 that one normally says "commits an offense," not "commits a use."[7] But the deletion of a word is obviously not as structurally radical as the two alternatives for the majority's reading.

THE IMPLICATIONS FOR JUDGING

The two sides parsed and parsed, trying to resolve this ambiguity. In their treatise *Reading Law: The Interpretation of Legal*

5. *Hayes*, 555 U.S. at 429.
6. *Id.* at 433 ("That may be so [that *committed* is superfluous], but reading 'committed by' to modify 'offense' has its own flaws.").
7. *But see* Neal Goldfarb, Brief for Professors of Linguistics as Amici Curiae in Support of Neither Party, 2008 WL 2468603, PDF at 6–11 (quoting many examples, legal and nonlegal, in which *committed by* modifies *the use of* and stating that the construction is not abnormal).

Texts, Justice Scalia and Bryan Garner identify four canons of construction that the majority used and three that the minority used.[8] Here are those canons, with the corresponding number from the survey form:

Majority
- grammar—#1
- ordinary meaning—#2
- prior construction—#4
- surplusage—#6

Minority
- last antecedent—#2
- scope of subparts—#5 and #6
- lenity—#10

That's typical in cases like this: either side can cite canons.

No doubt the *Hayes* case was difficult and close. The dissent's structural arguments were strong, but so was the majority's argument about previous decisions interpreting similar language in another statute (#4).

In the end, though, the majority's nontextual argument seemed the strongest of all (even though it took less than half the space in the opinion—compare parts II and III). Was it question-begging for the majority to rely on what they said was the statute's "manifest purpose"? Admittedly, they cited, almost in passing, a fairly weak piece of legislative history—the floor statement of one senator that the statute would reach offenses that didn't require a domestic relationship. But the dissent did not question the compelling fact that so limiting the offense would render it dead on arrival in the great majority of states and the great majority of instances involving a convicted domestic batterer. The dissent could only speculate about why Congress might want to pass such a narrow law.[9]

No one disagreed that the statute was intended to keep those batterers from possessing firearms. Even if that purpose was not explicitly stated anywhere, your intuition, your common sense, your judgment tells you that. And again, no one disputed it. So why shouldn't judges rely on such honest, sensible judgments? Why should they engage in fruitless efforts to untangle ambiguity, or grapple with how vague terms apply, by textual methods only? Textualists would claim that purpose must be gleaned from the text alone, but scholarly research shows emphatically that textualist justices on the Court do not constrain themselves in that way.[10]

Who knows whether judicial intuition precedes close textual analysis or proceeds from it, or whether it varies from case to case? I suspect that in *Hayes* the majority had a strong, early inclination of how the case should be decided. At any rate, I submit—and I think my little experiment goes to show—that decision-making should not be reduced to strict textual exposition. Judges should be bringing to bear and weighing all the plausible arguments in a case, including those based on reasoned intuition and common sense.

SURVEY FORM

***United States v. Hayes*, 555 U.S. 415 (2009)**

Facts: Hayes had been convicted in West Virginia of generic battery—standard, garden-variety battery: the misdemeanor crime did not require, as an element, that the batterer and victim be in a domestic relationship. Then Hayes was prosecuted under the Gun Control Act of 1968, 18 U.S.C. § 922(g)(9), for possessing a firearm, which police discovered in his home after responding to a 911 call.

Issue: The Gun Control Act of 1968 prohibits possession of a firearm by someone convicted of a "misdemeanor crime of domestic violence." Does the statute's definition of that term require that the crime have, as an element, a domestic relationship between the person convicted and the victim?

Language at issue: The definition appears in section 921(a)(33)(A):

> The term "misdemeanor crime of domestic violence" means an offense that—
> (i) is a misdemeanor under Federal, State, or Tribal law; and
> (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, *committed by a current or former spouse, parent, or guardian of the victim* . . . .

Does the *committed by* language modify *offense*—so that a domestic relationship is not required as an element of the underlying offense? (The majority took this view.) Or does that language modify *the use or attempted use of physical force*—so that a domestic relationship is an element of the offense? (The minority took this view.)

Analysis:
The majority:
(1) The word *element* is singular, suggesting that clause (ii) contains only one element, the use of force. **T**

8. READING LAW at 159–60.
9. *Hayes*, 555 U.S. at 435 (As a compromise, "[s]ome members might well have been willing to extend the ban beyond individuals convicted of felonies, but only if the predicate misdemeanor by its terms was addressed to domestic violence.").
10. *See* Anita S. Krishnakumar, *Backdoor Purposivism*, 69 DUKE L.J. 1275, 1276, 1320, 1329, 1352 (2020) (reporting from her extensive study of Court opinions that those justices "regularly have been using pragmatic reasoning, as well as traditional textual canons, . . . to impute a specific intent or policy goal to Congress"; that they invoked practical consequences "entirely external to the statutory text" in over 30% of the opinions they wrote; that they sometimes relied on "their own personal views about a statute's sensibility or their own judgment calls about what a statutory provision is designed to achieve"; and that even their use of textual tools "entails at least as much judicial discretion and room for normative decision-making as the more straightforward, traditional purposive mode of analysis that textualism decries").

(2) Reading *committed by* with *use* is syntactically awkward. It's more normal to say that someone "commits an offense," not "commits a use." **T**

(3) Since "crime of domestic violence" involves both the use of force and a domestic relationship, it makes sense to join those features together in clause (ii). **T & NT**

(4) The same language appears in another statute. When the statute was passed, courts had uniformly not required a domestic relationship as part of the underlying offense. Congress presumably knew that. **T**

(5) The doctrine of the last antecedent: "a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase it immediately follows." But the rule "is not absolute and can assuredly be overcome by other indicia of meaning." Here, there are other indicia. See (1) & (2).

(6) Also, applying that doctrine would render the word *committed* superfluous: Congress could have written *the use of physical force . . . by a current or former spouse* . . . . **T**

(7) Congress wanted to close a loophole. Existing laws were not keeping firearms out of the hands of domestic abusers, many of whom were not ultimately charged with or convicted of a felony. But as interpreted by the minority, the new, amending language (passed in 1996) would have been a "dead letter" in two-thirds of the states—states that did not have statutes proscribing *domestic* violence (as opposed to generic battery). And even in the remaining states, domestic abusers are routinely prosecuted under generic battery laws. So the minority's interpretation would defeat Congress's "manifest purpose"—to ban possession of firearms by domestic abusers convicted under any battery statute. **NT**

(8) In a floor statement, one senator, the amendment's sponsor, said that a domestic relationship would not be an element of the underlying offense. And the legislative record is otherwise silent. **NT**

(9) The rule of lenity in criminal cases does not apply because—considering text, context, purpose, and legislative history—there is no ambiguity. **T & NT**

The minority:

(1) The "natural" reading of *misdemeanor crime of domestic violence* is that it has something to do with domestic violence. **T**

(2) Under the doctrine of the last antecedent, the *committed by* phrase should modify what it immediately follows. But the majority's reading requires jumping over two line breaks, clause (i), a semicolon, and the first part of clause (ii). **T**

(3) Yes, *commits the use of force* is awkward, but it is used to prevent having to list specific crimes, as in *commits a battery*, *robbery*, *or kidnapping*. The awkwardness disappears with a list. **T**

(4) As for the singular word *element*, the Dictionary Act says that the singular includes the plural. Besides, a single element can contain multiple components. And other statutes combine as one element the use of force and its target (here, a domestic-relationship victim). **T**

(5) Putting the domestic-relationship part in clause (ii) with the element of the underlying offense strongly suggests that it is part of the required element. **T**

(6) The majority's reading requires effectively restructuring the statute and adding a word—that is, moving *committed by* into a new (iii) and adding the word *is* [*committed by*]. Only then does the language read smoothly with *offense that*. **T**

(7) The legislative history cited by the majority is one statement on the Senate floor. "Such tidbits do not amount to much."

(8) Invoking the statute's purpose ignores the complexity of the problems that Congress is called on to address and the compromises that may have gone into the final version.

(9) The majority approach poses practical difficulty. The judge or jury will often have to go beyond the record of the prior conviction—the elements of the crime—to determine whether it happened to involve domestic violence. **NT**

(10) The statute is ambiguous, so the rule of lenity should apply. This is a "textbook case" for the rule. It's not one of the rare cases in which arguments about legislative history and statutory purpose overcome the need for fair warning to defendants. **T & NT**

RESULTS OF THE VOTING

12 reader participants. **1** = a vote for the strongest reason; **2** = a vote for the second-strongest reason. A "1" vote gets two points; a "2" vote gets one point.

MAJORITY OPINION

Reasons (*Survey Form*)	**12 Readers; Two Votes Each**												**Totals**
1			**1**	**1**		**2**						**2**	**6**
2			**2**				**1**						**3**
3											**2**		**1**
4	**2**	**1**		**2**	**2**		**2**	**2**		**2**			**8**
5													
6													
7	**1**	**2**			**1**	**1**		**1**	**1**	**1**	**1**	**1**	**17**
8									**2**				**1**
9													
													36

MINORITY OPINION													
Reasons (*Survey Form*)	**12 Readers; Two Votes Each**												**Totals**
1	2	1		1									5
2			2		1			1					5
3													
4				2			1						3
5	1	2	1				2			2	2		8
6												1	2
7													
8													
9						2			1		1	2	6
10					2	1		2	2	1			7
													36

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Answers to Crossword

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