SUPREME COURT OF THE STATE OF WASHINGTON

TODD NEWLUN, Petitioner,	))	No. 93449-5
v.	)	STATEMENT OF
	)	ADDITIONAL
RICK SUCEE, et al., Respondents.	))	AUTHORITIES (RAP 10.8)

Pursuant to RAP 10.8, petitioner Todd Newlun submits the following statement of additional authority for the consideration of the Court in the above-captioned matter. With respect to the petitioner's argument that the specification of exemplary damage award in RCW 9.73.230 (11) when officers comply with the requirement of preparation of an written authorization but fail to even show reasonable suspicion that the target is about to commit a crime, creates an ambiguity in the statute as to whether the same sanction is intended to apply where supervisory police officers, instead of completing a written authorization and signing it, disregard the written requirement mandate of the statute and verbally direct the interception of a private communication. Also, in construing the

intention of an ambiguous statute, is the appellate court permitted to -- read or even rewrite -- statutes to avoid absurd results.

Respectfully submitted, this 26th day of September, 2016.

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Legislation

And Statutory Interpretation

Willaim N. Eskridge, Jr., Philip P. Frickey
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F. *Avoiding Absurd Results and Correcting Scriveners' Errors*

Assuming that the legislature does not intend irrational or incoherent directives, courts will read — or even rewrite — statutes to avoid *absurd results*. *Holy Trinity*, discussed in Chapter 6, illustrates this rule: given the constitutional protection of religion as well as the cultural assumption that this is a "Christian Nation," evangelical Justice Brewer thought it inconceivable that Congress in 1885 would have intended to exclude Christian ministers from this country. Note once again the importance of the normative baseline: to accept the argument, you must agree that this country is, as a matter of public law as well as culture, a Christian Nation. No less religiously devout than Justice Brewer, Justice Scalia has rejected that public law baseline and insisted, further, that general state laws may be applied to burden religious free exercise.[28] He considers *Holy Trinity* an abuse of the absurd-result canon.[29] Neither he nor Justice Stevens thought the canon applicable in *Sweet Home*.

What, then, is the difference between an *absurd* result (i.e., one the legislature certainly did not contemplate) and merely an *unreasonable* one (i.e., one the judge disagrees with and truly believes right-thinking people would find unreasonable)? A possible line is suggested by *Green v. Bock Laundry Machine Co.*[30] Federal Rule of Evidence 609(a)(1) then allowed a witness' credibility to be attacked by a prior criminal conviction, "but only if" the crime was a serious one *and* "the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant." The asymmetrical rule is defensible in criminal cases, where defendants receive a lot of special procedural protections, but not in civil cases, where it would exclude many convictions by tort and contract defendants while admitting all such convictions of plaintiffs. All nine Justices agreed that a literal reading of the law was absurd, and a majority of the Court rewrote Rule 609(a)(1)'s balancing test to apply

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[28]See *Employment Div., Dep't of Natural Resources v. Smith*, 494 U.S. 872 (1990) (Scalia, J., for the Court).

[29]See Antonin Scalia, *A Matter of Interpretation* 20-23 (1997) (scathing denunciation of the Court's approach and result in *Holy Trinity*).

[30]490 U.S. 504 (1989), excerpted and discussed in Eskridge & Frickey 589-603; Popkin 275-76.

only when a criminal defendant's credibility is attacked and to admit prior convictions of other witnesses.

Bock Laundry is probably the classic example of the absurd-results canon: not only would a literal application of the statute distinguish between civil plaintiffs and defendants without ascertainable reason, but the literal reading would probably have been unconstitutional.[31] Furthermore, there was evidence from the legislative history of the rule suggesting that the textual oddity was a *scrivener's error* not attributable to any legislative deliberation on the issue or conscious policy decision.[32] The Justices' willingness to rewrite the statute in *Bock Laundry* may have been contingent upon their belief that the absurd result was caused by a scrivener's error. Where an odd result is not the consequence of such an error, correction by the judiciary might be much less defensible under democratic premises.

The absurd-result canon produces complications, especially for textualists. In *Bock Laundry*, Justice Scalia agreed that the canon applied and contended that it should be implemented by reformulating the statute in the way that "does least violence to the text."[33] This

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[31]For more on the line between an absurd result and a merely unreasonable one, consider Justice Kennedy's suggestion in his separate opinion in *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 470-71 (1989), excerpted and discussed in Eskridge & Frickey 548-50, Popkin 235-41. Justice Kennedy asserted that the absurd-result exception "remains a legitimate tool of the Judiciary . . . only as long as the Court acts with self-discipline by limiting the exception to situations where the result of applying the plain language would be, in a genuine sense, absurd, *i.e.*, where it is quite impossible that Congress could have intended the result, and where the alleged absurdity is so clear as to be obvious to most anyone." For an even more restrictive statement of the absurd-result canon, see *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930).

[32]See generally Henry Hart, Jr. & Albert Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 1375 (William Eskridge, Jr. & Philip Frickey publication editors, 1994) (from the 1958 "tentative edition"); 2A Sutherland, *supra* note 11, §§ 47.35-.38. Other apparent examples of scrivener's error cases include *United States Nat'l Bank of Oregon v. Independent Ins. Agents of Am.*, 508 U.S. 439 (1993), excerpted and discussed in Popkin 210-14; *United States v. Locke*, 471 U.S. 84 (1985), excerpted and discussed in Eskridge & Frickey 550-52; Popkin 247-50; *Shine v. Shine*, 802 F.2d 583 (1st Cir. 1986), excerpted and discussed in Eskridge & Frickey 543-48.

[33]See *Bock Laundry*, 490 U.S. at 529 (Scalia, J., concurring in the judgment).

approach seems puzzling, for at least three reasons. First, why should a textualist ever rewrite a statute? If law simply consists of text, the point of interpretation is to give the text its plain meaning. If that produces an absurdity, then the textualist judge should strike the statute down as unconstitutional for lacking a rational basis rather than, in effect, amend its text by judicial construction. Second, it seems odd to say that the text is simultaneously contaminated by absurdity — thereby liberating the judge to rewrite it — and yet sufficiently sacrosanct that the rewriting must do the "least violence" to it. One would think that either the text deserves respect or it doesn't. Third, how much "violence" to the text would be inflicted by alternative rewrites strikes us as a question beyond precise judicial calibration, undercutting the goals of predictability and certainty that support textualism.[34]

Even for nontextualists, however, the appropriateness of reformulating statutes to avoid absurd results is debatable. In *Bock Laundry*, the majority recrafted the rule of evidence to limit its application to criminal defendants, based on legislative history suggesting that Congress was only thinking about criminal cases when it considered the rule. Justice Blackmun, in dissent, contended that the legislative history was sparse and confused, and he concluded that the balancing test should apply to any party in civil cases, as well as criminal defendants, because that rewrite would best serve the purpose of the rule, which was to avoid the potential that prejudice would effect the

[34]The rule stated that evidence of a prior criminal conviction was admissible only if the crime was a serious one "and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant." Justice Scalia, concurring in the judgment that the rule should apply only to criminal defendants, thought his rewrite could be accomplished merely by inserting the adjective "criminal" before the noun "defendant," while the dissent's approach of applying the rule to all parties would require giving "defendant" a meaning it will not bear ("party"). This rewrite would not be the way that a skilled drafter would amend the rule, however. The rule applies in civil as well as criminal cases. Justice Scalia's rewrite would make the rule nonsensical in civil cases — what criminal defendant? To achieve Justice Scalia's result, the skilled drafter might well amend the rule to state: "and, *in a criminal case*, the court determines . . . ." In contrast, the drafter might achieve the other result simply by substituting "party" for "defendant." Which does less violence to the text: the addition of four words or the substitution of one word? Of course, there are surely other ways to do either rewrite, lending further subjectivity to the inquiry.

outcome of a trial.[35] Of course, neither the majority, nor Justice Scalia, nor Justice Blackmun could actually change the words of the rule on the books; they could only affect the meaning attributed to those words in court. Thus, interpreting statutes to avoid absurd results may create traps for the unwary. An attorney might consult the Federal Rules of Evidence and confidently allow her client, a civil defendant, to take the stand, confident that the judge will find that he cannot be impeached by prejudicial evidence of his prior felony conviction, only to be shocked when the judge automatically admits the evidence because, through the looking glass of precedent, "defendant" means only "criminal defendant." The ordinary citizenry is, of course, much more likely than attorneys to be misled in this fashion by judicial transfigurations of statutes, perhaps undercutting the very legitimacy of the rule of law itself. Should the Court in *Bock Laundry* have simply held that the rule was unconstitutional, thereby forcing Congress to redraft it?

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

TODD NEWLUN, Respondent and Cross Appellant, and Petitioner vs. RICK SUCEE, Commander of the Northwest Regional Drug Task Force, CRAIG JOHNSON, Police Officer for the City of Bellingham, RICHARD FRAKES, Deputy Sheriff for Whatcom County, and B. L. Hanger, Trooper, Washington State Patrol, and the City of Bellingham, a Subdivision of the State of Washington, Whatcom County, a subdivision of the State of Washington, and the State of Washington, Respondents	No. 72642-1-I DECLARATION OF SERVICE

DECLARATION OF WILLIAM JOHNSTON

I, William Johnston , declare under penalty of perjury under the laws of the State of Washington, as follows:

WILLIAM JOHNSTON
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1. I am the attorney for the Respondent and Cross Appellant Todd Newlun;
2. On this day, September 26, 2016 I personally delivered a copy of Statement of Additional Authorities (RAP 10.8) on the Office of the Prosecuting Attorney for Whatcom County, Whatcom County Courthouse, Bellingham, Washington 98225.
3. I also served a copy of the Statement of Additional Authorities (RAP 10.8) on the Office of the City Attorney for Bellingham and its office at 210 Lottie Street, Bellingham, Washington.
4. I also served a copy of the Statement of Additional Authorities (RAP 10.8) on the Office of the Washington State Attorney General at its office on the 3rd floor of the Key National Bank Building on Holly Street in Bellingham, Washington 98225

Executed this 26th day of September, 2016 at Bellingham, Washington.

WILLIAM JOHNSTON

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