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## **War of the Words: Statutory Construction, Texas Criminal Law, and the Code Construction Act**

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## **Abstract**

Lawyers and judges are unified by words contained in statutes (i.e., statutory law). The “war of the words,” the struggle to determine the meaning of statutory law, entails more than conflicts in courtrooms or disagreements among lawyers or judges. It occurs repeatedly in the mind of every lawyer and judge when interpreting and construing statutes. Most commentary regarding statutory construction focuses primarily on civil matters. To promote increased discussion and study by criminal law practitioners, this paper focuses on statutory construction and the pervasive influence of the Code Construction Act on Texas criminal law.



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## WAR OF THE WORDS: THE CODE CONSTRUCTION ACT FROM THE COURTROOM TO THE COURT OF CRIMINAL APPEALS

*Words like violence  
Break the silence  
Come crashing in  
Into my little world  
Painful to me  
Pierce right through me  
Can't you understand?*

- Depeche Mode, *Enjoy the Silence*<sup>1</sup>

It is an all too human endeavor.<sup>2</sup> People struggle to make sense of the world around them. In and out of court, consciously and subconsciously, members of the bench and bar are challenged daily to construe information. And the experience tends to yield mixed results.

From the most mundane consumer transactions (e.g., ordering at a restaurant, following instructions from IKEA) to the most important interpersonal communications (with colleagues and loved ones), we are perpetually engaged in the construction of information. (And you are doing it right now.)

The challenge of construing information in our daily lives is complicated because people tend not to be mindful of what all it entails and there are not commonly accepted criteria for the task.

Professionally, however, it is another story. There are more than 92,833 licensed attorneys<sup>3</sup> and 3,214 members of the judiciary in Texas.<sup>4</sup> Despite different roles, opinions, and beliefs, informed by our own individual life experiences, we are nonetheless unified by words (i.e., the law).

We are all “word warriors.” Disputes about the meaning and application of words are the bread and butter of the legal profession. Yet, the “war of the words” is not limited to courtrooms or disagreements among lawyers or judges. Rather, it often occurs in our minds when interpreting and construing words.

This article is about a specific constellation of words, namely, criminal law, and the conflicts surrounding their meaning and application, which hinge on a host of variables and other laws, including the Code Construction Act.

In simplest terms, the Code Construction Act is a law about construing the law. Its influence on Texas criminal law is understated and pervasive. Nevertheless, it is seldom the primary focus of legal discussions. Consequently, its potential practical utility and application may not be fully appreciated by many criminal law practitioners.

### I. ORIGIN STORY

#### A. The Art of Words

Attempting to discern the meaning of words is an art (i.e., a skill acquired by experience, study, or observation) applied by lawyers and judges.<sup>5</sup> It is an art rife with complications. Sometimes the text of a statute is unclear. Other times the text of a statute is clear when applied in one context but not in another.

Simply stated, the legislature provides the words that constitute the law whereas the judiciary gets the last word on what those words mean (unless and until the legislature subsequently amends the law). While this description is accurate, it is woefully inadequate when it comes to the role of lawyers. It is like suggesting that baseball is a game that only consists of pitchers and umpires.

The real playmakers, of course, are attorneys—not legislators or the judiciary. Lawyers are the preliminary interpreters of law. How lawyers construe the law is seldom discussed but very important.

How did you learn statutory interpretation? Did you study it in law school? Were you taught canons with Latin names reminiscent of spells from Harry Potter? If so, were you left wondering about their real-world application? As the focus of legal education has shifted from common law to statutory law, statutory interpretation has become a required course in many law schools.<sup>6</sup>

The practical utility of these types of courses greatly depends on how statutory interpretation is taught. Schools tend to strongly emphasize three theoretical approaches used by the judiciary: (1)

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<sup>1</sup> DEPECHE MODE, ENJOY THE SILENCE (Reprise 1990).

<sup>2</sup> The authors wish to thank the following for their contribution to this endeavor: Ned Minevitz, Elaine Riot, and Elizabeth Rozacky.

<sup>3</sup> State Bar of Texas, Department of Research & Analysis, Attorney Population Density by Metropolitan Statistical Area (2019-2020)

[https://www.texasbar.com/AM/Template.cfm?Section=Demographic\\_and\\_Economic\\_Trends&Template=/CM/ContentDisplay.cfm&ContentID=50342](https://www.texasbar.com/AM/Template.cfm?Section=Demographic_and_Economic_Trends&Template=/CM/ContentDisplay.cfm&ContentID=50342).

<sup>4</sup> Texas Office of Court Administration, Annual Statistical Report Supplement, Profile of Appellate and Trial Court Judges (2020) [https://www.txcourts.gov/media/1451853/fy-20-annual-statistical-report\\_final\\_mar10\\_2021.pdf](https://www.txcourts.gov/media/1451853/fy-20-annual-statistical-report_final_mar10_2021.pdf).

<sup>5</sup> Ron Beal, *The Art of Statutory Construction: Texas Style*, 64 BAYLOR L. REV. 339, 342 (2012).

<sup>6</sup> Almas Khan, *Teaching a Master Class on Legislation to First-Year Legal Writing Students*, 19 Perspectives: Teaching Legal Res. & Writing 195 (2011).

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