The New Absurdity Doctrine

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"Never be a spectator of unfairness or stupidity."

—Christopher Hitchens[1]

Abstract

State legislatures often write incredibly broad criminal statutes. And the strict application of these statutes will sometimes produce absurd results. One such example is when a statute technically requires a defendant to register as a sex offender even though he was never convicted, or even accused, of a sex crime.

In situations like that, the absurdity doctrine permits the court to disregard the plain language of the statute to avoid an absurd and unjust outcome. In theory, the absurdity doctrine has been approved in all states; in practice, however, it often fails to protect defendants from absurd results such as the one described above.

One reason the absurdity doctrine fails is that, when applying it, courts often focus on legislative intent—an approach riddled with practical and theoretical problems. But divining the legislature's intent should not be a prerequisite for using the absurdity doctrine. Rather, the doctrine actually serves as a check on the legislature, setting "boundaries or conditions on legislative power."

This Article therefore proposes a new formulation of the absurdity doctrine focused exclusively on case outcomes. Instead of straining to divine legislative intent, courts should simply decide whether—in light of "rule of law values" such as "reasonableness, rationality, and common sense"—the application of a criminal statute to a given case produces an absurd outcome. In sum, courts should simply strive "never [to] be a spectator of unfairness or stupidity."

This Article then applies the new absurdity doctrine to the real-life sex offender registration case discussed above, illustrating how it would have saved the defendant from the life-ruining registry. This Article also explains an important limitation that must be placed on the judiciary's use of the absurdity doctrine.

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[1] Christopher Hitchens, LETTERS TO A YOUNG CONTRARIAN 140 (Basic Books 2001).

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INTRODUCTION

A seventeen-year-old boy found himself short on cash, so he "and others forced a minor"—another seventeen-year-old boy—"to ride around with them in a vehicle in order to collect a drug debt from the minor's friend."[2] The prosecutor charged the boy-turned-defendant in adult criminal court,[3] where he "was convicted of falsely imprisoning [the other] 17-year-old boy" for making him ride around in the car against his wishes.[4]

The crime of felony false imprisonment might seem a bit extreme under that set of facts, particularly given that the defendant and the crime victim were both seventeen years old. But that's not the absurdity of the case. Rather, the absurdity is this: upon conviction, the state's unwieldy law actually required the defendant to register as a *sex offender* for the crime of "false imprisonment of a minor."[5]

In addition to being branded a felon at the young age of seventeen, should the defendant also be placed on a sex offender registry when "the State, the circuit court, the court of appeals, and [the state supreme court] all agree that there is no allegation that the false imprisonment entailed *anything sexual*"?[6] The answer should be no. The defendant should not be required to register as a sex offender—a stigmatizing, even life-ruining

[2] State v. Smith, 780 N.W.2d 90, 93 (Wis. 2010).
[3] In Wisconsin, the state treats seventeen-year-olds as adults when they are accused of a crime but treats them as children for other purposes, including when they are alleged to be a crime victim in the very same case. *See* Eileen Hirsch, et al., *Legislative Watch: Return 17-Year-Olds to Juvenile Court*, WIS. LAWYER (June 5, 2007) ("Today, Wisconsin is one of only 13 states that charge all 17-year-old offenders in adult court. They typically are not violent offenders. In 2004, only 1.5 percent of arrests of 17-year-olds were for violent index offenses").
[4] *Smith*, 780 N.W.2d at 106 (Bradley, J., dissenting).
[5] Id. at 93.
[6] Id. at 106 (Bradley, J., dissenting) (emphasis added).

collateral consequence[7]—for conviction of an "offense[] that [has] no nexus whatsoever to a sexual crime or even to the risk of such a crime."[8]

Even though the plain language of the statute technically requires the defendant to register as a sex offender for this particular non-sex crime, one of the things standing in the way of that draconian result is the aptly-named absurdity doctrine. Simply put, "[t]he absurdity doctrine allows judges to ignore the ordinary meaning of statutory text when that ordinary meaning would lead to absurd outcomes."[9]

In theory, the absurdity doctrine is widely accepted, as "the highest courts of all 50 states and the District of Columbia have endorsed this principle."[10] In practice, however, the absurdity doctrine often fails to protect criminal defendants from bizarre, unjust, and absurd outcomes like the one discussed above.[11]

Part I of this Article discusses the basics of the absurdity doctrine and examines its application in some of the landmark cases. Part II demonstrates why the doctrine is so ineffective in contemporary practice: courts are irrationally and mistakenly obsessed with divining the *legislative intent* behind the statute in question. In reality, attempting to do so is usually a fool's errand.[12] And in some cases, the absurdity doctrine may even require a court to undermine, rather than honor, the legislature's intent.[13]

Part III explains that, instead of attempting to divine legislative intent, the absurdity doctrine simply requires a court to ask whether, given the facts of the case before it, the application of the statute produced an *absurd outcome*. This outcome-focused approach recognizes that the absurdity doctrine does not pay homage *to* the legislature, but instead serves as a check *on* the legislature.[14] In fact, a court's authority (and duty) to apply the absurdity doctrine stems from "rule of law values," including fundamental principles such as predictability, coherence, reasonableness, rationality, and common sense.[15]

Given this, Part IV develops and proposes a new absurdity doctrine—one that abandons the legislative-intent inquiry and instead focuses exclusively on case outcomes. In short, when applying the absurdity doctrine, courts should simply strive "never [to] be a spectator of unfairness or stupidity."[16] This Part then applies the new formulation to the case discussed in this Introduction, demonstrating how it would have saved the child defendant from onerous and irrational sex offender registration.[17]

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[7] *See* Richard Tewksbury, *Exile at Home: The Unintended Consequences of Sex Offender Registry Restrictions*, 42 HARV. C.R.-C.L. L. REV. 531, 532 (2007) ("Social science research has documented that, as a result of their registered status, RSOs experience a range of unintended negative consequences that typically have stronger impacts upon sex offenders than other felons.").

[8] State v. Smith, 780 N.W.2d 90, 107 (Wis. 2010) (Bradley, J., dissenting).

[9] Linda D. Jellum, *But That is Absurd! Why Specific Absurdity Undermines Textualism*, 76 BROOK. L. REV. 917, 921 (2011).

[10] Veronica M. Dougherty, *Absurdity and the Limits of Literalism: Defining the Absurd Result Principle in Statutory Interpretation*, 44 AMER. U. L. REV. 127, 129, n. 9 (1994) (providing case cites for all jurisdictions).

[11] *See* Part II.

[12] *See* Part II.A.

[13] *See* Part II.B.

[14] *See* Part III.

[15] *See* id.

[16] Hitchens, *supra* note 1, at 140; *see also* Part IV.

[17] *See* Part IV.B.

Finally, Part V explains why the absurdity doctrine is necessary to protect the people from the government, but must not be used as a prosecutorial weapon by the government against the people.

I. ABSURDITY 101: THE BASICS

The absurdity doctrine "authorizes a judge to ignore a statute's plain words in order to avoid the outcome those words would require in a particular situation."[18] Precise formulations of the doctrine vary by jurisdiction, and may be somewhat circular as they often incorporate the word absurdity itself.[19] And many formulations hinge on the level of absurdity required to invoke the doctrine.[20] For example, on one end of the spectrum, before a court may ignore the plain language of a statute, the situation before it "must be one in which the absurdity and injustice of applying the [statute] to the case, would be *so monstrous*, that all mankind would, without hesitation, unite in rejecting the application."[21]

On the other end of the spectrum, however, it may be sufficient merely to show that "a literal reading [of the statute] would compel an *odd result*."[22] Most formulations of the absurdity doctrine will fall somewhere between the two extremes of "monstrous" and merely "odd." For example, in some cases the invocation of the doctrine requires "more than a showing (a) that troubling consequences may potentially result if the statute's plain meaning were followed or (b) that a different approach would have been wiser or better."[23]

The imprecision of the doctrine, however, is not much different than the imprecision inherent in most of our legal concepts, including the various burdens of proof. Where is the line between reasonable suspicion and probable cause when a court determines the legality of an arrest? Similarly, where is the line between preponderance of the evidence and clear and convincing evidence when determining liability? And most important of all, what constitutes proof of guilt beyond a reasonable doubt at a criminal trial?[24]

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[18] Dougherty, *supra* note 10, at 128. The absurdity doctrine has gained widespread acceptance, even among the so-called "textualists"—a group that actually *needs* the doctrine "to avoid the harsh results of their chosen theory" or, stated less kindly, because the doctrine provides "a way for textualists to cheat." Jellum, *supra* note 9, at 923. For a discussion of the primary schools of thought on statutory interpretation, *see* id. at 938 (discussing "textualists" and "purposivists"); Andrew S. Gold, *Absurd Results, Scrivener's Errors, and Statutory Interpretation*, 75 U. CIN. L. REV. 25, 41 (2006) (comparing "textualists" with "intentionalists"); and John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2393 (2003) (discussing "intentionalism," "intent skepticism," and "textualism"). This Article, however, is not concerned with whether the absurdity doctrine offends the disciples of a given school of thought. Such an inquiry is fodder for law professors but is of little interest to the practicing lawyer.

[19] *See, e.g.*, Case v. Olson, 14 N.W.2d 717, 719 (Iowa 1944) (the absurdity doctrine is to be used "where adherence to the letter would result in absurdity, or injustice, or would lead to contradiction").

[20] *See* Gold, *supra* note 18, at 53 ("Precedent varies as to how absurd a statutory application must be to trigger the absurdity doctrine.").

[21] United States v. Husted, 545 F.3d 1240, 1245 (10th Cir. 2008) (emphasis added) (quoting Sturges v. Crowninshield, 17 U.S. 122, 202-03 (1819)).

[22] Id. (emphasis added) (quoting Bock Laundry, 490 U.S. 504, 509 (1989)).

[23] People v. Munoz, 252 Cal. Rptr. 3d 456, 474 (Ct. App. 2019) (parenthetical subparts added).

[24] The evidence demonstrates that jurors have difficulty distinguishing between the different burdens of proof. However, we do not abandon these legal distinctions just because juries have trouble drawing

Likewise, with regard to the absurdity doctrine, "[t]here is no clear line which distinguishes the routine application of a statute from the absurd. For that matter, there is no clear line which distinguishes that which is merely absurd, from the absurd and monstrous."[25] Rather than drawing bright lines, then, "[a]s one moves along the continuum of statutory applications, from unlikely, to odd, to unthinkable, a point is reached where any competent user of the language will say that the language does not apply to these facts."[26] In other words, the application of the statute would, at that point, produce an absurd result which is then rejected.

Historically, the absurdity doctrine dates to 1765 when William Blackstone wrote: "If there arise out of acts of parliament any absurd consequences, manifestly contradictory to common reason, they are, with regard to those collateral consequences, void."[27] The United States Supreme Court first recognized the doctrine in 1819.[28] It later decided perhaps its most famous absurdity case, *United States v. Kirby*, in 1868.[29]

In *Kirby*, the defendant was charged criminally under the statute "which provides that, if any person shall knowingly and willfully obstruct or retard the passage of the mail . . . he shall, upon conviction . . . pay a fine not exceeding one hundred dollars[.]"[30] This seems like a reasonable statute on its face. However, defendant Kirby was actually the sheriff, and his alleged crime was his act of arresting a mail carrier pursuant to a valid arrest warrant for murder.[31] The problem for the defendant-sheriff was that he arrested the mail carrier during his mail route, thus "knowingly and willfully obstruct[ing]" the delivery of the mail.[32]

Although the sheriff-turned-defendant was technically guilty under the plain language of the criminal statute, the Court would not tolerate such an absurd outcome. With admirable brevity and simplicity, it disregarded the statute in favor of a more rational approach: "common sense" dictates that the statute "which punishes the obstruction or retarding of the passage of the mail . . . does not apply to a case of temporary detention of the mail caused by the arrest of the carrier upon an indictment for murder."[33]

In so holding, the Court analogized to two famous scenarios that previously invoked the absurdity doctrine. First, the law "that whoever drew blood in the streets should be punished with utmost severity, did not extend to the surgeon who opened the vein of a person that fell down in the street in a fit."[34] Second, the law "that a prisoner

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accurate lines between them. *See* Lawrence T. White & Michael D. Cicchini, *Is Reasonable Doubt Self-Defining?*, 64 VILL. L. REV. 1 (2019) (demonstrating that mock jurors do not distinguish between proof beyond a reasonable doubt and the two lower burdens of proof) and Michael D. Cicchini, *Reasonable Doubt and Relativity*, 76 WASH. & LEE L. REV. 1443 (2019) (arguing for a context-based definition of proof beyond a reasonable doubt to distinguish it from the two lower burdens of proof).

[25] Gold, *supra* note 18, at 79.

[26] Id.

[27] Dougherty, *supra* note 10, at 135, n. 30 (quoting WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 91 (1st ed. 1765) (internal punctuation omitted)).

[28] Id. (citing Sturges v. Crowninshield, 17 U.S. 122, 202-03 (1819)).

[29] United States v. Kirby, 74 U.S. 482 (1868).

[30] Id. at 483.

[31] Id. at 484.

[32] Id.

[33] Id. at 487.

[34] Id. (internal punctuation omitted).

who breaks prison shall be guilty of felony, does not extend to a prisoner who breaks out when the prison is on fire."[35] To put it more eloquently, such a person "is not to be hanged because he would not stay to be burnt."[36]

In a more contemporary and entertaining example—one that brings to mind the saying about no good deed going unpunished—a defendant in Ohio found "a certain grey squirrel, which was apparently dislodged from its nest shortly after birth."[37] Playing the role of Good Samaritan, "[t]he defendant exercised control over the squirrel, providing nutrition and hydration[.]"[38] Due to her efforts, and "notwithstanding the low potential for survival, the squirrel, in fact, was habilitated and survived."[39]

Upon first taking the squirrel into her home, the defendant even "contacted the Division of Wildlife and inquired whether there were provisions for her to follow" such as obtaining a proper license for the squirrel.[40] The government bureaucrats "advised that she need follow no special procedures" and all was well and good for some time.[41] But eventually, the government changed its mind and course. It "filed a misdemeanor criminal complaint against defendant alleging that she did unlawfully have a game quadruped to wit; a squirrel in captivity[.]"[42]

Although the defendant was, strictly speaking, guilty under the unambiguous language of the statute, the court rejected the state's absurd attempt to convict her and brand her a criminal. The court wrote:

> Day after day there is an endless parade of people demonstrating incredible acts of culpability against others, even defenseless children. When a person appears before the court having demonstrated only affection for an orphaned animal and an incredible regard for life, that person should be rewarded. But a narrow mind begets obstinacy and obviously it is very difficult to persuade arbitrary bureaucrats of concepts beyond the scope of their understanding. . . .
>
> At a time when the state is struggling to find resources to educate our children and to make them intelligent, compassionate people involved in honest, life-enhancing pursuits, it is more than ironic that the state . . . would choose to allocate the resources of two uniformed officers to pursue a woman who demonstrates no moral culpability whatsoever. This court is not so foolhardy. Therefore . . . the case is dismissed forthwith.[43]

With those entertaining examples of the absurdity doctrine under our belt,[44] a final introductory topic is worth addressing: the categories of general versus specific

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[35] Id.
[36] Id. (internal punctuation omitted).
[37] Division of Wildlife v. Clifton, 692 N.E.2d 253, 254 (Ohio 1997).
[38] Id.
[39] Id.
[40] Id. at 257.
[41] Id.
[42] Id. at 254.
[43] Id. at 258-59.
[44] For additional cases applying the doctrine, and another workable definition of the doctrine itself, *see* Manning, *supra* note 18, at 2405-06, n. 70 and accompanying text.

absurdity. "[G]eneral absurdity is often readily apparent from the text of the statute itself. The specific facts of the case will play little, if any, role."[45] For example, "[a] statute that imposes a waiting period for filing an appeal rather than a time limit in which to file is absurd in all cases."[46] Instances of general absurdity are often caused by a simple and obvious legislative error when drafting the statute.[47]

The absurdity cases discussed thus far in this Article, however, were all examples of specific absurdity. The statutes that prohibit interfering with the mail, drawing blood in the streets, escaping from prison, and keeping game quadrupeds inside the home are generally reasonable.[48] However, prosecuting the sheriff who arrested the mail carrier on a murder warrant, the surgeon who opened the vein of a person in the street for medical purposes, the prisoner who escaped because the prison was on fire, or the Good Samaritan who took in the helpless infant squirrel are all absurd because of the specific facts of those cases.[49]

Legislatures have an incentive to correct statutes that suffer from general absurdity,[50] but they typically will not correct those statutes that create instances of specific absurdity. The reason the legislature won't amend such statutes—that is, statutes that lead to absurd outcomes only in specific cases—is that the statutes, as written, still have many proper applications and therefore serve a valid purpose.[51]

Consider the sex offender registry law discussed in the Introduction. The law requiring sex offender registration upon conviction for falsely imprisoning a minor still works well in most cases. Generally, an adult male who is convicted of taking another person's young child against the child's will, with the intent to sexually assault her, should be required to register as a sex offender.[52] This is true even if the defendant is convicted only of false imprisonment but not of sexual assault because, for example, someone or something intervened before he could commit his intended sex crime.[53]

On the other hand, sex offender registration is nonsensical in the case of a seventeen-year-old boy who takes another seventeen-year-old boy with him to collect a drug debt. Such action may be criminal, and arguably it should even be a felony, but it does not involve sex in any way[54] and should not require sex offender registration.

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[45] Jellum, *supra* note 9, at 933.

[46] Id. (discussing *Amalgamated Transit Union Local 1309 v. Laidlaw Transit Services, Inc.*, 435 F.3d 1140 (9th Cir. 2006)).

[47] *See* id. at 934 (citing Green v. Bock Laundry Mach. Co., 490 U.S. 504, 511-24 (1989) (addressing the absurd outcome when the clear language of the rule is applied literally, thus causing the court to replace the statute's use of "defendant" with "criminal defendant" to avoid the absurdity)).

[48] *See* id. at 935 (discussing the statute prohibiting "individuals from drawing blood in the streets").

[49] *See* id. ("[A] statute that prohibits individuals from drawing blood in the streets is not absurd until applied to a doctor offering medical care.").

[50] *See* id. at 937.

[51] *See* id. at 935 ("[T]he statute as generally applied does exactly what Congress intended the statute to do.").

[52] State v. Smith, 780 N.W.2d 90, 105 (Wis. 2010) ("[I]n the large majority of cases where people kidnap or unlawfully imprison other people's children, the children either are sexually assaulted or are in danger of sexual assault.") (citing People v. Knox, 903 N.E.2d 1149, 1154 (N.Y. 2009)).

[53] Id. at 103 (A "person who falsely imprisons a minor with the purpose to commit a sexual assault" should not escape sex offender registration just because "the assault is thwarted").

[54] Id. at 106 ("[T]he State, the circuit court, the court of appeals, and [the state supreme court] all agree that there is no allegation that the false imprisonment entailed anything sexual").

The legislature has no incentive to change such laws that, like the sex offender registration statute, produce absurd outcomes only in specific cases. Consequently, "it is precisely when statutes are specifically absurd that judicial intervention is most needed."[55] This Article, therefore, is concerned only with instances of specific absurdity and, even more narrowly, *specific absurdity in criminal cases*. Unfortunately, as the next Part explains, the absurdity doctrine often fails to protect defendants from absurd outcomes in such cases.

II. UNJUSTIFIED: THE OBSESSION WITH LEGISLATIVE INTENT

When the absurdity doctrine fails to prevent absurd results,[56] it often fails because, when applying the doctrine, courts begin by attempting to divine the legislative intent behind the statute. That is, "[r]esolving specific absurdity often requires a judge to determine whether excepting the situation before the court will . . . *be consistent with the legislature's intent*."[57]

This approach is helpful in cases of general absurdity and sometimes even in cases of specific absurdity. And it would certainly be sufficient for a defendant to show that violating the legislature's intent renders a given application of a statute absurd. However, when a defendant invokes the doctrine against the government, demonstrating that the legislature's intent has been violated is a sufficient, but certainly not necessary, condition for finding absurdity.

Asking whether the legislature intended a particular result—the result that is alleged to be absurd—is often the wrong question. There are at least two reasons for this. First, attempting to divine legislative intent is, in many cases, pure folly. And second, even when a proxy for legislative intent is available, the absurdity doctrine often requires courts to undermine, rather than comply with, the legislature's intent.

A. *The Folly of the Inquiry*

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[55] Jellum, *supra* note 9, at 919.

[56] *See, e.g.*, People v. Munoz, 252 Cal. Rptr. 3d 456, 473 (Ct. App.) (denying defendant relief despite the absurdity that under the statutes "an attempted murderer could be punished with a sentence lengthier than that conceivably imposed on a murderer"); Braine v. State, 255 So. 3d 470, 472 (Fla. Ct. App.) (denying defendant relief despite the absurdity that the statute "rewards an escalation in felonious conduct and punishes those demonstrating improved behavior"); State v. Matthews, 933 N.W.2d 152 (Wis. Ct. App. 2019) (denying defendant relief despite the absurdity of the statutes making it a misdemeanor to have sex with a seventeen-year-old but a *felony* to remove one's clothing before doing so).

[57] Jellum, *supra* note 9, at 935 (emphasis added); *see also* Dougherty, *supra* note 10, at 136 ("Courts often justify the [absurdity] principle in terms of legislative intent"); Gold, *supra* note 18, at 30 ("A requirement that all readers would agree Congress could not have intended the statute to apply to the matter in dispute . . . should limit the potential for misuse" of the doctrine); *Munoz*, 252 Cal. Rptr. 3d at 474 ("[T]o justify departing from a literal reading of a clearly worded statute, the results produced must be so unreasonable that the Legislature could not have intended them."); State v. Kremmin, 889 N.W.2d 318, 320 (Minn. Ct. App. 2017) ("Absurdity will not override the plain meaning of an unambiguous statute except in an exceedingly rare case in which the plain meaning of the statute utterly confounds the clear legislative purpose of the statute."); State v. Matthews, 933 N.W.2d 152, 159 (Wis. Ct. App. 2019) ("[T]he doctrine is applicable only when it is clear that the legislature could not have intended the plain language to lead to such absurd results.").

Legislative intent is, in many cases, an elusive concept, thus making any attempt to divine it a fool's errand. Unlike the situation where the legislature obviously intended to impose a time limit for filing an appeal but accidentally imposed a waiting period instead[58]—an example of general absurdity—most laws are not enacted pursuant to such clear and obvious objectives. Rather, "the legislative process is full of compromises and legislative jockeying" among the individual legislators.[59] A statute's language may even be "deliberately imprecise to accommodate political interests. Careful draftsmanship is all too often absent."[60]

The consequence of this messy process is that "a legislative body cannot, in every instance, be counted on to have said what it meant or to have meant what it said."[61] This is especially true with regard to state legislatures, as opposed to the United States Congress.[62] Therefore, trying to divine a uniform mental state of a group of individuals with diverse and often conflicting objectives is, in its own right, an exercise in absurdity. Instead, one would do better to follow the old aphorism about laws and sausages: "you should never watch either one being made."[63]

Even in cases where there *might* be such a thing as a uniform legislative intent, most courts have no idea how to look for it. For example, in one absurdity case, the court began its analysis by declaring that it must divine the legislature's intent.[64] This, of course, would require the court "to look to extratextual sources both to confirm that the absurd meaning was not intended and to identify the intended meaning."[65] Yet the court did no such thing. Instead, it simply conducted a double jeopardy analysis, even though the defendant did not pursue such a challenge.[66] The court then declared that, because the charges did not violate double jeopardy, there was no absurdity; the court therefore denied the defendant's appeal.[67]

Perhaps because of the skill and effort required for a true legislative-intent analysis, some courts will adopt an overly simplistic rule of thumb: the court "must presume that a legislature says in a statute what it means and means in a statute what it says[.]"[68] Those courts then apply the plain language of the statute to the facts of the case

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[58] *See* Amalgamated Transit Union Local 1309 v. Laidlaw Transit Services, Inc., 435 F.3d 1140 (9th Cir. 2006)).

[59] Jellum, *supra* note 9, at 922. For more details about the ugliness of the lawmaking process, which has long been analogized to the unattractive sausage-making process, *see* Manning, *supra* note 18, at 2409-19.

[60] Jellum, *supra* note 9, at 922, n. 28 (quoting John M. Walker, Jr., *Judicial Tendencies in Statutory Construction: Differing Views on the Role of the Judge*, 58 N.Y.U. ANN. SURV. AM. L. 203, 204 (2001) (internal punctuation omitted or modified)).

[61] Bakke v. Dept. of Natural Resources, 897 N.W.2d 522, 536 (Iowa, 2017).

[62] Id. at 537 (state legislatures "generally meet on a part-time basis. They do not generally employ the mechanisms of extensive public hearings, markups, and staff review" and "legislation may be passed without a full linguistic vetting.").

[63] JoAnn Alumbaugh, *If Only Laws Were Made More Like Sausages*, DAIRY HERD MANAGEMENT (Dec. 5, 2017) (defending the sausage-making process in the unfair comparison to lawmaking), at https://www.dairyherd.com/article/if-only-laws-were-made-more-sausages.

[64] State v. Matthews, 933 N.W.2d 152, 158-59 (Wis. Ct. App. 2019).

[65] Jellum, *supra* note 9, at 922-23.

[66] *Matthews*, 933 N.W.2d at 158.

[67] Id.

[68] Id. at 159.

before it and, if the facts technically fit within the statutory language, refuse to find any absurdity.[69]

The obvious problem with these two approaches is that they badly miss the point. Determining whether two charges violate double jeopardy or whether statutory language technically fits the facts of a particular case are important exercises. However, they reveal absolutely nothing about whether the application of the statute or statutes to the facts produces *an absurd outcome*. That, after all, is the purpose of the absurdity doctrine.[70]

Another reason that legislative intent is usually irrelevant in cases of specific absurdity is that the situation before the court was simply unimaginable at the time the legislature drafted the statute.[71] The legislature, therefore, never even had any intent that judges could later attempt to divine.[72] The reason is that legislatures draft laws over-inclusively.[73]

For example, consider a typical disorderly conduct criminal statute: "Whoever, in a public or private place, engages in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct under circumstances in which the conduct tends to cause or provoke a disturbance is guilty of a Class B misdemeanor."[74] The statute is so broad that it even reaches inside the defendant's home and criminalizes six categories of conduct, some of which—such as "indecent," "profane," and "boisterous," which is not to be confused with "unreasonably loud"—are incredibly vague and subject to prosecutorial whims. The statute even criminalizes "otherwise disorderly conduct," whatever that is. Worse yet, and as prosecutors often argue to juries to win guilty verdicts, the conduct doesn't even need to cause an *actual* disturbance; rather, it merely has to "tend[] to cause" a disturbance.[75]

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[69] Id. at 160 (finding that the defendant's alleged acts fell within the applicable statutes and, therefore, refused to find absurdity "under circumstances such as these.").

[70] Dougherty, *supra* note 10, at 138 ("In *Kirby*, the Court enunciated a strong presumption about *outcome considerations*. The Court did *not* attempt to justify the presumption in terms of actual *legislative intent*.") (emphasis added).

[71] *See* Brakke v. Dept. of Natural Resources, 897 N.W.2d 522, 534 (Iowa 2017) (discussing the application of the absurdity doctrine and the "inherent limit of the legislative process to foresee various applications of a statute").

[72] *See* Gold, *supra* note 18, at 29 ("The nature of the legislative process raises serious doubts about the verifiability, and *even existence*, of a subjective legislative intent") (emphasis added). In these situations, a court may shift the goalposts a short distance by focusing on "the statute's substantive goals" or the "statutory purposes" which are arguably different than legislative intent. Glen Staszewski, *Avoiding Absurdity*, 81 IND. L.J. 1001, 1049 (2006).

[73] *See* Jellum, *supra* note 9, at 922.

[74] WIS. STAT. § 947.01 (1) (2017-18). Other states' statutes are similar. For example, a very unwieldy Texas statute prohibits, under certain circumstances, "abusive, indecent, profane, or vulgar language," "offensive gesture or display," and "unreasonable noise." The statute then becomes oddly, and perhaps overly, technical in its prohibitions: one is guilty of disorderly conduct if one "exposes his anus or genitals in a public place and is reckless about whether another may be present who will be offended or alarmed by his act[.]" TEX. STAT. § 42.01 (2020).

[75] Prosecutors typically tack a disorderly conduct charge on to virtually all criminal complaints, regardless of the underlying act or charges. Because each charge technically includes an element the other does not, courts hold that such charge-stacking does not violate double jeopardy. *See* State v. Henning, 681 N.W.2d 871 (Wis. 2004) (discussing the "elements-only" test which allows charge-stacking as long as each charged crime "requires proof of a fact which the other does not."). With an extra charge, prosecutors have leverage in plea bargaining. *See* Mark Godsey, *Prosecutors, Charge Stacking, and Plea Deals*, WRONGFUL

When drafting this statute, the legislature could not have envisioned all of the situations to which it might be applied. Instead, the legislature simply handed prosecutors a blank check, presumably (or at least hopefully) trusting them not to use the statute in ways that produce absurd outcomes. And this raises an interesting question: Who is more absurd, the legislature for issuing the blank check in the first place, or a prosecutor when he or she writes in an absurd number and attempts to cash it?

Consider, for example, a disorderly conduct case where a Wisconsin lawyer went to a state mental health hospital, during regular visiting hours, to see his client who had retained him "to try to effect her release from that institution."[76] The lawyer was denied access to the client for reasons that were unknown or, at best, speculative.[77] One of the male nurses even "testified that he really did not know exactly why everyone wanted the [lawyer] to leave the ward[.]"[78]

The lawyer objected to being singled out and "insisted he had the right to remain and visit with his client."[79] When his objection fell on deaf ears, he "peaceably left the premises[.]"[80] The lawyer's right to equal treatment and the client-patient's right of access to counsel were apparently of little interest to prosecutor, who later criminally charged the lawyer for otherwise disorderly conduct[81] that tends to cause a disturbance (as the disturbance was merely possible, hypothetical, and imaginary).[82]

Assume that the above lawyer-defendant had challenged his prosecution on the grounds of absurdity. Just as it was absurd to prosecute the sheriff for interfering with the delivery of the mail for arresting the mail carrier, it is also absurd to prosecute a lawyer for insisting on seeing his client at a state institution during regular visiting hours simply because his continued presence *might*, for reasons unknown, cause other patients to be disturbed in some unspecified way.

If a court were to apply the absurdity doctrine in this case, should the court really attempt to divine legislative intent? Neither the legislature nor even a single legislator would have ever dreamed of the factual situation before the court. There is simply no legislative intent to divine. Instead, the relevant question is whether the prosecutor's use of the statue, under the set of facts before the court, leads to an absurd result.

CONVICTIONS BLOG (June 12, 2015) (Charge stacking "has become absolutely standard practice."). If all else fails for the state and the case goes to trial with weak evidence of guilt, the prosecutor can still salvage a conviction on disorderly conduct by arguing that the defendant's behavior, even if it didn't cause an actual disturbance, "tends to" do so which is sufficient for conviction. WIS. STAT. § 947.01 (1) (2017-18).

[76] State v. Eson, 208 N.W.2d 363, 367 (1973).

[77] Id. at 368 ("On the visit involved here, the hospital aide in charge of signing in visitors, Eleanor Lynch, told the defendant that he could not be allowed to visit and that the hospital administration had a new rule which forbade *his* presence on the ward, *she thought*, because his presence had been agitating to the patients *in the past*.") (emphasis added).

[78] Id.

[79] Id.

[80] Id. at 372 (Heffernan, J., dissenting).

[81] Id. at 367 ("[T]here are no facts alleged, it would seem, from which it could be inferred that the [lawyer's] conduct was boisterous or that it was violent, abusive, indecent, profane, or unreasonably loud.") (internal punctuation omitted).

[82] Id. at 368 ("Gallagher . . . knew by the gathering of five or six patients within the immediate area that it would be better if the defendant's presence were removed. He stated that some of the patients have been known to blow up when they get excited. When one patient blows or gets high, then more patients go along with it and before long it's out of hand.") (internal punctuation omitted).

Although the real-life lawyer-defendant in the above case did not raise an absurdity defense, one of the dissenters on the court essentially conducted the proper analysis, though without formally invoking the absurdity doctrine. The dissenter first observed that the statute is incredibly broad, and therefore a prosecutor could use it legally or illegally, depending on the facts of a particular case.

> [T]he majority has given an unconstitutional gloss to a statute that under a restricted view would be constitutional. The facts alleged in the complaint do not fall squarely within the prohibition of the statute, and the interpretation which the court has given to "otherwise disorderly" shows that the statute is vague and subject to almost any interpretation that a complainant or a court wishes to put upon it.[83]

In other words, we're not dealing with general absurdity, but rather specific absurdity. Further, under the absurdity doctrine, it is the outcome of the case, not an imaginary legislative intent when drafting the disorderly conduct statute, which should be the relevant point of inquiry. Once again, the dissent's analysis, though conducted under the rubric of a different legal theory, is insightful.

> It appears . . . that the issuance of a complaint and warrant after the defendant peaceably left the premises raises grave questions of abuse of the criminal processes. The record as a whole reveals that [the lawyer-defendant] was concerned about the proper treatment and civil liberties of inmates at the institution. The record shows that he alone was singled out, by a patently illegal rule that denied certain rights of access to patients. It would appear . . . that this prosecution was instituted not because of what [the lawyer-defendant] had done, but because of who he was—a lawyer who considered it his duty to protect his clients in the face of official arrogance, a thorn in the side of the hospital authorities. The record shows pique not at what [the lawyer-defendant] did . . . but at his course of conduct that had irritated the authorities to the extent that they denominated him, as the complaint reveals, an "undesirable person."[84]

In fact, the dissent's lambasting of the government and its various agents is reminiscent of the judge's lambasting of the prosecution in the previously-discussed squirrel case.[85] In that case, instead of opining about a perceived, imaginary, or non-existent legislative intent, the court simply condemned the government's unfair, unjust, and even ignorant decision to prosecute the Good Samaritan defendant with a broadly worded statute.[86]

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[83] Id. at 372 (Heffernan, J., dissenting).
[84] Id.
[85] *See* Division of Wildlife v. Clifton, 692 N.E.2d 253, 258-59 (Ohio 1997).
[86] Id. ("At a time when the state is struggling to find resources to educate our children and to make them intelligent, compassionate people involved in honest, life-enhancing pursuits, it is more than ironic that the state . . . would choose to allocate the resources of two uniformed officers to pursue a woman who demonstrates no moral culpability whatsoever.").

The above disorderly conduct case and the previous squirrel case demonstrate that, in many instances of specific absurdity, legislative intent simply never existed in the first place and, therefore, is not a proper subject of judicial inquiry.

B. *Contradicting the Legislature*

To continue with a topic briefly introduced in the last section, courts have developed a practical construct, or proxy, to stand in for legislative intent: the plain language of the statute.[87] "The purpose of statutory interpretation is to discern the intent of the legislature, and we consider first the language of the statute . . . and do not look beyond it to ascertain its meaning."[88] Alternatively stated, "[w]hen the words of a statute are unambiguous, then, the first canon of judicial construction is also the last: the judicial inquiry is complete."[89]

But in cases of specific absurdity, the statute usually *is* unambiguous. It is the application of that unambiguous language to a particular fact pattern that creates the absurdity. And in those cases, the absurdity doctrine requires a court to *undermine*, rather than follow, the legislature's intent (or, more accurately, the legislative-intent proxy).

For example, a Georgia statutory scheme criminalizing child molestation was unambiguous: it prohibited sexual conduct "perpetrated on a child under the age of 16" and defined a child "as a legitimate descendant" of the perpetrator.[90] Given that clear language, one defendant appealed his conviction, arguing that the statute did not apply to him because the alleged victim in his case was not his "legitimate descendant."[91] The defendant was correct, of course, as the statute defining the word child was clear. Therefore, the plain-language proxy for legislative intent leads to this inescapable conclusion: the legislature did not intend for the statute to apply to that particular defendant's set of facts as the child in his case was not his legitimate descendant.

Nonetheless, the court used the absurdity doctrine to undermine—rather than comply with—that clear legislative intent:

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[87] *See* Manning, *supra* note 18, at 2398 (discussing the "plain meaning presumption" as an "evidentiary rule of thumb").

[88] State v. Orlik, 595 N.W.2d 468, 474 (Wis. Ct. App. 1999) (citing State v. Setagord, 565 N.W.2d 506, 509 (Wis. 1997)). This is merely a proxy or stand-in for legislative intent, particularly with regard to state legislatures. *See* Bakke v. Dept. of Natural Resources, 897 N.W.2d 522, 537 (Iowa, 2017) (discussing the sloppiness of the state legislative process).

[89] State v. Matthews, 933 N.W.2d 152, 159 (Wis. Ct. App. 2019) (quoting Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992) (internal punctuation omitted)). *See also* Gold, *supra* note 18, at 26 ("If the statute is unambiguous, searching behind the statutory language for the actual intentions of the legislators is unnecessary."); Commonwealth v. Raban, 85 A.3d 467, 469 (Penn. 2014) ("The best indication of [legislative] intent is the plain language of the statute"); Braine v. State, 255 So. 3d 470, 471 (Fla. Ct. App. 2018) ("The first place we look when construing a statute is to its plain language—if the statute is clear . . . we look no further."); Holland v. Dist. Court, 831 F.2d 940, 943 (10th Cir. 1987) ("What a legislature says in the text of a statute is considered the best evidence of legislative intent or will.").

[90] Staley v. State, 672 S.E.2d 615, 615 (Ga. 2009).

[91] Id.

> It is the duty of the court to consider the *results and consequences* of any proposed construction and not so construe a statute as will result in unreasonable or absurd consequences . . .
>
> From this perspective, it is obvious that the most reasonable interpretation of the statute, and the only one that does not result in unreasonable or absurd consequences, is that these statutes criminalize the acts . . . when perpetrated on *any* child under the age of 16, not just the legitimate descendants of the offender. To rule otherwise would lead to the absurd result of de-criminalizing the molestation of a step-child, an illegitimate child, or any other child who was not the "legitimate descendant" of a defendant.[92]

Similarly, in *Holy Trinity v. United States*, Congress passed a crystal clear law that "it shall be unlawful . . . to . . . in any way assist or encourage the importation or migration, of any . . . foreigner . . . into the United States . . . to perform labor or service of any kind[.]" [93] The statute did, however, make very specific exceptions for "professional actors, artists, lecturers, singers, and domestic servants," which further "strengthens the idea that every other kind of labor and service was intended to be reached by the first section" of the statute and, consequently, its importation into the United States was prohibited.[94]

Despite the unambiguous language and, therefore, the legislature's clear intent to prevent foreign workers (save for certain performance artists and servants) from coming to the United States, the Court actually permitted the importation of a pastor from England.[95] How could it do so given the legislative-intent proxy to the contrary? Quite simply, it violated the legislature's intent in order to avoid "the absurd results which follow from giving such broad meaning to the words"—specifically, "labor or service of any kind" which, the Court believed, should not include pastoral services.[96]

As these cases demonstrate, "avoiding absurd results may not implement, but instead may *undermine*, the only relevant expression of legislative intent."[97] But that doesn't mean the courts will admit what they are doing. When violating the legislature's intent, courts may go to great lengths to try to convince us they are *not* doing the very thing they are obviously doing.

For example, in the above Georgia case the court rewrote "legitimate descendant" as "any child"; however, instead of admitting what it was doing, it actually declared that it was complying with, and not contradicting, legislative intent.[98] Of course, rewriting the plain language of a statute is, by definition, contradicting the legislature.

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[92] Id. at 616 (emphasis added). For a similar holding where the court rewrote, and expanded, the statute defining "sexual contact" to prevent the defendant from escaping conviction, *see* State v. Bariteau, 884 N.W.2d 169 (S.D. 2016).
[93] Holy Trinity v. United States, 143 U.S. 457, 458 (1892).
[94] Id. at 458-59.
[95] Id. 459.
[96] Id.
[97] Manning, *supra* note 18, at 2395 (emphasis added).
[98] Staley v. State, 672 S.E.2d 615, 616 (Ga. 2009) (Applying the statutory language as written, the court held, "was not the intention of the legislature and we eschew such a construction of these statutes.").

Even the Supreme Court is not immune from self-delusion. In the above case, the Court acknowledged that Congress's refusal to include "pastor" in its list of exceptions to the statute was powerful evidence of legislative intent.[99] Despite that, the Court nonetheless declared that its statutory rewrite "is *not* the substitution of the will of the judge for that of the legislator[.]"[100]

The lesson in these two cases is reader beware. When a court struggles mightily to convince us that it is acting consistent with the legislature's intent, there is a good chance it is actually undermining it.

On the other hand, some courts respect language, logic, and truth. They won't try to hoodwink us by pointing to a blue sky and telling us it's red. Instead, they are clear about what they are actually doing. In *Kirby*, the case where the sheriff was charged for arresting a mail carrier during his mail route, the Court applied the absurdity doctrine. But instead of trying to convince us that it was acting consistent with the legislature's intent, the Court admitted that "no intention to extend such exemption" for the sheriff's conduct "should be attributed to Congress unless clearly manifested by its language."[101] In other words, *Kirby* "enunciated a strong presumption about *outcome considerations*. The Court did not attempt to justify the presumption in terms of actual legislative intent."[102]

III. OUTCOME-FOCUSED "RULE OF LAW" VALUES

As demonstrated above, legislative intent could be irrelevant to an absurdity analysis, and it might even be at odds with the absurdity doctrine. Given this, the proper focus for courts is not the legislature, but simply whether the application of the criminal statute to a given set of facts produces an absurd, and therefore unacceptable, outcome.[103] And because many criminal statutes are incredibly broad:

> [T]here will always be cases that may fit within the ordinary meaning of the text of a statute and to which the statute *should not apply*. Consequently, it is precisely in these cases that a court should step in and

[99] Holy Trinity v. United States, 143 U.S. 457, 459 (The Court admitted that "there is great force to this reasoning").

[100] Id. (emphasis added).

[101] United States v. Kirby, 74 U.S. 482, 486 (1868).

[102] Dougherty, *supra* note 10, at 138 (citing United States v. Kirby, 74 U.S. 482, 487 (1968) (emphasis added)). The *Kirby* court added that we can avoid absurd consequences by "presum[ing] that the legislature intended [unspecified] exceptions to its language, which would avoid results of this character." *Kirby*, 74 U.S. at 486-87. Alternatively stated, "[g]iven the lack of clairvoyance of human actors, there is no way to avoid all possibility of absurd applications, no matter how carefully a statute is drafted." Gold, *supra* note 18, at 73. Therefore, courts must "alleviate the inevitable absurdities that would otherwise result from the application of general rules to unforeseen circumstances as a normal function of the interpretive process." Staszewski, *supra* note 72, at 1012.

[103] In some ways, this is analogous to the nullification approach to the absurdity doctrine advocated by some Federal agencies when interpreting Federal law. *See* D. Wiley Barker, *The Absurd Results Doctrine, Chevron, and Climate Change*, 26 BYU J. PUB. L. 73, 84 (2012) ("The nullification approach proposes that where a literal reading of the statute would produce absurd results, the agency may nullify the express terms of the statute and replace them with its own language to achieve what the agency perceives as a more acceptable result. This best represents the EPA's current approach . . .").

> correct the resulting injustice even though stepping in to resolve cases of specific absurdity violates textualist principles.[104]

Those of us in the trenches of criminal defense are amused by law professors' concern with labels such as "textualist," along with their reverence for such doctrines.[105] The reality is that many courts, especially our trial courts, "have a long history of acting as a 'superlegislature' and ignoring—and even contradicting—the Legislature's words when doing so benefits the state."[106] Or, as the great American writer Ambrose Bierce realized more than a century ago, "a previous decision, rule or practice . . . has whatever force and authority a Judge may choose to give it, thereby greatly simplifying his task of doing as he pleases."[107]

Nonetheless, modern academics do have a point. It is true that in some circumstances—particularly when applying the absurdity doctrine would benefit the defendant—appellate courts are more reluctant to undermine legislative intent for fear of being labeled as activist judges or otherwise offending the legislature.[108] These courts have therefore created two tricks to deploy alongside the absurdity doctrine.

First, some courts will conveniently presume the legislature would never have intended any absurd result; therefore, the court can now claim it is *not* violating the legislature's intent when invoking the absurdity doctrine to override the statute's plain language.[109] This sleight-of-hand allows judges to conclude that the doctrine "demonstrates a *respect for* the coequal Legislative Branch, which we assume would not act in an absurd way."[110] In other words, "[t]he absurd result principle, allowing judges to ignore or rewrite the words of the legislature, has traditionally been regarded as a threat to legislative supremacy. This 'implicit legislative intent' justification defused that threat—or at least seemed to."[111]

Second, in a similar vein, other courts will conclude that an unambiguous statute is actually ambiguous. One court explained that "we have sometimes utilized a circular work-around in which we declare that if the statute produces absurd results, it must be 'ambiguous.'"[112] If it is ambiguous, of course, then the court is not bound by its plain language, and therefore is not violating legislative intent. "But it is doubtful that a clear

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[104] Jellum, *supra* note 9, at 935-36 (emphasis added).

[105] *See supra* note 18.

[106] Michael D. Cicchini, *Wisconsin Courts as "Superlegislatures"*, WIS. L.J. (Oct. 31, 2016) (providing three examples of how courts disregard the plain language of statutes when doing so benefits the state), at https://wislawjournal.com/2016/10/31/critics-corner-wisconsin-courts-as-superlegislatures/. Violating legislative intent to the detriment of a defendant is just one such example of judicial misbehavior. *See* Adam J. Kolber, *Supreme Judicial Bullshit*, 50 ARIZ. ST. L.J. 141 (2018).

[107] Ambrose Bierce, DEVIL'S DICTIONARY, *precedent* (1911), at https://www.gutenberg.org/files/972/972-h/972-h.htm#link2H_4_0018.

[108] Gold, *supra* note 18, at 81 ("Textualists in particular are nervous about rewriting what appears to be an unambiguous statutory text.").

[109] *See* Dougherty, *supra* note 10, at 132.

[110] Pub. Citizen v. U.S. Dept. of Justice, 491 U.S. 440, 470 (1989) (emphasis added); *see also* Gold, *supra* note 18, at 64 ("This article proposes a different solution for absurd results: a clear statutory text is not actually disregarded when the absurdity doctrine is applied. Instead, the absurdity doctrine is triggered by those highly unusual situations in which a presumed legislative intent is in conflict with a 'literal' application of statutory language.").

[111] Dougherty, *supra* note 10, at 130.

[112] Brakke v. Dept. of Natural Resources, 897 N.W.2d 522, 538 (Iowa 2017).

text is really transformed into an ambiguous one solely based on the consequences of its application."[113] Given this, one court confessed:

> In cases where we employ circular ambiguity, we are really applying the true absurdity doctrine, namely, overriding the text of a statute to avoid an intolerable result, just as the United States Supreme Court did in *Kirby*, *Holy Trinity*, and *Public Citizen*, and just as many other state courts have done over the decades.[114]

Courts need not hide from "applying the true absurdity doctrine." In fact, courts should proudly jettison their often misplaced legislative-intent inquiries as a prerequisite for finding absurdity. Courts need not depend on, or worry about, the legislature. "The effort to attribute the [absurdity] principle's authority to the legislature seems to involve more fiction than fact."[115] The reason is that "the absurdity doctrine ultimately lacks justification in terms of legislative intent[.]"[116] "Rather, the [absurdity doctrine] stands on its own. Its authority derives from its pedigree and, more fundamentally, from common sense."[117]

In other words, when applying the absurdity doctrine, judges are "actually responding to some other authority entirely, either their own or an authority inhering in neither the judiciary nor the legislature. . . . [I]t is that authority, and *not the authority of the legislature*, that legitimizes the principle."[118] More specifically:

> The term absurd represents a collection of values, best understood when grouped under the headings of *reasonableness, rationality, and common sense*. Based on those values, courts reject certain outcomes as unacceptable, thereby rejecting the literal interpretations of statutes when they would result in those outcomes. . . . [T]hose values represented by the term absurd accordingly act as a *pervasive check on statutory law, and*

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[113] Id.

[114] Id. *See also* Laura R. Dove, *Absurdity in Disguise: How Courts Create Statutory Ambiguity to Conceal Their Application of the Absurdity Doctrine*, 19 NEV. L.J. 741, 745 (2019) (By creating ambiguity out of plain language, "courts are able to achieve results virtually identical to those possible if a judge determined that a statute's meaning was plain and then proceeded to apply some version of the absurdity doctrine.").

[115] Dougherty, *supra* note 10, at 131.

[116] Manning, *supra* note 18, at 2434.

[117] Dougherty, *supra* note 10, at 138 (citing United States v. Kirby, 74 U.S. 482, 487 (1968)).

[118] Id. at 132 (emphasis added). *See also* Manning, *supra* note 18, at 2431-32 ("[T]he absurdity doctrine's legitimacy might rest on grounds other than legislative intent. . . . Put another way, when judges invoke the absurdity doctrine . . . one might ascribe their behavior to *judicial* power to 'enrich positive law with the moral values and practical concerns of civilized society,' even when such action requires displacing clear statutory outcomes.") (quoting United States v. Marshall, 908 F.2d 1312, 1335 (7th Cir. 1990) (Posner, J., dissenting)). Manning argues that such judicial power is not consistent with certain "inferences from the constitutional structure" and fails to respect "legislative supremacy[.]" Id. at 2392. But the absurdity doctrine actually protects against "disparate treatment" and "other undesirable consequences" of blindly applying statutory law, and, therefore, "it should not be confused with the 'arbitrary' exercise of official discretion that the constitutional structure was designed to prevent." Staszewski, *supra* note 72, at 1024.

> *are rooted in the rule of law*. The absurd result principle is both a surrogate for, and a representative of, rule of law values.[119]

The term "rule of law values" also refers to "predictability" and "the coherence of the legal system as a whole."[120] "Grounding the absurd result principle in the rule of law explains its presence throughout history and across legal systems, and its acceptance by people of widely varying . . . leanings."[121] The absurdity doctrine therefore "sets boundaries or conditions on legislative power."[122] Given this, it should be the courts' obligation to focus on *case outcomes* rather than undertaking their often badly misplaced legislative-intent inquiries.[123] By analogy to another aspect of criminal law:

> Even though we charge jurors to apply the test of common sense that we use in our every day lives, judges . . . often become lost in abstract thought and concepts, believing that they should apply statutes blindly. [A] court [must] take[] its obligation and its oath of office much more seriously.[124]

Put another way, "[t]here is little reason to have a sophisticated judiciary as a coequal branch of government if all that the judiciary is allowed to do is apply statutes blindly without considering the justice of the application."[125] The court's role, rather, is to protect the defendant from injustice, including the strict application of statutes that produce absurd and unjust outcomes. "To remove this power from judges would elevate the role of the legislature at the expense of the judiciary."[126]

Insisting that judges consider the absurdity and injustice of a given outcome is not too much to ask. First, the law already gives judges tremendous discretion in numerous contexts, including: (a) deciding whether the police had reasonable suspicion to stop a

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[119] Dougherty, *supra* note 10, at 133 (emphasis added). *See also* United States v. Kirby, 74 U.S. 482, 487 (1868) ("common sense" dictates that the statute "which punishes the obstruction or retarding of the passage of the mail . . . does not apply to a case of temporary detention of the mail caused by the arrest of the carrier upon an indictment for murder."). Manning, however, argues that the "strict separation of lawmaking from judging" is also a "rule-of-law objective," and this objective is actually violated when court's use the absurdity doctrine. Manning, *supra* note 18, at 2434-35. This claim has been ably refuted by Staszewski, who argues that the absurdity doctrine does not violate the separation of powers. *See* Staszewski, *supra* note 72, at 1012.

[120] Dougherty, *supra* note 10, at 133 (parenthetical omitted). This is important, as the very nature of the legislative process often produces a "statutory scheme or body of law" that "as a whole is not quite neat or coherent[.]" Dove, *supra* note 114, at 756. *See also* Part II.

[121] Dougherty, *supra* note 10, at 134.

[122] Id. at 164.

[123] Id. at 138 (citing United States v. Kirby, 74 U.S. 482, 486 (1868)); *see also* Dove, *supra* note 114, at 755 ("The absurdity doctrine is avowedly results-oriented.").

[124] Division of Wildlife v. Clifton, 692 N.E.2d 253, 257 (Ohio 1997).

[125] Jellum, *supra* note 9, at 936.

[126] Id. Others disagree with the coequal-branch-of-government doctrine and, instead, consider the legislature to be superior with the courts relegated to the role of "faithful agents." Manning, *supra* note 18, at 2389. For a response to this and Manning's other arguments, *see* Staszewski, *supra* note 72, at 1001 ("[W]hile American lawmakers have broad authority to regulate in the public interest, our constitutional republic also has a responsibility to avoid needless harm to the extent fairly possible. When courts interpret laws to avoid absurd results . . . they are justifiably seeking to serve the common good that legislation is presumed to embody[.]").

suspect, (b) deciding whether there is probable cause set forth in a complaint, (c) setting an amount for bail, (d) determining the admissibility of critical evidence at trial, and (e) imposing sentences upon conviction which could range, for example, from a mere fine to forty years of imprisonment.[127] Judges can similarly be trusted to determine when a given outcome is unjust or absurd—judged by the standards of predictability, coherence, reasonableness, rationality, and common sense—without worrying about whether the legislature would approve.[128]

Second, we *need* judges to fulfill this obligation now more than ever. As many of the cases cited in this Article have demonstrated, "prosecutorial discretion offer[s] no guarantee against the emergence of the truly absurd result."[129] Instead, prosecutors are usually the source of the absurdity. And while law professors may enjoy debating whether, for example, "[p]ublic and social choice theories theoretically normalize legislative outcomes that are 'merely' odd, anomalous, ill-conceived, illogical, not ideal, or even silly[,]" thus weighing against the use of the absurdity doctrine,[130] our lawmakers are churning out broad, irrational, life-ruining statutes for prosecutors to deploy.[131] Because legislatures are handing out blank checks to prosecutors, it is now, more than ever, that judges must exercise their power as a "coequal branch of government" to avoid absurd outcomes.[132] Judges must do more than merely "apply statutes blindly without considering the justice of the application."[133]

Consequently, when a judge has to dismiss a case because the statute, as applied to the facts, produces an absurd outcome, this is not too heavy of a burden for the judiciary to bear, nor is it an intrusion upon the legislature. Not only are judges "far better situated than the legislature to avoid problematic statutory applications as they arise," but doing so is also a judicial obligation "as part of the statutory bargain."[134]

IV. A NEW ABSURDITY DOCTRINE

Absurdity comes in so many variations that the doctrine defies the formulation of a precise rule or even a balancing test—two things that judges are used to seeing. "Cases

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[127] *See, e.g.*, WIS. STAT. § 948.02 (2) (2017-18) ("Whoever has sexual contact . . . with a person who has not attained the age of 16 years is guilty of a Class C felony"), and WIS. STAT. § 939.50 (3) (c) (2017-18) ("Penalties for felonies are as follows: For a Class C felony, a fine not to exceed $100,000 or imprisonment not to exceed 40 years, or both").

[128] Even "textualism" requires judges to use actual judgment, rather than merely applying the plain language of a statute. *See* Gold, *supra* note 18, at 32 ("Modem textualists contend that statutory language must be read in light of the reasonable understanding of the relevant linguistic community, given the circumstances in which the language was uttered.").

[129] Id. at 61-62.

[130] Dove, *supra* note 114, at 756 (citing Manning, *supra* note 18, at 2412-19 for a discussion of "social choice theory").

[131] One such example is the oppressive and irrational sex offender registry statute discussed in the Introduction. In another example from the same state, the legislature has become much more punitive. In the 1980s a class B felony—the most serious charge short of intentional homicide—was punishable by up to 20 years of imprisonment. *See* WIS. STAT. § 939.50(3)(b) (1985-86). Today, that class of crimes is punishable by up to 60 years of imprisonment, which would be an effective life sentence for nearly all adults. *See* WIS. STAT. § 939.50(3)(b) (2017-18).

[132] Jellum, *supra* note 9, at 936.

[133] Id.

[134] Staszewski, *supra* note 72, at 1052.

using or referring to the principle do not [even] define absurdity, nor do they specify the kinds of situations where the principle should be applied."[135] Rather, absurdity seems to fall into the "I know it when I see it" test that was famously articulated by Justice Potter Stewart.[136]

But the analysis is not a free-for-all. As the *Kirby* court illustrated, the proper focus of the absurdity doctrine is whether the application of a given law to a particular set of facts produces an absurd outcome.[137] In other words, "[t]he initial outcome offends us at some gut level; it offends our sense not only of fairness, but of rationality and common sense."[138] Or, as another court put it, the outcome of the case leads us to proclaim, "Oh my gosh, that can't be!"[139]

To reduce the absurdity doctrine to a motto, directive, or rule-of-thumb for use by a judge, one would do well to adopt the more direct and to-the-point inspirational mandate of the late Christopher Hitchens: "Never be a spectator of unfairness or stupidity."[140] This simple mandate embodies the values of predictability, coherence, reasonableness, rationality, and common sense. And, as the next section demonstrates, this mandate essentially drove the court's decision in the famous squirrel case.

A. *Game Quadrupeds and Poetry*

Recall from Part I the discussion of the squirrel case in which a woman found an abandoned, helpless baby squirrel, took it inside of her home, nursed it back to health, and even contacted the Division of Wildlife to ask whether she needed a special permit.[141] She was advised that "she need follow no special procedures."[142] She therefore "relied upon that to her detriment" and acted accordingly.[143]

As the court observed, "[a] citizen should be able to obtain competent advice from a state agency."[144] Nonetheless, the state later reversed course and charged the Good-Samaritan-turned-defendant with a crime for keeping a "game quadruped to wit; a squirrel[,]"[145] even though it was agreed that releasing the quadruped back into the wild would likely result in imminent "death for the squirrel."[146]

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[135] Dougherty, *supra* note 10, at 128.
[136] *See* Peter Lattman, *The Origins of Justice Stewart's "I Know It When I See It"*, WALL ST. JOURNAL (Sep. 27, 2007) (discussing the famous quotation from Jacobellis v. Ohio, 378 U.S. 184 (1964)), at https://blogs.wsj.com/law/2007/09/27/the-origins-of-justice-stewarts-i-know-it-when-i-see-it/. Similar tests have been used in other contexts as well. *See, e.g.*, Johnson v. United States, 529 U.S. 694, 718 (2000) (Scalia, J., dissenting) ("the acid test of whether a word can reasonably bear a particular meaning is whether you could use the word in that sense at a cocktail party without having people look at you funny.").
[137] Dougherty, *supra* note 10, at 138 (discussing the holding of Kirby and its focus on "outcome considerations" and not "actual legislative intent.").
[138] Id. at 151.
[139] Brakke v. Dept. of Natural Resources, 897 N.W.2d 522, 540 (Iowa 2017).
[140] Hitchens, *supra* note 1 at 140.
[141] Division of Wildlife v. Clifton, 692 N.E.2d 253, 257 (Ohio 1997).
[142] Id.
[143] Id.
[144] Id.
[145] Id. at 254.
[146] Id. at 258.

The prosecution of this case is offensive "at some gut level."[147] To apply the Hitchens Mandate, it is *unfair* and *stupid*. As discussed earlier, the court explained the unfairness by citing the defendant's good intentions—not only in helping the infant squirrel but also in attempting to comply with the law—and declaring that she "should be rewarded" rather than prosecuted.[148] The court also explained the stupidity of the prosecution, pointing to the wasted government resources that could be put to better use instead of pursuing "a woman who demonstrates no moral culpability whatsoever."[149]

The court then elaborated further on both the unfairness and stupidity of the prosecution: "Even a child could see that there is no justice or right in the position of the state."[150] More bluntly, the court even wrote that one of the state's arguments, advanced in its blind pursuit of conviction, amounted to "such undeniable idiocy that trying to argue against it nearly defies the capacity of the English language."[151]

Perhaps demonstrating of the difficulty of "trying to argue against" the state's irrational position, and certainly illustrating the flexibility of the absurdity doctrine, the court concluded its decision with prose.

> This opinion could have been reduced to a simple poem:
> The court hereby announces a pearl,
> It's sometimes OK to have a squirrel,
> The legislature did a statute create,
> The Wildlife Division obviously did not equate.
> The necessity to be kind, thorough, and specific,
> The lack of these is legally terrific.
> The result is this very short epistle,
> The defendant / squirrel is granted a dismissal.[152]

Not all authors, of course, are so artistically inclined, even when they are awarded true absurdities about which to write. Therefore, the next section will demonstrate a hypothetical application of the new absurdity doctrine, in a more conventional format, to the sex offender registry case discussed earlier.

B. *Sex Offender Registries and Hamburgers*

Recall from the Introduction the sex offender registry case where the defendant, a seventeen-year-old boy, was convicted of felony false imprisonment for taking another seventeen-year-old boy with him to collect a drug debt.[153] Then, very bizarrely, upon conviction of this non-sex crime the defendant was forced to register as a sex offender.[154] The court's decision focused on the supposed legislative intent behind the sex offender

[147] Dougherty, *supra* note 10, at 151.
[148] Division of Wildlife v. Clifton, 692 N.E.2d 253, 258-59 (Ohio 1997).
[149] Id.
[150] Id. at 258.
[151] Id.
[152] Id. at 259.
[153] State v. Smith, 780 N.W.2d 90 (Wis. 2010).
[154] Id. at 93-94.

registry statute,[155] along with the constitutional principles of due process and equal protection.[156] It then somehow upheld the registry requirement over the dissent of two justices.[157]

A good legislative-intent analysis certainly would have resulted in a win for the defendant. To apply a common legislative-intent inquiry framework, it is difficult to understand how an examination of "the mischief to be remedied" under a sex offender registry statute, combined with "the consequences" and "unreasonable[ness]" of making a non-sex-offender child register,[158] could possibly have produced the result reached by the court. But in addition, the case could also have been swiftly dispensed with via the absurdity doctrine, had the defendant raised such a challenge.[159] Applying the Hitchens Mandate articulated earlier—"never be a spectator of unfairness or stupidity"—here is how the case could have (and should have) been decided.

First, it is grossly *unfair* to make this defendant register as a sex offender. It is agreed by everyone—including the prosecutor, the crime victim, every judge at every level of the court system, and every other sentient being remotely connected with this case—that the defendant's actions were not motivated by sex and, further, had nothing to do with sex in any way, real or imaginary.[160] To make the child defendant register would be a heretofore unimagined and an incredibly blatant violation of the common sense principle that the punishment must fit the crime.

Because the defendant did nothing sexual in deed or even in thought, he should not have to face the stigmatization, harassment, and even physical assaults that come with sex-offender status, or the inevitable housing, employment, and other financial difficulties that flow from being branded a sex offender.[161] These so-called collateral consequences of sex offender registration are more oppressive than the felony conviction itself. To ruin the balance of this child defendant's life when he didn't commit a sex

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[155] Id. at 97-100.

[156] Id. at 96-97.

[157] Id. at 106 (Bradley, J., dissenting).

[158] These quotations represent two parts of the three-part legislative intent inquiry described in Commonwealth v. Raban, 85 A.3d 467, 469 (Penn. 2014) ("[W]e may apply several considerations to ascertain the legislative intent, including the mischief to be remedied, the former law, and the consequences of a particular interpretation. Moreover, we are to assume the legislature did not intend a result that is unreasonable [or] absurd").

[159] While both a straight legislative intent analysis and the application of the absurdity doctrine should have resulted in a decision favorable to the defendant, the proper application of other principles also should have done so. One such example is the use of "contextual analysis" when interpreting the proper scope of a statute. *See* Gold, *supra* note 18, at 67-69. In other cases, such as the prisoner escaping to avoid being burned in the fire, there may an affirmative defense, such as the doctrine of necessity, which could be used in lieu of the absurdity doctrine. Id. at 70. But while affirmative defenses are relevant for trial, as a practical matter they could be difficult to assert in a motion to dismiss. Civil practice, however, may permit such an approach when the facts supporting the defense are alleged in the complaint. *See, e.g.*, Tamayo v. Blagojevich, 526 F.3d 1074, 1086 (7th Cir. 2008) ("A plaintiff pleads himself out of court when it would be necessary to contradict the complaint in order to prevail on the merits. If the plaintiff voluntarily provides unnecessary facts in [the] complaint, the defendant may use those facts to demonstrate that [the plaintiff] is not entitled to relief."). For a lengthy discussion of other alternatives to the absurdity doctrine, *see* Manning, *supra* note 18, at 2454-85 and Staszewski, *supra* note 72, at 1055-64.

[160] State v. Smith, 780 N.W.2d 90, 106 (Wis. 2010) (Bradley, J., dissenting).

[161] *See* Erika Davis Frenzel, et al., *Understanding Collateral Consequences of Registry Laws: An Examination of the Perceptions of Sex Offender Registrants*, 11 JUSTICE POL'Y J. 1, 2 (2014).

crime or even have a sexual thought is more offensive than, say, sentencing a defendant to life in prison for misdemeanor theft.[162] Such irrationality must be condemned, rather than perpetrated, by the courts.

Second, to require this child to register as a sex offender is *stupid*, as it violates the very purpose of the registry. Numerous public databases—both governmental and private—already exist to identify criminals.[163] The purpose of a sex offender registry "is to protect the public *from sex offenders*."[164] This is inherent in the very concept of a sex offender registry. Yet the prosecutor denies this and instead advances an incoherent, unreasonable, and hyper-technical argument.

A philosopher's lesson exposes the folly of the prosecutor's position.[165] Assume I sit down in a restaurant and say, "Give me a hamburger, medium rare, with ketchup and mustard, but easy on the relish."[166] Then, suppose "that the hamburger is brought to me encased in a cubic yard of solid Lucite plastic so rigid that it takes a jack hammer to bust it open[.]"[167] Under the prosecutor's reasoning, my order would be fulfilled and I must pay. Why? Because I failed to inform the waiter that I wanted the burger delivered *not* encased in impenetrable plastic so that I could eat it.

The prosecutor's position is unreasonable, as it completely ignores "unstated background assumptions"[168]—specifically, that I am ordering a burger in a restaurant *because I intend to eat it*. "A myriad of unstated background assumptions . . . qualify literal meaning."[169] In our case, when applying the registry statute, some of the unstated background assumptions are that the defendant was convicted of a sex crime, was somehow motivated by sex, or committed some sexual act of some kind. Without at least one of these, the sex offender registry statute does not apply and the defendant need not, and must not, be subjected to its onerous requirements.

Forcing this defendant to register would not only be wrong, but it would also harm the community that the registry was designed to protect. "[T]he governmental purpose [of the registry] may be undermined by requiring non-sex offenders to register. When the registry is clogged by offenders who bear no meaningful relationship to [the registry's] purpose, the court undermines" the usefulness and effectiveness of the registry.[170]

Much like prosecuting the Good Samaritan in the squirrel case, forcing this defendant to register as a sex offender would be Kafkaesque. Additionally, much like prosecuting the Good Samaritan, forcing this defendant to register would be stupid. This entire case has been a waste of valuable public resources. The outcome advocated by the state would produce no imaginable benefits, would undermine the government's

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[162] *See* Erwin Chemerinsky, *Life in Prison for Shoplifting: Cruel and Unusual Punishment*, ABA HUM. RTS. (Jan. 1, 2004).

[163] *See, e.g.*, WIS. CIRCUIT COURT ACCESS, at https://wcca.wicourts.gov/case.html; MUGSHOTS.COM, at https://mugshots.com/.

[164] State v. Smith, 780 N.W.2d 90, 106 (Wis. 2010) (emphasis added) (Bradley, J., dissenting).

[165] *See* Gold, *supra* note 18, at 69 (discussing the philosopher John R. Searle's analogy and how some legal scholars argue that such "contextual analysis" might be used "as a substitute for the absurdity doctrine in some cases.").

[166] Id. (quoting John R. Searle, *Literal Meaning*, in EXPRESSION AND MEANING 117, 127 (1979)).

[167] Id. (quoting Searle, *supra* note 166, at 127).

[168] Id. at 68.

[169] Id. at 80.

[170] State v. Smith, 780 N.W.2d 90, 111 (Wis. 2010).

legitimate objectives, and would even harm the community that the registry is supposed to benefit. The court must not tolerate or perpetuate such unfairness and stupidity. The defendant is not subject to the registry.

V. NOT FOR GOVERNMENT CONSUMPTION

A variety of laws and procedural mechanisms—whether embodied in statutes, court decisions, or the Constitution—are intended to protect the citizenry from the government. However, the government inevitably erodes these protections over time. Consider the once formidable *Miranda v. Arizona*, designed to protect us from the intimidating and coercive nature of an in-custody police interrogation.[171] Since that landmark case was decided, our *Miranda* rights have been steadily eroded and all but buried in the Arizona desert.

More specifically, even when a suspect is incarcerated he might not be considered to be "in custody" and, therefore, might not be entitled to a reading of his *Miranda* rights before interrogation.[172] And in cases where the police *do* read the suspect his rights, courts have made it virtually impossible for the suspect to actually invoke those rights. For example:

> [W]hen a suspect in an interrogation told detectives to "just give me a lawyer dog," the Louisiana Supreme Court ruled that the suspect was, in fact, asking for a "lawyer dog," and not invoking his constitutional right to counsel. It's not clear how many lawyer dogs there are in Louisiana, and whether any would have been available to represent the human suspect in this case, other than to give the standard admonition in such circumstances to simply stop talking.[173]

This decision demonstrates that legislatures and prosecutors aren't the only government agents that generate absurd outcomes—the courts, unfortunately, are equally capable.

In other instances, the government not only erodes our rights but actually turns them against us. For example, in order to charge a defendant with a misdemeanor, a prosecutor must set forth probable cause in a complaint.[174] Not surprisingly, the defendant has greater protection against a felony charge,[175] as the prosecutor in most states must additionally demonstrate probable cause at a preliminary hearing.[176]

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[171] Miranda v. Arizona, 384 U.S. 436 (1966).

[172] Howes v. Fields, 565 U.S. 499 (2012) (Ginsburg, J. dissenting) (disagreeing with the majority's bizarre requirement of "custody within custody" before the police are required to read an imprisoned suspect his *Miranda* rights)).

[173] Tom Jackman, *The Suspect Told Police 'Give Me a Lawyer Dog.' The Court Says He Wasn't Asking for a Lawyer*, WASH. POST (Nov. 2, 2017), at https://www.washingtonpost.com/news/true-crime/wp/2017/11/02/the-suspect-told-police-give-me-a-lawyer-dog-the-court-says-he-wasnt-asking-for-a-lawyer/?noredirect=on.

[174] *See* Michael D. Cicchini, *Improvident Prosecutions*, 12 DREXEL L. REV. 465, 507 (2020).

[175] Id.

[176] Id.

Through a bizarre series of court decisions,[177] however, prosecutors in one state are now free to tack-on new felony charges without presenting any evidence at the preliminary hearing or even alleging any facts in the complaint.[178] "The conundrum is this: misdemeanor defendants [now] have *greater* protection against improvident prosecutions than do felony defendants. . . . Worse yet, prosecutors and courts have transformed the preliminary hearing from a safeguard *against* improvident prosecutions to a prosecutorial weapon for adding charges without probable cause."[179]

The point of this brief foray into lawyer dogs and preliminary hearings is to demonstrate that, in the context of criminal cases, the absurdity doctrine must protect the defendant *from the government*. Courts must *not* permit the government to use the absurdity doctrine as a prosecutorial weapon *against the defendant*.

One reason the absurdity doctrine is not for government consumption is that the government writes both the substantive and procedural criminal laws. It therefore has no basis to later complain that the outcomes produced by its own laws are absurd. Instead, the prosecutor is free to charge the defendant with a different statute or the legislature can simply amend the law prospectively. The government must not be allowed to use the absurdity doctrine to achieve an outcome that, even if more reasonable or arguably more "just," is inconsistent with the plain language of its own laws.

Additionally, when the government tries to argue that its own statutes are absurd—and then seeks to (a) broaden a criminal statute to encompass the defendant's behavior or (b) narrow an affirmative-defense statute to foreclose a trial defense—it violates fundamental principles such as due process, notice, the rule of lenity, and other notions of procedural fairness.

This phenomenon was on full display in the wrongly-decided Georgia case discussed earlier.[180] Recall that the incest-type statutes "criminalize[d] specific conduct perpetrated on a child under the age of 16" who is a "legitimate descendant" of the perpetrator.[181] When the defendant appealed because he was convicted of such acts against a child that was not his "legitimate descendent," the court decided it would be absurd to read the law literally.[182] To avoid "unreasonable or absurd consequences," it therefore rewrote "legitimate descendant" as "any child," thus upholding the defendant's conviction for a crime that didn't even exist in law.[183]

This is a gross misuse of the absurdity doctrine. While the defendant's conduct was wrong, it did not violate the criminal statutes used to prosecute him. The defendant therefore argued, correctly, that "he cannot constitutionally be convicted under these

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[177] Id. at 505-08. These pro-prosecutor, court-created doctrines are known as the "any felony test" and the "transactional-relation test."

[178] Id.

[179] Id. at 507-08.

[180] Staley v. State, 672 S.E.2d 615 (Ga. 2009).

[181] Id. at 615 (internal quotations omitted).

[182] Id. at 616.

[183] Id. Other cases have been similarly decided, as courts sometimes use the absurdity doctrine to contradict the plain language of a statute to the defendant's detriment. Courts seem willing to invoke this ends-justify-the-means approach when the defendant is charged with sex crimes. *See, e.g.*, State v. Bariteau, 884 N.W.2d 169, 179 (S.D. 2016) (Zinter, J., dissenting) ("[T]o sustain the conviction on the facts of this case, the majority changes the statutory definition from one prohibiting 'any touching of' genitals to one prohibiting 'any touching with' genitals.").

statutes[.]"[184] In rejecting the defendant's argument without any analysis whatsoever, the court completely ignored several important legal principles. An Indiana court explained, in a different absurdity case, the problem with the Georgia court's decision:

> Criminal statutes may not be enlarged beyond . . . the language used and may not be held to include offenses other than those clearly defined. . . .
>
> Equally compelling is the second principle underlying our narrow construction of criminal statutes—that they should give fair warning about what conduct they prohibit. This principle applies most often through the rule of lenity, which requires us to interpret *ambiguous* criminal statutes in the defendant's favor as far as the language can reasonably support. And it weighs even more heavily when the *plain meaning* is in the defendant's favor. How can a defendant have fair warning about criminal liability that has no basis in the law's plain meaning? Such a result would raise serious due-process concerns.[185]

Similarly, as an Iowa court observed in another case, "[w]e have engaged in a specific absurdity analysis . . . to narrow the scope of a statute that criminalized fraudulent practices in the context of public records."[186] In another case, the court used the absurdity doctrine to add a "prescription-drug defense" to a statutory scheme on "driver's license revocation[.]"[187] However, in refusing to invoke the absurdity doctrine at the state's request to *expand* government power, the court wrote:

> We also observe some of the features that may tend to support application of the absurdity doctrine are not present in this case. We note that the DNR asks us to expand, rather than retract, government power. . . . [W]e think it is a more difficult argument to make than when a [criminal] statute is narrowed. If the legislature wants to assert new regulatory powers over private landowners, it should do so expressly. Further, to the extent there are constitutional issues at stake here, they cut against a broad interpretation of the statute . . .[188]

Even outside the context of the absurdity doctrine, the Supreme Court of the United States has also recognized that constitutional concerns, including basic notice and fairness principles, mandate that criminal statutes be read narrowly. For example, public officials in New Jersey recently shut down morning commuter traffic in a political

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[184] *Staley*, 672 S.E.2d at 615.

[185] Calvin v. State, 87 N.E.3d 474, 478-79 (Ind. 2017) (internal punctuation and citation omitted). *See also* State v. Kremmin, 889 N.W.2d 318, 321 (Minn. Ct. App. 2017) ("[N]o citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed."); FLA. STAT § 775.021(1) (2014) (The criminal statutes "shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused.").

[186] Brakke v. Dept. of Natural Resources, 897 N.W.2d 522, 538 (Iowa 2017) (citing State v. Hoyman, 863 N.W.2d 1, 14 (Iowa 2015)).

[187] Id. at 538-39 (citing Bearinger v. Dept. of Transport., 844 N.W.2d 104, 106 (Iowa 2014)).

[188] Id. at 541.

scandal known as Bridge-Gate.[189] They used false pretenses for the shutdown and did so "for a political reason—to punish the mayor of Fort Lee for refusing to support the New Jersey Governor's reelection bid."[190] They were then charged with and convicted of "fraud on a federally funded program or entity" for the chaos and extra work they caused the employees of the Port Authority.[191] The Court, however, was unanimous:

> The evidence the jury heard no doubt shows wrongdoing—deception, corruption, abuse of power. But the federal fraud statutes at issue do not criminalize all such conduct. Under settled precedent, the officials could violate those laws only if an object of their dishonesty was to obtain the Port Authority's money or property.[192]

Consequently, because "the [Port Authority's] employees' labor was just the incidental cost . . . rather than itself an object of the officials' scheme[,]" the Court "reverse[d] the convictions."[193] This, of course, does not leave the government permanently without recourse. Even assuming the legislature had intended to criminalize this particular conduct but simply failed to do so, there are important individual liberties at stake; therefore, "rectifying that oversight is a legislative rather than judicial function."[194]

Likewise, in the context of the absurdity doctrine, a defendant's due process right to fair warning about which behavior the state criminalizes is paramount. This important notice doctrine must prevent the government from using the absurdity doctrine against a defendant—even in those rare cases where the government's proposed rewrite of the statute would avoid an unreasonable, or even absurd, result. Expanding the reach of a criminal statute "falls outside the doctrine's boundaries."[195] In such cases, "[r]egardless of whether [a court] can discern the legislature's reasons for writing the [criminal] statutes as it did, [a court] cannot rewrite—and certainly not broaden—them through the absurdity doctrine."[196]

CONCLUSION

The absurdity doctrine allows courts to disregard the plain language of a statute when its strict application would produce an absurd result—one where the "outcome offends us at some gut level; it offends our sense not only of fairness, but of rationality and common sense."[197]

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[189] *See* Kelly v. United States, 590 U.S. 1 (2020).
[190] Id. at 3.
[191] Id. at 2.
[192] Id. at 4.
[193] Id.
[194] State v. Bariteau, 884 N.W.2d 169, 180 (S.D. 2016) (Zinter, J., dissenting). The dissent argued that the criminal statute should not be expanded to encompass the defendant's behavior. "Because the words used in the definitional statute do not prohibit Bariteau's reprehensible acts, I have no choice but to respectfully dissent. Only the Legislature may rewrite the statute." Id. at 181.
[195] Calvin v. State, 87 N.E.3d 474, 479 (Ind. 2017).
[196] Id.
[197] Dougherty, *supra* note 10, at 151; *see also* Part I.

The strict application of criminal statutes often produces such absurd outcomes, including, as discussed in the Introduction, forcing a child defendant to register as a sex offender when he has never been convicted, or even accused, of a sex crime.[198] But the absurdity doctrine is not as effective in protecting defendants as it should be.[199] The primary reason for this is that when applying the doctrine, many courts attempt to divine, and act consistent with, the legislative intent behind the statute.[200]

This legislative-intent inquiry is usually improper and sometimes even defeats the purpose of the absurdity doctrine.[201] In many cases, divining legislative intent simply is not possible.[202] Other times, the absurdity doctrine may even require the court to contradict, rather than follow, legislative intent.[203]

Fortunately, divining legislative intent should not play a role in a court's absurdity analysis in most cases. The absurdity doctrine does not depend upon the legislature for its validity; rather, it "sets boundaries or conditions on legislative power."[204] It derives its authority from "rule of law values"—principles such as "reasonableness, rationality, and common sense"[205]—and the proper focus of the doctrine is on case outcomes.[206] In other words, if the application of a statute's plain language to a set of facts produces an absurd outcome, the doctrine must protect the defendant from that statute under those circumstances.[207]

When the absurdity doctrine no longer tied to a legislative-intent analysis, the question remains: How does a court apply the doctrine in a way that respects the incredibly important, but vague, "rule of law values" of "reasonableness, rationality, and common sense"? This Article proposes a simple formulation of the doctrine: "Never be a spectator of unfairness or stupidity."[208]

Despite the flexibility of this new absurdity doctrine—indeed, of any formulation of the doctrine—the results it produces will not vary any more than those in other areas of criminal law, including judges' decisions to admit or exclude evidence at trial or to impose a particular number of years for a prison sentence, for example.[209] Further, with regard to the sex offender registry case discussed in this Article, the new absurdity doctrine would prevent the unfair and stupid outcome of requiring a child defendant to register as a sex offender when he has never even been accused, let alone convicted, of a sex crime.[210]

Finally, as many courts have already recognized within the context of criminal law, the absurdity doctrine protects the defendant from the government.[211] Conversely, principles such as due process, fair notice, the rule of lenity, and similar doctrines prevent

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[198] *See* State v. Smith, 780 N.W.2d 90, 93 (Wis. 2010).
[199] *See* Part II.
[200] *See* id.
[201] *See* id.
[202] *See* Part II.A.
[203] *See* Part II.B.
[204] Dougherty, *supra* note 10, at165.
[205] Id. at 133.
[206] See Part III.
[207] *See* id.
[208] Hitchens, *supra* note 1, at 140; *see also* Part IV.
[209] *See* Part III.
[210] *See* Part IV.B.
[211] *See* Part V.

the government from using the absurdity doctrine against a defendant. In other words, because the state writes the laws, it must not be allowed to dispense with a defendant's right to procedural fairness by arguing that its own laws are absurd.[212]

[212] *See* id.