

“ONLY A SITH THINKS LIKE THAT”: LLEWELLYN’S  
“DUELING CANONS,” ONE TO SEVEN

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[I]n the field of statutory construction . . . there are “correct,” unchallengeable rules of “how to read” which lead in happily variant directions.<sup>1</sup>

I. INTRODUCTION

In 1950 the redoubtable Karl N. Llewellyn launched the most famous of all attacks on canons of construction, a list of twenty-eight pairs of canons having opposite effect.<sup>2</sup> This was and has been widely considered by statutory interpretation theorists to be devastating to the legitimacy of canons. Fifteen years ago, *Vanderbilt Law Review* ran a symposium on Llewellyn’s attack and it met with uniform approval.<sup>3</sup> Daniel Farber, for example, called Llewellyn’s list “fiendishly deconstructive;”<sup>4</sup> Jonathon Macey and Geoffrey Miller said it “derailed” “intellectual debate about the canons for almost a quarter of a century.”<sup>5</sup> But there was no detailed examination then, nor has there been since, of the validity or contrariety of Llewellyn’s pairings.

In any other discipline one would expect every element of every pair in Llewellyn’s list to be scrutinized closely, and the justifi-

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1. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons of About How Statutes are to be Construed*, 3 VAND. L. REV. 395, 399 (1950) [hereinafter Llewellyn, *Canons*].

2. *Id.*

3. Symposium: *A Reevaluation of the Canons of Statutory Interpretation*, 45 VAND. L. REV. 529 (1992).

4. Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 VAND. L. REV. 533 (1992).

5. Jonathan R. Macey & Geoffrey P. Miller, *The Canons of Statutory Construction and Judicial Preferences*, 45 VAND. L. REV. 647 (1992).

cations to be laid on the table for examination.<sup>6</sup> We should not accept Llewellyn's list as a "devastating deconstruction" just because of its rhetorical impact. It is like adopting a theory in chemistry on the basis of an extraordinary experiment that nobody ever even tried to replicate. Indeed, the relative stability and longevity of many canons suggest that they are well adapted to their tasks, that a sudden demonstration of their invalidity is likely to be ill-founded.<sup>7</sup> Thus, the contrasting pairs of canons in Llewellyn's list deserve examination.

That is my project: to take each pair in turn and hold it up to scrutiny, to trick out the justifications, and examine the applications to which they have been put. My initial hypothesis was that Llewellyn's pairings might not prove devastatingly inconsistent. The conditions for the proper use of each of the superficially contrary members of a pair, and the justifications for their use, might adequately deflate the dramatic effect of the *prima facie* contrariety.

This paper reports my results for Llewellyn's first seven pairs. I shall treat the pairs of canons *seriatim*, first the thrust, then the parry. In *Canons*, Llewellyn gives only his statement of each of the canons in a pair, two or more secondary sources, and a case. I follow that pattern, except with the secondary sources first, as these sometimes give explanations. Llewellyn relies on four secondary sources: Sutherland,<sup>8</sup> *Corpus Juris Statutes*,<sup>9</sup> Black's *Handbook on the*

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6. Some canons at least have been shown to be supportable in speech act theory by justifications of much wider application and in which we can place great confidence. See M.B.W. Sinclair, *Law and Language: The Role of Pragmatics in Statutory Interpretation*, 46 U. PITT. L. REV. 373 (1985); MICHAEL SINCLAIR, *GUIDE TO STATUTORY INTERPRETATION* 140-41 (2000); Geoffrey P. Miller, *Pragmatics and the Maxims of Interpretation*, 1990 WIS. L. REV. 1179 (1990).

7. Given their durability and apparent usefulness to decision-makers, one would expect some foundational principles of general applicability could be found to underlie the canons. Rationally insupportable decision tools tend not to have general adaptive utility, even if they have occasional ad hoc appeal.

8. J.G. SUTHERLAND, *STATUTES AND STATUTORY CONSTRUCTION* (John Lewis ed., Callaghan & Co. 1904) (1891).

9. 59 C.J. *Statutes* (1932).

*Construction and Interpretation of Laws*,<sup>10</sup> and *Ruling Case Law (R.C.L.)*.<sup>11</sup>

After this general introduction to the thrust or parry of the pair, I brief Llewellyn's cited case and note how it supports the canon. The cases are sometimes not quite adequate as support, or support the canon in only one of its aspects, so I provide further illustrative cases. Out of respect for the justifiedly high regard in which Llewellyn is held, I make no attempt to be "wise after the fact;" I have used and relied on only materials available in 1950. Bringing the list of canons up to date is another project.

Following the analysis of the thrust and parry, if there is a genuine conflict, I offer a "Resolution." In some cases, one is forced to query whether Llewellyn's choice of dueling thrust and parry should properly be called "canons."<sup>12</sup> Unfortunately this detracts greatly from the rhetorical force of the list as argument, and severely undermines the claim that canons may be chosen to suit one's ends, whatever they may be. But it is an aspect of Llewellyn's *Canons* that must be addressed. Where necessary, I discuss it at the conclusion of the discussion of a pair in a subsection labeled "Comment."

## II. CANONS: AN OVERVIEW

If one is to criticize Llewellyn's use of a verbal formula as insufficiently canonical, one owes an explanation of what a canon is.

Canons are wise saws backed by experience and intuition. They are not law, nor do they claim to be universally binding, but they should have significance greater than a mere cliché. One

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10. HENRY CAMPBELL BLACK, *HANDBOOK ON THE CONSTRUCTION AND INTERPRETATION OF LAWS* (2d ed. 1911).

11. 25 *RULING CASE LAW*, *Statutes* (1929). *R.C.L.* is a treatise that has faded from fashion, and, unlike Llewellyn's more favored secondary sources, Sutherland or *Corpus Juris*, it tends to be discursive, offering more by way of explanation and criticism, and, for a treatise, some very stylish writing. For example "is the very lock and key to set open the windows of the statute." *Id.* § 279, at 1053-54.

12. I recently heard one of our most eminent jurists, speaking on law and economics, refer to "Statutes in derogation of the common law are to be construed narrowly" as "a maxim of the common law." "It is," he continued, "you can find it on Llewellyn's list in the *Vanderbilt Law Review*." If being on Llewellyn's list in *Canons* is a criterion for being a canon, then of course we can have no ground for raising this question.

might see them as having compulsive weight somewhere between homespun sayings and general truths of science or mathematics. That is, “*expressio unius est exclusio alterius*” carries more weight than “A stitch in time saves nine,” but less than “Every even number is the sum of two primes.”<sup>13</sup>

Although one ought not demand a formulation of statute-like determinacy, some stability or limit on variety in expression, some *canonical form*, is necessary.<sup>14</sup> Second, a canon should have a sufficient frequency of application to have been used, tested, and contested over time in a decent variety of circumstances in a decent variety of cases. Only thus can a principle achieve the sort of acceptance needed to make it useable without further ado. For example, the self-translating Latin maxim “*expressio unius est exclusio alterius*” is a paradigmatic canon: it is a stable verbal formula showing no variation in Latin and little in its occasional translations,<sup>15</sup> and it finds common application in cases.<sup>16</sup> Perhaps a mark of the true canon is that cites are not necessary, the formula itself carrying sufficient interpretive authority.

Most general criticisms of canons treat them as fixed, unconditional, formulaic rules to be applied mindlessly at every opportu-

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13. This is known as “Goldbach’s Conjecture.” Goldbach suggested it in a letter to Euler dated June 17, 1742. It has never been either proven or disproven although it has been verified up to  $10^{14}$ . I chose it rather than a simple theorem of arithmetic for that reason.

14. William Eskridge compiled a list of some ninety-six “canons” used by the Supreme Court between 1986 and 1991. If one follows Eskridge’s example, a canon is any verbal formulation relating to interpretation, although not necessarily a canonical formulation. But surely that is too broad a meaning to be of use. WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 323-28 (1994).

15. As in Thrust #20: “Expression of one thing excludes another.” Llewellyn, *Canons*, *supra* note 1, at 405.

16. Compare, “Presumption that states can tax activities within their borders, including Indian tribal activities, but also presumption that states cannot tax Indian lands.” ESKRIDGE, *supra* note 14, at 326 (citing *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 173 (1989); *County of Yakima v. Confederated Tribes & Bands of Yakima Indians*, 502 U.S. 251, 257-59, 267-69 (1992)). A judge might well write, “On the well accepted principle *expressio unius est exclusio alterius* we hold that . . .”, but can you imagine, “On the presumption that states can tax activities within their borders, including Indian tribal activities, but also [on the] presumption that states cannot tax Indian lands we hold that . . .”? Rather, the judge would write, “The Supreme Court has held that, in the absence of . . . we must presume that . . .” and give cites.

nity.<sup>17</sup> Yet recently, scholars of statutory construction have been arguing for an increase in rigidity and formalism in the use of canons. Adrien Vermeule argues that every judge should adopt and follow a fixed interpretive doctrine;<sup>18</sup> Gary O'Connor argues for a restatement as an authoritative formulation of permissible rules of interpretation;<sup>19</sup> and in the extreme, Nicholas Quinn Rosenkranz argues for the adoption of statute-like rules of interpretation.<sup>20</sup> I hope to show that any attempt to rigidify or formalize canons and their use is fundamentally misguided. The application of a canon depends on its justification. When the conditions presupposed by a canon do not obtain, then it should not be used. Llewellyn himself says so: "Plainly, to make any canon take hold in a particular instance, the construction contended for must be sold, essentially, by means other than the use of the canon."<sup>21</sup> A canon, then, looks more like a formulaic summary of the end result of a process of reasoning, but a process sufficiently commonplace to justify a canonical formula.

Legislative intent is the key to statutory interpretation. If the statute is clear as enacted, then it must be applied without further ado as it is the legislature's only official expression of its intent.<sup>22</sup> However, if as applied to the case at hand the statute is less than perfectly clear, we should interpret it as intended by the legislature that enacted it rather than, say, as a judge might prefer.<sup>23</sup> This has

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17. See, e.g., REED DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 234 (1975).

18. Adrien Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74 (2000). I have argued that the reasoning on which Vermeule's thesis is based is fallacious. See Michael Sinclair, *The Proper Treatment of "Interpretive Choice" in Statutory Decision-Making*, 45 N.Y.L. SCH. L. REV. 389 (2002).

19. Gary E. O'Connor, *Restatement (First) of Statutory Interpretation*, 7 N.Y.U. J. LEGIS. & PUB. POL'Y 333 (2003).

20. Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085 (2002).

21. Llewellyn, *Canons*, *supra* note 1, at 401. To do Llewellyn justice, one should see his list of dueling canons not as a devastating deconstruction, but as a demonstration of this thesis.

22. This is Thrust #12 in Llewellyn's list: "If language is plain and unambiguous it must be given effect." Llewellyn, *Canons*, *supra* note 1, at 403. This, and variations on the theme, are known as the "Plain Meaning Rule."

23. There has long been a quasi-debate over whether there can be such a thing as legislative intent. It was raised and disposed of in the earliest treatise on statutory interpretation, the 16th century *Discourse upon the Exposition & Understandinge of Statutes*, but

been recited innumerable times in as many ways. For example, in 1824, our revered fourth chief justice, Chief Justice Marshall, wrote that the judge's aim is to "giv[e] effect to the will of the Legislature."<sup>24</sup> In his 1874 treatise, Sedgwick wrote: "[T]he object and the only object of judicial investigation, in regard to the construction of doubtful provisions of statute law, is to ascertain the intention of Legislature which framed the statute."<sup>25</sup> One of our finest federal circuit court judges, former Chief Judge of the D.C. Circuit Patricia Wald, wrote: "When a statute comes before me to be interpreted, I want first and foremost to get the interpretation right. By that, I mean simply this: *I want to advance rather than impede or frustrate the will of Congress.*"<sup>26</sup>

A canon of construction is and can be no more than an aid in determining legislative intent. Thus a canon will always be trumped by express statutory language or by clear evidence of legislative intent to the contrary.<sup>27</sup> Eminent legal historian Willard Hurst summed it up succinctly: "A rule of construction was only an aid to fulfilling the legislative intent; as such it was always rebuttable by

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still occasionally raises its head. SAMUEL E. THORNE, DISCOURSE UPON THE EXPOSITION & UNDERSTANDING OF STATUTES, 103, 151 (The Ward Ritchie Press 1942). See ESKRIDGE, *supra* note 14, at 14-25; SINCLAIR, *supra* note 6, at 89-102; STEVEN D. SMITH, LAW'S QUANDARY 135-40 (2004).

24. *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 866 (1824).

25. THEODORE SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND CONSTRUCTION OF STATUTORY AND CONSTITUTIONAL LAW 194 (John Norton Pomeroy ed., Baker, Voorhis & Co., 1874) (1857).

26. Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277, 301 (1990). See also *NBD Bank v. Bennett*, 67 F.3d 629, 633 (7th Cir. 1995) (Easterbrook, J.); Stephen Breyer, *On The Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992) (defending the role of legislative history in judicial interpretation of statutes). Some writers have stipulated distinctions between the words "intent," "purpose," and "will" as applied to legislatures; however, as there is no such refinement in common currency, in this context the words are properly treated as synonymous.

27. Such evidence might come from the statutory environment, or from extrinsic resources such as legislative history. One crux of the present contention over the propriety of using legislative history may be exactly this point. A corollary of this paper is that to use most canons it is necessary to understand the context and purpose of the statute's enactment for their appropriate and rational use. They thus cannot, as "traditional tools of statutory construction," take the place of the usual indicia of context and purpose: statutory language first and foremost, and legislative history only when that proves inadequate. See *United States v. Dotterwiech*, 320 U.S. 277 (1943); *Gooch v. United States*, 297 U.S. 124 (1943).

more specific matter from the statutory text or from legislative history."<sup>28</sup>

It is essential to keep this in view, not only because it is fundamental to statutory interpretation and the use of canons of construction, but also, more importantly, because for the purposes of this paper any clash, inconsistency or inconcinnity between canons will be in terms of their facilitating the determination of legislative intent. Legislative intent and its determinants thus provide the arena and the scorecards for Llewellyn's dueling pairs of canons.

### III. LLEWELLYN'S PAIRS

#### *Pair One*

THRUST: "A statute cannot go beyond its text."<sup>29</sup>

PARRY: "To effect its purpose a statute may be implemented beyond its text."<sup>30</sup>

*Thrust #1*: "A statute cannot go beyond its text."

This is not the familiar "Statutes in derogation of the common law will be construed narrowly;" Llewellyn saved that for his second pair. Thrust #1 would be applicable in either of two situations: (i) when two statutes converge as to some requirement, one may not be construed so broadly as to encroach upon the other; or (ii) when the common law is neutral, a statute may not be applied by judicial construction beyond its terms.

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28. JAMES WILLARD HURST, *DEALING WITH STATUTES* 56-57 (Columbia Univ. Press 1982) (citing *Dotterweich*, 320 U.S. at 282; *Gooch*, 297 U.S. at 128). The Supreme Court in *Dotterweich* remarked:

Giving all proper force to the contention of the counsel of the Government, that there has been some relaxation on the part of the courts in applying the rule of strict construction to such statutes, it still remains that the intention of a penal statute must be found in the language actually used, interpreted according to its fair and obvious meaning.

*Dotterweich*, 320 U.S. at 289. And, in *Gooch*:

The rule of *ejusdem generis*, while firmly established, is only an instrumentality for ascertaining the correct meaning of words when there is uncertainty. Ordinarily, it limits general terms which follow specific ones to matters similar to those specified; but it may not be used to defeat the obvious purpose of legislation.

*Gooch*, 297 U.S. at 128.

29. Llewellyn, *Canons*, *supra* note 1, at 401.

30. *Id.*

The secondary sources Llewellyn offers express this principle more elaborately than he does. Sutherland, always concerned with legislative intent as the touchstone of interpretation, begins "There can be no intent of a statute not expressed in its words."<sup>31</sup> However, Sutherland progressively weakens this formulation from not giving a statute a meaning repugnant to its terms<sup>32</sup> to a weak version of the plain meaning rule:

The intent to be ascertained and enforced is the intent expressed in the words of the statute, read in the light of the constitution and the fundamental maxims of the common law, and not an intent based upon conjecture or derived from external considerations.<sup>33</sup>

*Corpus Juris* is less helpful, being equally supportive of Parry #1:

Necessary implications and intendments from the language employed in a statute may be resorted to to ascertain the legislative intent where the statute is not explicit, but they can never be permitted to contradict the expressed intent of the statute or to defeat its purpose.<sup>34</sup>

Llewellyn's cited case, *First National Bank of Webster Springs v. DeBerriz*, illustrates the first of the applicable situations, the extension of a statute into the domain of another statute.<sup>35</sup> West Virginia Supreme Court Justice Poffenbarger expressed this canon as, "[T]here is a presumption against legislative intent in the enactment of one law to innovate upon, limit or alter another,"<sup>36</sup> and "[T]here is a presumption against legislative intent in the enactment of one statute to encroach upon another, having different subject matter, further than is absolutely necessary to the accomplishment of the purpose of the act."<sup>37</sup>

Two statutes potentially overlapped in the case, creating a possible inconsistency by implication although not explicitly. Section 7

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31. SUTHERLAND, *supra* note 8, § 388, at 745.

32. *Id.* (citing *Dewey v. United States*, 178 U.S. 510 (1900)). For a discussion of *Dewey*, see *infra* text accompanying notes 45-52.

33. SUTHERLAND, *supra* note 8, § 388, at 747.

34. 59 C.J. *Statutes*, *supra* note 9, § 575, at 972-73.

35. 105 S.E. 900 (W. Va. 1921).

36. *Id.* at 901.

37. *Id.* at 902.

of chapter 139 of the West Virginia Code provided for court action to enforce judicial liens against real property when the debtor's personal property proved insufficient.<sup>38</sup> Section 7 of chapter 86 of the West Virginia Code provided: "When the personal estate of a decedent is insufficient for the payment of his debts, his executor or administrator may commence and prosecute a suit in equity to subject his real estate to the payment thereof as provided in this article."<sup>39</sup> Further,

If such suit be not brought within six months after the qualification of such executor or administrator, any creditor of such decedent, whether he has obtained a judgment at law for his claims or not, may institute and prosecute such suit on behalf of himself and the other creditors of such decedent, in which the personal representative, surviving wife or husband, heirs and devisees, if any, of the decedent shall be made defendants.<sup>40</sup>

Clearly the implication was that a creditor of the decedent must allow the decedent's personal representative six months before commencing suit on the debt. Did that implication extend to the action, already commenced, to enforce a judgment lien against the decedent's property?

The West Virginia Supreme Court held that it did not: "There is no express statutory inhibition of the prosecution of a judgment lien suit, after the death of the judgment debtor, nor any statute expressly staying prosecution thereof."<sup>41</sup> Nor was a six month stay of action a necessary implication of section 7 of chapter 86 as it spoke only in terms of general creditors: it "pertains to general debts, not judgment lien debts for which provision is made by chapter 139 of the Code. The two subjects are wholly different, although related."<sup>42</sup> Generally, "implication cannot prevail over a clear and positive express provision."<sup>43</sup>

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38. *Id.* at 901. It is now W. VA. CODE § 38-3-9 (2006).

39. It is now W. VA. CODE § 44-8-7 (2006).

40. *Id.*

41. *First Nat'l Bank*, 105 S.E. at 901.

42. *Id.* at 902. Remarkably: "Besides, sec. 11 of ch. 86 expressly provides that the chapter shall not affect any lien by judgment or otherwise, acquired in the lifetime of the decedent." *Id.*

43. *Id.*

A clash of the two statutes could thus be avoided, and so ought to be. Especially was this so as “[i]t cannot be assumed that the Legislature was ignorant of this all pervading and fundamental principle. Presumptively, its members were familiar with it, and, not having provided otherwise, they must be taken to have intended it to operate in proceedings instituted under these two statutes.”<sup>44</sup>

The reasoning here is impeccable: one should not find contradictions between statutes if one can avoid it; whether realistically or not, we must presume legislatures would not intentionally impose inconsistent constraints on our behavior in everyday life or in legal procedures.

Had Llewellyn really intended more than this first application, he chose not to illustrate it. He might have, with the oft-cited Supreme Court decision in *Dewey v. United States*.<sup>45</sup> At issue was the prize money to be paid United States naval officers and men for the defeat of Spanish naval ships in the battle of Manila Bay. The statute provided for a sum “of one hundred dollars, if the enemy’s vessel was of inferior force, and of two hundred dollars if of equal or superior force, to be divided among the officers and crew in the same manner as prize money.”<sup>46</sup> The individual Spanish vessels sunk or captured were of inferior force, but they were more numer-

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44. *Id.*

45. 178 U.S. 510 (1900). Sutherland cites *Dewey* in support of § 388. See SUTHERLAND, *supra* note 8, § 388, at 746 n.85.

46. *Dewey*, 178 U.S. at 511. Revised Statute section 4635 stated:

A bounty shall be paid by the United States for each person on board any ship or vessel of war belonging to an enemy at the commencement of an engagement, which is sunk or otherwise destroyed in such engagement by any ship or vessel belonging to the United States, or which it may be necessary to destroy in consequence of injuries sustained in action, of one hundred dollars if the enemy’s vessel was of inferior force, and of two hundred dollars if of equal or superior force, to be divided among the officers and crew in the same manner as prize money; and when the actual number of men on board any such vessel cannot be satisfactorily ascertained, it shall be estimated according to the complement allowed to vessels of its class in the navy of the United States; and there shall be paid as bounty to the captors of any vessel of war captured from an enemy, which they may be instructed to destroy, or which is immediately destroyed for the public interest, but not in consequence of injuries received in action, fifty dollars for every person who shall be on board at the time of such capture.

*Id.* (quoting Rev. Stat. § 4635).

ous, carried more men, and “[t]he enemy’s vessels were supported by land batteries and by mines and torpedoes in the entrance to Manila Bay and in the bay itself, and some of those in the bay exploded during the action.”<sup>47</sup> Thus, wrote Justice Harlan, “We are asked to construe the words in the present statute ‘one hundred dollars, if the enemy’s vessel is of inferior force, and two hundred dollars if of equal or superior force.’”<sup>48</sup> Was the phrase confined to consideration of the individual vessels or might it take into account the entire opposing force including enemy “land batteries, mines and torpedoes?”<sup>49</sup> Notwithstanding that it had “not forgotten the skill and heroism displayed by the distinguished commander of our fleet in the battle of Manila, as well as by officers and sailors acting under his orders,”<sup>50</sup> the Court refused the latter interpretation:

We cannot do that without going far beyond the obvious import of the words employed by Congress. Of course, our duty is to give effect to the will of Congress touching this matter. But we must ascertain that will from the words Congress has chosen to employ . . . There is undoubtedly force in the suggestion that in rewarding officers and sailors who have sunk or destroyed the enemy’s vessels in a naval engagement it is not unreasonable that all the difficulties, of every kind, with which they were actually confronted when engaging the enemy should be taken into consideration. But that was a matter which we cannot suppose was overlooked by Congress; and we are not at liberty to hold that it proceeded upon the broad basis suggested, when it expressly declared that the amount of its bounty shall depend upon the question whether “the enemy’s vessel” — not the enemy’s vessel and the land batteries, mines and torpedoes, by which it was supported — was of inferior or of equal or superior force.<sup>51</sup>

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47. *Id.* at 513.

48. *Id.* at 519-20.

49. *Id.* at 520.

50. *Id.*

51. *Id.*

Despite being highly motivated, and being given a useful legal argument by Chief Justice Fuller in dissent,<sup>52</sup> the majority thus kept strictly to the statutory text. It's a good illustration of exactly the general version of Thrust #1, without another statute in contention.

Notice that Justice Harlan did not rely on the recitation of a canon in making the argument. He built his argument on a more fundamental principle, itself resting on the democratic principle of legislative supremacy, *viz*, that a court must ascertain and give effect to the intent of the legislature, as expressed in "the words Congress has chosen to employ."<sup>53</sup> As Sutherland put it succinctly in 1904, "The intention is not something evinced *dehors* the statute; it is to be learned from it . . . ."<sup>54</sup>

*Parry #1*: "To effect its purpose a statute may be implemented beyond its text."

In *First National Bank*, Ms. DeBerriz argued that section 7 of chapter 86 implied a suspension of the bank's suit on its judgment lien, but failed to convince the court that such an implication was required in light of its inconsistency with section 7 of chapter 139 of the West Virginia Code. What if section 7 of chapter 139 had not been there? The court recited "A necessary implication within the meaning of the law is one that is so strong in its probability that the contrary thereof cannot reasonably be supposed."<sup>55</sup> But for the legislative restriction, it might well have found such an implication.<sup>56</sup> This is what Llewellyn contemplates by *Parry #1*, as shown by his

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52. Chief Justice Fuller argued:

Indeed, the words of the statute, if literally construed, might be limited to engagements of single vessels on each side, yet as to this the principal opinion correctly applies a liberal construction, and any other would be preposterous. But if a liberal construction be proper at all, why not altogether?

*Id.* at 523 (Fuller, C.J., White & McKenna, JJ. dissenting).

53. *Id.* at 520.

54. SUTHERLAND, *supra* note 8, § 586, at 1077.

55. *First Nat'l Bank*, 105 S.E. at 901.

56. As the Revisor's note commented on the 1931 modification of section 7 of chapter 86:

Since the lien creditors' suits must be revived and new parties brought in, and since much of the proof that may then have already been taken would suffice for the suit under this section, it would seem better for all purposes to allow the lien creditors' suit to be changed into such a suit as is provided for by this section.

W. VA. CODE § 44-8-7 (2006).

illustrative case, *Dooley v. Pennsylvania Railroad*.<sup>57</sup> In the words of District Judge Booth, "It is elementary that what is implied in a statute is as much a part of it as what is expressed."<sup>58</sup>

Llewellyn's secondary source agrees:

That which is implied in a statute is as much a part of it as that which is expressed. A statutory grant of a power or right carries with it, by implication, everything necessary to carry out the power or right and make it effectual and complete, but powers specifically conferred cannot be extended by implication.<sup>59</sup>

*Dooley* was about the United States President's control over the railroad under a war powers statute:

The President, in time of war, is empowered, through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer and transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable.<sup>60</sup>

Did this give the President the power to avoid by proclamation<sup>61</sup> a creditor's garnishment of "traffic balances"<sup>62</sup> owed the railroad? Of

57. 250 F. 142 (D. Minn. 1918).

58. *Id.* at 143.

59. 59 C.J. *Statutes*, *supra* note 9, § 575, at 973 (citing *Dooley*, 250 F. 142).

60. *Dooley*, 250 F. at 143 (quoting Act of Aug. 29, 1916, Pub. L. No. 64-242, § 1, 39 Stat. 645).

61. The proclamation in question, dated December 26, 1917 read:

Except with the prior written assent of said director, no attachment by mesne process or on execution shall be levied on or against any of the property used by any of said transportation systems in the conduct of their business as common carriers; but suits may be brought by and against said carriers and judgments entered as hitherto until and except so far as said director may by general or special order, otherwise determine.

*Id.*

62. In other words, debts:

Moneys coming in as traffic balances are simply earnings constituting a revolving fund, and form part of a working or liquid capital. Such a fund is just as necessary to the successful operation of a railroad as cars, engines, or coal. The liquid capital may be part of a wage fund to-day, part of a coal-purchasing fund to-morrow, and part of a car rental fund the day after.

course it did: "It is also elementary that, when a power is conferred by statute, everything necessary to carry out the power and make it effectual and complete will be implied."<sup>63</sup>

Thus, the statute was extended beyond its express terms to cover actions without which it could not achieve its purpose.<sup>64</sup> If it could not "take possession and assume control"<sup>65</sup> of a railroad's property, including moneys owed it,<sup>66</sup> then the administration could not exercise the power authorized under the President's proclamation.<sup>67</sup>

This form of argument is, perhaps, more obvious in the cases on which Judge Booth relied, *County of Wilson v. National Bank*<sup>68</sup> and *City of Little Rock v. United States*.<sup>69</sup> In the former, the issue was "the power of the county, under the act of December 16, 1867, to issue bonds in payment of stock taken by it in the Tennessee and

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The court will take judicial notice that no railroad system can be successfully operated without such a fund.

*Id.* at 144.

63. *Id.* at 143.

64. Although not mentioned in the opinion, presumably the garnishment action was pursuant to statute and that statute we can presume made no special exception for presidential assumption of control in war time. Presented that way the decision looks a little like the contrary of *First National Bank*, but only a little. Judge Booth apparently and quite properly found the federal statute's language did indeed expressly "innovate upon, limit or alter" the statute authorizing garnishment. *See id.* at 143-44.

65. *Id.* at 143 (quoting Act of Aug. 29, 1916, Pub. L. No. 64-242, § 1, 39 Stat. 645).

66. In the second part of the argument the court found that:

[The] contention, viz. that moneys constituting traffic balances do not come within the purview of the proclamation, in other words, are not "property used by any of said transportation systems in the conduct of their business as common carriers," in my opinion cannot be sustained. Certainly cars, engines, coal, machinery, would all be wholly within the terms used. Moneys coming in as traffic balances are simply earnings constituting a revolving fund, and form part of a working or liquid capital. Such a fund is just as necessary to the successful operation of a railroad as cars, engines, or coal. The liquid capital may be part of a wage fund to-day, part of a coal-purchasing fund to-morrow, and part of a car rental fund the day after. The court will take judicial notice that no railroad system can be successfully operated without such a fund.

*Id.* at 144.

67. *Id.*

68. 103 U.S. 770 (1880).

69. 103 F. 418 (8th Cir. 1900).

Pacific Railroad Company.”<sup>70</sup> The power was not express in that act; however:

Sect. 4 declare[d] that subscriptions to the capital stock of the railroad company may be taken in county bonds, and sect. 19 authorize[d] the commissioners provided for in sect. 3 to apply for a subscription to the capital stock of the railroad company, payable in the bonds of the county, whereupon the county authorities [we]re required to cause an election to be held, first causing thirty days' notice of such election, the amount of stock to be subscribed, for what purpose, and how and when payable, to be given, as required in county elections. There c[ould] scarcely be a stronger implication of the power to issue bonds.<sup>71</sup>

In *City of Little Rock*, the city, having no available money, sought to pay a judgment creditor in warrants; but no statute gave it express authority to issue warrants. Yet statutes authorized the city to take its warrants as payment for property taxes. Thus:

That which is implied is as much a part of a statute, grant, or contract as that which is expressed . . . . “A thing which is within the intention of the makers of the statute is as much within the statute as if it were within the letter.” . . . City warrants could not be received in payment of taxes, as this constitution and these statutes declare they shall be . . . unless under this constitution and these laws cities had the power to issue them.<sup>72</sup>

*Dooley*, *County of Wilson* and *City of Little Rock* are, strictly speaking, not about implication but presupposition, a.k.a. “pragmatic implicature”: their argument is that the statute could not make any sense, could never apply, unless such-and-such also applied. How could the federal administration take control of a railroad if it could not take control of its assets, including debts owed it? How could a county subscribe to railroad stock using county bonds, as expressly authorized, had it not the power to issue bonds? How could a city take its warrants in payment for taxes, for which the

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70. *County of Wilson*, 103 U.S. at 778.

71. *Id.* at 777-78.

72. *City of Little Rock*, 103 F. at 420-21.

statute provides, if it could not issue warrants? In none of these cases does the presupposed power clash with another statutory mandate.

A straightforward example of Parry #1 as Llewellyn formulated it is the Supreme Court's 1868 decision in *Silver v. Ladd*.<sup>73</sup> The Donation Act of 1850 provided, *inter alia*:

There shall be, and hereby is, granted to every white settler or occupant of the public lands . . . above the age of eighteen years . . . who shall have resided upon and cultivated the same for four consecutive years . . . the quantity of . . . 320 acres of land, if a single *man*, and if a married *man* the quantity of . . . 640 acres; one-half to himself and the other half to his *wife*, to be held in her own right.<sup>74</sup>

Elizabeth Thomas, twenty years a widow, and her adult unmarried son went to Oregon, built a house on the dividing line between two 320 acre sections, and cultivated both. At the appropriate time donation certificates — patents to the tracts — were issued Mrs. Thomas and her son, one 320 acre section each. A year later, Mrs. Thomas' certificate was revoked. She sued and lost in the Oregon courts, which followed Thrust #1 in sticking to the text of the statute.<sup>75</sup> The Supreme Court decided for Mrs. Thomas, arguing that there was a societal need to encourage the perseverance and courage necessary to pioneer the land in the face of hardship and danger, and that this was the purpose of the statute. The case is often held up as an example of an expansion of the scope of a statute by Plowden's method of implementing the equity of the statute,<sup>76</sup> *i.e.* an example of Parry #1. With respect to the values and qualities the statute sought to reward, *viz* perseverance and courage, Mrs. Thomas was indistinguishable from a married woman or person of the male persuasion; thus, granting her the land gave effect to the legislative purpose.<sup>77</sup>

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73. 74 U.S. (7 Wall.) 219 (1868).

74. *Id.* (quoting the Donation Act of 1850).

75. "The Supreme Court of Oregon, whose judgment we are now to review, held the certificate void, because she was not such a person as could take lands under the act, being an unmarried female." *Id.* at 224.

76. See *Eyston v. Studd*, 2 Plow. 459, 75 Eng. Rep. 688 (1574).

77. The Court commented:

Here, there was no inconsistent statute to contend with, unless it was a statute granting title by adverse possession, presumably requiring merely a longer period of occupation. Did the enacting legislature contemplate such a situation as this when enacting the statute? There was no argument that it did; it would have meant deliberately discriminating in favor of married women against widows and spinsters, an unlikely proposition. The Court explicitly found Congress had not intended such discrimination:

The evident intention to give to women as well as men, is shown by the provision, that, of the six hundred and forty acres granted to married men, one-half shall go to their wives, and be set apart to them by the surveyor-general, and shall be held in their own right. Can there be any reason why a married woman, who has the care and protection of a husband, and who is incapable of making a separate settlement and cultivation, shall have land given to her own use, while the unprotected female, above the age of eighteen years, who makes her own settlement and cultivation, shall be excluded?<sup>78</sup>

Here the Court undoubtedly went beyond the text of the statute to implement legislative intent to nobody's detriment. It could have stuck woodenly to Thrust #1, as had the Oregon courts. Perhaps a majority of the 1916-17 Supreme Court<sup>79</sup> and the more ardent "textualists" of the present judiciary might concur, but few else.

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[T]he section of this statute which we are now considering was passed for the purpose of rewarding in a liberal manner a meritorious class of persons, who had taken possession of that country and held it for the United States, under circumstances of great danger and discouragement. These circumstances and the policy of this act are fully stated in the case of *Stark v. Starrs*, decided at our last term.

Anything, therefore, which savors of narrowness or illiberality in defining the class, among those residing in the Territory in those early days, and partaking of the hardships which the act was intended to reward, who shall be entitled to its benefits, is at variance with the manifest purpose of Congress.

*Silver*, 74 U.S. (7 Wall.) at 225-26.

78. *Id.* at 226-27.

79. *See Caminetti v. United States*, 242 U.S. 482 (1917).

*Resolution:*

There is no clash between the first version of Thrust #1 — “[T]here is a presumption against legislative intent in the enactment of one law to innovate upon, limit or alter another”<sup>80</sup> — as illustrated by *First National Bank*,<sup>81</sup> on the one hand, and Parry #1 as expounded in the secondary sources cited and illustrated in *Dooley*.<sup>82</sup> We must assume a legislature would not intentionally enact an inconsistency and so, if possible, we interpret prima facie conflicting statutes sufficiently narrowly to avoid one’s encroaching upon the other: Thrust #1. On the other hand, where a statute would be meaningless without some prerequisite power, we must presume the legislature also presupposed that power, in the absence of some clear statutory indication to the contrary: Parry #1.<sup>83</sup>

If we take the more general version of Thrust #1 — *viz*, when the common law is neutral, a statute may not be applied by judicial construction beyond its terms — as illustrated by *Dewey*,<sup>84</sup> and contrast that with Parry #1 in its most general form — *viz*, that “what is implied in a statute is as much a part of it as what is expressed”<sup>85</sup> — as illustrated by *Silver*,<sup>86</sup> we may indeed have a clash. In both cases the Court had a strong motivation to find a broader interpretation than the terms of the statute appeared to warrant. In this respect there appear to be only two relevant distinctions. First, in *Silver*, the Court found no reason to believe that Congress had contemplated

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80. *First Nat'l Bank*, 105 S.E. at 901.

81. *See supra* text accompanying notes 35-44.

82. *See supra* text accompanying notes 57-67.

83. This is an instance of the more general principle that we should presume our legislature meant something by the words enacted and so not interpret them as meaningless. Llewellyn’s version comes at Thrust #16: “Every word and clause must be given effect.” Llewellyn, *Canons*, *supra* note 1, at 404. This in turn is founded on a more widely applicable principle of felicity in conversation, a fundamental part of speech act theory. It is based on the seminal work of the English philosopher of language, H. P. Grice, on speech acts, first presented in 1967 as the William James Lectures at Harvard University. For many years the transcript circulated widely in mimeographed form, but in the last twenty-five years it has been incorporated into many anthologies. For example, it appears under the title *Logic and Conversation*, in 3 *SYNTAX AND SEMANTICS: SPEECH ACTS* 41 (Peter Cole & Jerry L. Morgan eds., 1975). For a more detailed outline of the use of Gricean pragmatics, see Sinclair, *supra* note 6; Miller, *supra* note 6.

84. *See supra* text accompanying notes 45-53.

85. *Dooley*, 250 F. at 143.

86. *See supra* text accompanying notes 73-79.

the situation at issue, thus no grounds to infer it intended to exclude the widow from its beneficial purpose. By contrast, in *Dewey* Justice Harlan wrote that Congress must have been aware of exactly the situation at issue. Second, in *Silver*, to deny the widow Thomas her land would discriminate against widows as compared to married women, something not contemplated elsewhere in the Act and unlikely unless stated expressly. In *Dewey* there was no parallel discrimination consequent upon denying an expansive reading of the statute: brave officers and men would merely be compensated at half the rate they sought. Thus, legislative intent, as inferred from the context of enactment won out in both cases.

It is only because we find the parsimony to the heroes who so brilliantly fought and won the battle of Manila Bay distasteful that we might wish for a more generous interpretation in *Dewey*.<sup>87</sup> Yet *Silver* might also have met with a parsimonious interpretation, albeit with more difficulty than in *Dewey*. "Surely," one can almost hear the righteous opine, "The legislature should be more careful in its choice of words; Mrs. Thomas' loss is a small price for sending such a message to Congress."<sup>88</sup> As a court we find law, not make it, and we do not have the power to grant 320 acres of Oregon to Mrs. Thomas when the legislature has not seen fit to do so."

Thus, with some effort, we can show a genuine difference between Thrust #1 and Parry #1, and a difference that might not be dissolved by exploration of the context. It just requires a determined refusal to implement apparent legislative intent, and a willingness to accept the frustration of that intent and an unpalatable deprivation to one who acted in reasonable reliance on a sensible interpretation.

*Comment:*

Are we really dealing with canons in Pair One? Why, one might ask, did we not find anything of the form Llewellyn uses in any of the cases or secondary sources that he cites? There was no apparent reliance on the authority of verbal formulations in these cases, but only argument. Where argument is necessary and available, canons

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87. "All genuine Americans recall with delight and pride the marvelous achievements of our navy in that memorable engagement." *Dewey*, 178 U.S. at 520.

88. See Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 457 (1989).

should be not only redundant but also inappropriate. A canon should have sufficient authority in itself to be relied upon as the basis of or a link in an argument in a case, not as a conclusion itself to be justified.<sup>89</sup>

*Pair Two*

THRUST: “Statutes in derogation of the common law will not be extended by construction.”

PARRY: “Such acts will be liberally construed if their nature is remedial.”<sup>90</sup>

*Thrust #2*: “Statutes in derogation of the common law will not be extended by construction.”<sup>91</sup>

We need have no doubt as to the stature of Thrust #2 as a canon. It was for long one of the most familiar, although usually expressed as an exhortation to strict construction. For example, the 1874 Supreme Court put it as “[s]tatutes passed in derogation of the common law . . . should be construed strictly.”<sup>92</sup> Sutherland, Llewellyn’s most favored secondary source, elaborates simply:

Such statutes as take away a common-law right, remove or add to common-law disabilities, confer privileges or provide for proceedings unknown to the common law, or which are in derogation of the common law, are strictly construed. The courts cannot properly give force to them beyond what is expressed by their words, or is necessarily implied from what is expressed.<sup>93</sup>

In passing, even in 1904 the tag, “or is necessarily implied from what is expressed,” was required, potentially taking almost all force from the preceding words. Black, Llewellyn’s second secondary source, agrees, but softens the tag:

[A]cts of the legislature made in derogation of the common law will not be extended by construction; that is, the

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89. See *supra* text accompanying notes 14-21.

90. Llewellyn, *Canons*, *supra* note 1, at 401.

91. *Id.*

92. *Ross v. Jones*, 89 U.S. (2 Wall.) 576, 591 (1875).

93. SUTHERLAND, *supra* note 8, § 573, at 1058-59. Sutherland includes numerous cites at each point. See *id.* at 1058 n.1, 1059 n.2.

legislature will not be presumed to intend innovations upon the common law, and its enactments will not be extended, in directions contrary to the common law, farther than is indicated by the express terms of the law or by fair and reasonable implications from its nature or purpose or language employed.<sup>94</sup>

Black's weakening of the conditions on the exception fits the change in social and judicial climate since the turn of the 20th century. Writing in 1932, Black argued that Thrust #2 had lost all vitality, that it "no longer ha[d] any foundation in reason" and should be modified or abandoned.<sup>95</sup>

If Thrust #2 has any continuing force, it is on its alternate justification, the principle of notice. One is not and ought not be bound by a law unless one can have notice of it.<sup>96</sup> Common law draws its power from reason,<sup>97</sup> and gives notice by the standards of decency current in society.<sup>98</sup> A statute in accord with common standards of behavior need not be narrowly construed. But one that seeks to change behavior or to penalize a common practice needs active publicity,<sup>99</sup> and should not be construed beyond the scope thus publicized — that is, it should be strictly construed. The requirement of notice, determined by the nature of the behavior in question and how one engaged in it ordinarily knows the standards required, provides a much better and more discriminating ground for Thrust #2 in the modern world than does the old "brooding omnipresence in the sky."

Llewellyn supports Thrust #2 with *Devers v. City of Scranton* from the 1932 Pennsylvania Supreme Court.<sup>100</sup> One of Scranton's fire

94. BLACK, *supra* note 10, § 113, at 367.

95. *Id.* at 368. Black cites, *inter alia*, *Gibson v. Jenney*, 15 Mass. 205 (1818), for the proposition that courts were in general agreement. See BLACK, *supra* note 10, § 113, at 374 n.44.

96. See generally SINCLAIR, *supra* note 6, at 7-8 & n.35 (commenting on the necessity of notice).

97. As Chief Judge Breitel wrote, common law "is based on reasoning and presupposes . . . that its determinations are justified only when explained or explainable in reason." Charles D. Breitel, *The Lawmakers*, 65 COLUM. L. REV. 749, 772 (1965).

98. SINCLAIR, *supra* note 6, at 17.

99. "The citizen is entitled to an unequivocal warning before conduct on his part, which is not *malum in se*, can be made the occasion of a deprivation of his liberty or property." *People v. Phyfe*, 136 N.Y. 554, 559 (1893).

100. 161 A. 540 (Pa. 1932).

trucks, allegedly negligently driven, had “run down and killed” plaintiff Devers’ son.<sup>101</sup> At common law a municipality could not be liable for damages it caused in carrying out its governmental functions — health, safety, and welfare.<sup>102</sup> So if Devers had any chance, it had to be under a statute: “Every county, city, borough, incorporated town or township within this Commonwealth, employing any person, shall be jointly and severally liable with such person for any damages caused by the negligence of such person while operating a motor vehicle upon the highway in the course of their employment.”<sup>103</sup> But what was a motor vehicle for this purpose? The statute tells: “motor vehicles” included “every vehicle . . . which [wa]s self-propelled, except tractors, power shovels, road rollers, agricultural machinery, and vehicles which move[d] upon or [we]re guided by a track, or travel[ed] through the air.”<sup>104</sup> Very good, but what was a vehicle for this purpose? “Vehicle” meant “[e]very device in, upon, or by which any person or property [wa]s or may be transported or drawn upon a public highway,” with a list of exceptions similar to that in the definition of “motor vehicle.”<sup>105</sup> Thus, the court decided against Devers: “We are clearly of the opinion that a fire truck is not a device intended for the transportation of persons or property upon the public highway.”<sup>106</sup> That is indeed a narrow construction. But, “[i]n construing a statute which changes or is in derogation of the common law, the letter of the act is to be strictly considered.”<sup>107</sup> After all, “it is not to be presumed the legislature intended to make any innovation upon the common law, further than the case absolutely requires.”<sup>108</sup> It appears the common

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101. *Id.* at 541.

102. *See id.*

103. *Id.* (quoting Act of May 1, 1929, P.L. 905, art. VI, § 619).

104. *Id.* at 542 (quoting Act of May 1, 1929, P.L. 905, art. VI, § 102).

105. *Id.*

106. *Id.*

107. *Id.* (citations omitted).

108. *Id.* at 543. It had perhaps a better argument. The legislature had amended the section specifically to provide liability if the negligent driver was a “member of a *volunteer* fire company,” and this driver was in a professional fire company. *Id.* (emphasis added). “[H]ad the Legislature intended to fix liability upon municipalities for the negligence of the *paid* employees . . . it would have so stated specifically as it did in the case of volunteer fire companies.” *Id.* This was a perfect example of *expressio unius est exclusio alterius*.

law of sovereign immunity, along with the old cliché, Thrust #2, still held sway for the 1932 Pennsylvania Supreme Court.

What was the Pennsylvania court thinking? Did it believe that the driver operated the truck with notice of his employer's freedom from liability for his negligence? Or, that the driver's employer paid less attention to hiring and training than it otherwise might have because of its freedom from liability for the driver's negligence? Hardly. But the court no doubt felt a general background support for the principles — dubious though we might now find them — underlying sovereign immunity and the inroads that could be made upon it by tort liability. No doubt the City of Scranton's insurer was also gratified.

*Parry #2*: "Such acts will be liberally construed if their nature is remedial."<sup>109</sup>

This too is a maxim with a long history. A hint of it occurs in 1584 in the celebrated *Heydon's Case*:<sup>110</sup> "[E]quity will aid remedial laws though penal . . ."<sup>111</sup> Having restated Thrust #2, Sutherland immediately says "statutes may be remedial, and then they must, except as antagonized by other rules of construction, be liberally construed."<sup>112</sup> This is relatively timid in light of the equivocations Sutherland had on Thrust #2.<sup>113</sup> The 1932 *Corpus Juris* recites Parry #2 to include also the converse, excluding a case within the letter of the statute but not the intent.<sup>114</sup>

109. Llewellyn, *Canons*, *supra* note 1, at 401.

110. 3 Co. 7a, 76 Eng. Rep. 637 (1584).

111. *Id.* at 7b n.B, 76 Eng. Rep. at 638 n.B.

112. SUTHERLAND, *supra* note 8, § 574, at 1061. Llewellyn cites sections 573-75. See Llewellyn, *Canons*, *supra* note 1, at 401 n.6. As an illustration to Parry #2 Sutherland gives, "A statute legitimating bastards should be liberally construed." SUTHERLAND, *supra* note 8, § 573, at 1059 n.2 (citing *Beall v. Beall*, 8 Ga. 210 (1850)).

113. After discussing the idea behind Parry #2, Sutherland refers to section 592, which restates Parry #1: "When the scope and intent of an act are ascertained by all the aids available, words whose ordinary acceptation is limited may be expanded to harmonize with the purpose of the act." SUTHERLAND, *supra* note 1, § 592, at 1087. He also cites *Silver v. Ladd*, 74 U.S. (7 Wall.) 219 (1868). *Id.*

114. "Where necessary to effectuate the legislative intent, remedial statutes will be construed to include cases within the reason, although outside the letter, of the statute, and to exclude cases within the letter, but outside the reason." 59 C.J. *Statutes*, *supra* note 9, § 657, at 1109. It illustrates with the well-known torts case, *Gorris v. Scott*, (1874) 9 L.R. Exch. 125. See *id.* at 1109 n.94. In that case, the defendant ship owner failed to build pens to segregate stock being transported in violation of the Contagious Diseases

Two questions stand out: “What counts as remedial?” and “What does it mean to construe a statute liberally?”. In answering the first question, both secondary sources paraphrase *Heydon’s Case’s* first steps:

- 1st. What was the common law before the making of the Act.
- 2nd. What was the mischief and defect for which the common law did not provide.
- 3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth.<sup>115</sup>

If the statute is seen not as imposing a restriction or right or duty on the common law, but as fixing it to cover a new situation or an otherwise unforeseen problem, then it is remedial,<sup>116</sup> “[a]nd it is the duty of judges so to construe the statute as to suppress the mis-

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Act. *Gorris*, (1874) 9 L.R. Exch. 125. The animals were lost overboard in a storm, thus “the damage [wa]s of such a nature as was not contemplated at all by the statute, and as to which it was not intended to confer any benefit on the plaintiffs.” *Id.*

115. 3 Co. at 7b, 76 Eng. Rep. at 638. The famously quotable passage in its entirety is:

And it was resolved by them, that for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law,) four things are to be discerned and considered: —

- 1st. What was the common law before the making of the Act.
- 2nd. What was the mischief and defect for which the common law did not provide.
- 3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth.

And, 4th. The true reason of the remedy; and then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, *pro privato commodo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico*.

*Id.* Justice Frankfurter wrote: “The well known resolutions in *Heydon’s Case*, have the flavor of Elizabethan English but they express the substance of a current volume of U.S. Reports as to the considerations relevant to statutory interpretation.” Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 541 (1947). That remains valid fifty-five years later.

116. SUTHERLAND, *supra* note 8, § 583, at 1074; 59 C.J. *Statutes*, *supra* note 9, § 657, at 1106.

chief and advance the remedy."<sup>117</sup> That is the essence of what treatise writers mean by "construe liberally": "to construe a statute liberally or according to its equity is nothing more than to give effect to it according to the intention of the law-maker, as indicated by its terms and purposes."<sup>118</sup>

*Becker v. Brown*, Llewellyn's example, is not especially well chosen to illustrate Parry #2.<sup>119</sup> It was a complicated dispute over priority between liens on cattle, and was probably resolved before the opinion threw in, almost as an afterthought, "The statute is remedial in its character, and in accordance with familiar rule, it should receive a liberal construction for the purpose of effectuating its object."<sup>120</sup> Woollen purchased cattle from defendants/appellants Becker & Degen in Colorado, the latter taking but failing to perfect a security interest for the price; worse, the agreement itself proved void. Woollen moved the cattle to Nebraska and subsequently placed them with plaintiffs Brown and Dale in their feed lots. Neither Brown nor Dale knew of Becker & Degen's attempted lien. Unpaid, Becker & Degen, discovering the infirmities of their contractual lien and that Brown and Dale had the cattle, obtained another, this time valid and this time perfected. Thus armed they obtained the cattle, not because Brown and Dale acknowledged the validity of their right, but by threat of force. Brown and Dale brought suit under Nebraska's statutory "agister's lien,"<sup>121</sup> which simply gave a lien to a person who "[fed] and [took] care of any

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117. SUTHERLAND, *supra* note 8, § 583, at 1074. Sutherland would exclude penal statutes. *Id.* § 584, at 1074.

118. *Id.* § 589, at 1085. See also BLACK, *supra* note 10, § 113, at 378-79.

119. 91 N.W. 178 (Neb. 1902).

120. *Id.* at 180.

121. The court said of that statute:

Section 28 of chapter 4 of the Compiled Statutes of this state enacts: "When any person shall procure, contract with, or hire any other person to feed and take care of any kind of live stock, the person so procured, contracted with, or hired, shall have a lien upon such property for the feed and care bestowed by him upon the same for the contract price therefor, and in case no price has been agreed upon, then for the reasonable value of such feed and care." This is an amendment of a former statute, which, however, differed only in respect to the specific regulations as to remedies, and concerning which, it was held by this court in *Marseilles Mfg. Co. v. Morgan*, 12 Neb. 66, 10 N.W. 462, that a lien arising thereunder was subject to the lien of a prior valid chattel mortgage.

*Id.* at 178.

kind of live stock” — an agister — for the price agreed for so doing “and in case no price ha[d] been agreed upon, then for the reasonable value of such feed and care.” Did Brown and Dale’s statutory lien take priority over Becker & Degen’s later arising but duly perfected consensual lien for the price of the cattle? Yes. The statutory lien had to be distinguished from a common law lien, such as an ordinary bailee would have.<sup>122</sup> The opinion doesn’t say explicitly, but it seems clear that in a cattle-producing economy it would be, and would be known by Supreme Court Justices to be, essential that the general rule be modified for cattle: at the appropriate time cattle must be sent to market; delays to resolve legal disputes would destroy their value; so the possessory perfection of the bailee’s lien would be ineffective. Thus, the court stated, “we think that by our statute the legislature plainly indicated an intent to do something more than to extend to agisters the common-law lien of a bailee for hire.”<sup>123</sup> With some further discussion, this justified the outcome. Parry #2 is tagged on at the end, seemingly an afterthought.

*Resolution:*

Prima facie there is no clash between Thrust #2 and Parry #2. The condition on Parry #2, “if their nature is remedial,” separates its application to special cases, not covered by Thrust #2. Thrust #2 tells us that if a statute should impose some innovation on the “robe without seam” that is the common law, the judiciary should minimize its effect. After all, the common law is rational, moral, just and fair, and as finely discriminatory as any problem might require.<sup>124</sup> A statute in derogation of the common law must, ipso facto, fail on at least one such count. But should there be a tear in that fabric, then a statute to patch, mend, stitch up, in a word, to remedy that flaw, should be construed as liberally as needed to make it effective.

That is nice and idealistic, but much too prima facie. Look, for example, at Llewellyn’s illustrative cases. *Devers* could as easily have

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122. “The general rule [was] that a bailee for hire, who performs labor or services upon or with respect to the subject of the bailment, loses his lien for compensation by permitting the article to go out of his possession . . .” *Id.* at 179.

123. *Id.*

124. See Michael B.W. Sinclair, *What is the ‘R’ in IRAC?*, 46 N.Y.L. SCH. L. REV. 457, 474-75 (2002).

gone the other way and illustrated Parry #2. The common law gave sovereign immunity to the defendant city. Was the statute in derogation of that just and wise law? Or, was it stitching up a rent, newly apparent in the otherwise perfect fabric? Sovereign immunity arose in an historic era in which governmental functions were fewer and did not include the use of motor vehicles. Much changed with the introduction of motor vehicles, including the felt propriety of governmental immunity from responsibility for its drivers. But the common law had trouble with its precedents, so firmly in place, albeit an antiquated place. Wasn't this statute, perhaps, designed to remedy that inconcinnity? One could understand excepting a fire fighting vehicle on the grounds that it served a governmental function fraught with hazards known for centuries, but hardly on the ground that it was not a vehicle (even as statutorily defined). But the court was not interested in rationality, only in the wooden, unthinking application of a cliché.

You cannot make quite the same argument for symmetrical application of the agister's lien statute in *Becker*. As it was decided, the common law bailee's lien did not take into account the peculiar time sensitivity of cattle fattening and marketing. In a state economically dependent on agriculture, that was a significant problem necessitating a legislative remedy. Had the court interpreted the statute narrowly, it would have made the statutory agister's lien no different from the common law bailee's lien. That is, it would have interpreted the legislature as doing nothing in enacting the statute, a violation not only of common sense and legislative supremacy,<sup>125</sup> but also of Thrust #16: "Every word and clause must be given effect."<sup>126</sup>

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125. In a very pretty case ("The question presented in this case is more curious than difficult": was a swine once butchered still a swine or was it distinguishable as pork, thus not exempt from execution by the sheriff under the statute construed strictly?), Chief Justice Parker of the 1818 Massachusetts Supreme Court observed: "It is said that statutes, made in derogation of the common law, are to be construed strictly. This is true; but they are also to be construed sensibly, and with a view to the object aimed at by the legislature." *Gibson v. Jenney*, 15 Mass. 205, 206 (1818) (deciding that the purpose of the statute — to protect the very poor by allowing a family one cow and one swine exempt from process — would not be served if the family could not eat their slaughtered pig).

126. Llewellyn, *Canons*, *supra* note 1, at 404.

There are two points to draw. First, if a court wishes, it can often pick either of Thrust or Parry #2 and by brute force produce its choice of outcome. Misused in this way, the two canons are indeed contraries. But this is no more than an indictment of mindless, mechanical decision making.<sup>127</sup> The second point is that, when faced with a statute inconsistent with the common law, whether a judge applies Thrust #2 or Parry #2 depends very greatly on whether the judge sees the statute as solving a problem in the common law or imposing legislatively upon it. *Devers* is an example. Also the married women's property acts of the 19th century: were they remedial of a defect or in derogation of the common law? In 1904, Sutherland reported that their "increasing the power of married women over their separate property, being in derogation of the rights of the husband and of the common law, are to be construed strictly."<sup>128</sup> But sensibilities were soon to change.<sup>129</sup> Black wrote "A good illustration of the mistaken application of the rule [Thrust #2] . . . is found in the case of the statutes enabling married women to deal freely with their separate property and to make contracts respecting the same."<sup>130</sup>

Mechanics' liens, when first introduced, met with different opinions as to their status, remedial or in derogation of the common law. In Michigan the Supreme Court said:

[T]his court has repeatedly declared in substance that these acts are innovations upon the common law over the rights of property by permitting the institution of private charges on property without or against the owner's assent and without any judicial or other official sanction, and by

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127. Postmodern viewpoint epistemology — "[M]any of the truths we cling to depend greatly on our own point of view" — doesn't help; it is a denial of rationality, justifying any outcome at the whim of the judge. *STAR WARS EPISODE VI: THE RETURN OF THE JEDI* (20th Century Fox 1983).

128. SUTHERLAND, *supra* note 8, § 574, at 1061-62. Sutherland cites cases from New Jersey, Delaware, Illinois, Missouri, Alabama, Iowa, Pennsylvania, Connecticut, Michigan, Vermont, and New York. *Id.* at 1062 nn.20-21.

129. In 1920, the South Carolina Supreme Court, in *Prosser v. Prosser*, 102 S.E. 787 (S.C. 1920), used the state's code of civil procedure primarily to provide a battered wife a tort remedy against her husband, but added an argument under the Married Women's Property Act: "More than this, a wife has a right in her person; and a suit for a wrong to her person is a thing in action; and a thing in action is property, and her property." *Id.* at 788.

130. BLACK, *supra* note 10, § 113, at 377.

authorizing an enforcement of such charges by unusual and summary methods, and that the provisions of these enactments cannot be extended in their operation and effect beyond the plain and fair sense of the terms . . . .<sup>131</sup>

Right next door in Ohio the Supreme Court said to the contrary:

Looking thus at the object of the statute, and perceiving it to be one of an equitable character and beneficent tendency, section seven being directory of the mode of securing the object of the statute, the same ought to be liberally construed, for the furtherance and attainment of such object.<sup>132</sup>

What do you think? Was it a defect in the common law in need of remedy that the laborer had no way "to secure . . . his hire or reward for the construction or repair which he had made"?<sup>133</sup> Or, was it an innovation upon the common law power of the purchaser of the work to retain the benefit but avoid paying for it? The answer might not have been as transparent to the judiciary of the time, few if any of whom had experience selling repair or construction services, as it seems to us today.

Llewellyn is correct: this pair of canons cannot solve such a question. A judge who uses one or the other without explaining the ground on which she does so has not switched on her brain. Explaining the ground requires answering *Heydon's Case's* first questions, that is, explaining the purpose for enacting the statute at the time it was enacted, for "[a] statute merely declaring a rule, with no purpose or objective, is nonsense."<sup>134</sup>

Legislatures, whether reorganizing or changing the common law, have sometimes included in a statute a provision preempting the possibility of subversion of their intent by either Thrust or Parry #2.<sup>135</sup> The Uniform Commercial Code (U.C.C.) is a good example. In its very first provision of consequence it says: "This act shall be

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131. *Wagar v. Briscoe*, 38 Mich. 587, 592 (1878); *accord* *Wade v. Reitz*, 18 Ind. 307 (1862).

132. *Thomas v. Huesman*, 10 Ohio St. 152, 156 (1859).

133. The purpose of the mechanic's lien statute "was to secure to the laborer his hire or reward for the construction or repair which he had made." *Id.*

134. Llewellyn, *Canons*, *supra* note 1, at 400.

135. For example, New Zealand makes Parry #2 quite general by its Acts Interpretation Act of 1924, which, at section 5(j) reads:

liberally construed and applied to promote its underlying purposes and policies.”<sup>136</sup> In view of the number of moves they put on an ossified common law of contract they were replacing,<sup>137</sup> Llewellyn and his fellow code drafters were wise to include this provision.

*Pair Three*

THRUST: “Statutes are to be read in the light of the common law and a statute affirming a common law rule is to be construed in accordance with the common law.”

PARRY: “The common law gives way to a statute which is inconsistent with it and when a statute is designed as a revision of a whole body of law applicable to a given subject it supersedes the common law.”<sup>138</sup>

*Thrust #3*: “Statutes are to be read in the light of the common law and a statute affirming a common law rule is to be construed in accordance with the common law.”<sup>139</sup>

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Every Act, and every provision or enactment thereof, shall be deemed remedial, whether its immediate import is to direct the doing of anything Parliament deems to be for the public good, or to prevent or punish the doing of anything it deems contrary to the public good, and accordingly shall receive such fair, large, and liberal construction and interpretation as will best ensure the attainment of the object of the Act and of such provision or enactment according to its true intent, meaning, and spirit.

1 REPRINT OF THE STATUTES OF NEW ZEALAND 9 (R.E. Owen 1958).

136. U.C.C. § 1-102(1) (2005).

137. For example, U.C.C. section 2-207 abolished the “mirror image” rule for contracts formed by the exchange of writings. An early commentator wrote:

Inexorably eradicating old doctrine root and branch, the Code settles the “battle of forms” by providing in section 2-207 that express acceptance varying the terms of the offer amounts not to a conceptual counteroffer but instead “operates as an acceptance,” unless designated to be conditional upon assent by the offeror, whereupon any such additional terms will normally become a part of merchants’ contracts unless the offer specifies otherwise, the additional terms materially alter the contract or express objection to them is promptly given. Comment 2 specifies that “a proposed deal which in commercial understanding has in fact been closed is recognized as a contract.”

Eugene F. Mooney, *Old Kontract Principles and Karl’s New Kode: An Essay on the Jurisprudence of Our New Commercial Law*, 11 VILL. L. REV. 213, 235 (1966).

138. Llewellyn, *Canons*, *supra* note 1, at 401.

139. *Id.*

There is a certain accolade value to calling a string of words a canon; not just any old sentence about interpretation, even of suitable pomposity, warrants it. Thrust #3 doesn't deserve this elevation. It is scarcely more than a restatement of the first two *Heydon's Case* steps, a repeat of the justificatory thinking underlying Pairs One and Two, a corollary to Thrust #2. It is not surprising that secondary sources for it are so few. *R.C.L.*, in the cited section 280 under the caption "Presumption Against Change of Common Law," says "it is rather to be presumed that no change in the common law was intended, unless the language employed clearly indicates such an intention."<sup>140</sup> Of course! Given the conceptual status of the common law — as pure, immutable, and universal — that dominated legal thinking through a good part of the 19th century, it could hardly be otherwise.

Thrust #3 comes in the preceding section of *R.C.L.* cited, section 279. Whether a statute accords with or is in derogation of the common law,

it must be read and construed in the light of the common law in force at the time of its enactment; for, as has been said, to know what the common law was before the making of a statute, whereby it may be seen whether the statute was introductory of a new law or only affirmative of the common law, is the very lock and key to set open the windows of the statute.<sup>141</sup>

In other words, *Heydon's Case*: "1st. What was the common law before the making of the Act. 2nd. What was the mischief and defect for which the common law did not provide."<sup>142</sup> Where the statute restates the common law, "affirm[s] a common law rule," then of course it is to be read "in accordance with the common law." Both the legislature and judicial preference agree. Why should any judge construe differently? The contrary situation, where the statute innovates on the common law, is the explicit domain of Thrust #2.

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140. 25 R.C.L. *Statutes*, *supra* note 11, § 280, at 1054.

141. *Id.* § 279, at 1053-54.

142. 3 Co. 7a, 7b, 76 Eng. Rep. 637, 638 (1584).

*Bandfield v. Bandfield*, Llewellyn's case in support of Thrust #3, illustrates the point that this is merely a derivative of Thrust #2.<sup>143</sup> As a legal decision, it came just six months after another case exactly on point, decided without opinion.<sup>144</sup> Michigan's married women's property act read as follows:

The real and personal estate of every female, acquired before marriage, and all property, real and personal, to which she may afterwards become entitled by gift, grant, inheritance, devise, or in any other manner, shall be and remain the estate and property of such female. \* \* \* Actions may be brought by and against a married woman in relation to her sole property, in the same manner as if she were unmarried.<sup>145</sup>

Did this give a wife the right to "maintain suit against her husband for a personal tort, committed upon her while they were living together as husband and wife?"<sup>146</sup> Common law would not allow such a suit, and the Michigan Supreme Court said the statute would not either.

Against the common law background, and social conventions as understood by the late 19th century judiciary, this is hardly surprising.<sup>147</sup> Chief Justice Grant explained, "The result of plaintiff's contention would be another step to destroy the sacred relation of man and wife, and to open the door to lawsuits between them for every real and fancied wrong, — suits which the common law has refused on the ground of public policy."<sup>148</sup> No property was involved here. To allow the wife a cause of action would be purely

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143. 75 N.W. 287 (Mich. 1898).

144. The court explained:

We answered this question in the negative in the case of *Wagner v. Carpenter*, Circuit Judge, decided November 17, 1897. . . . No opinion was written. But the sole and identical question there involved is the same as is involved in this suit. The briefs there filed pursued the same line of argument and cited the same authorities as are now cited.

*Id.* at 287. No reason is given for publishing an opinion in this case.

145. *Id.* (quoting 2 How. Ann. St. §§ 6295, 6297).

146. *Id.*

147. It is thus an illustration of Thrust #2, or Thrust #20, *Expressio unius est exclusio alterius*: "Expression of one thing excludes another." Llewellyn, *Canons*, *supra* note 1, at 405.

148. *Bandfield*, 75 N.W. at 288.

judicial innovation. But Michigan's Chief Justice then concluded by instructing how, in the event of divorce, "[t]his court, clothed with the broad powers of equity, can do justice to her for the wrongs of her husband . . . ."<sup>149</sup>

In so far as the case might be said to support Thrust #3, it is in a quotation from Bacon's *A New Abridgement of the Law* (a 19th century English treatise):

In all doubtful matters, and where the expression is in general terms, statutes are to receive such a construction as may be agreeable to the rules of the common law in cases of that nature; for statutes are not presumed to make any alteration in the common law, farther or otherwise than the act expressly declares. Therefore, in all general matters the law presumes the act did not intend to make any alteration; for, if the parliament had had that design, they would have expressed it in the act.<sup>150</sup>

Llewellyn might have used the 1914 North Dakota case, *Reeves & Co. v. Russell*.<sup>151</sup> Between a prior recorded chattel mortgagee and the blacksmith who repaired it and retained possession of it, who had priority in the threshing machine?<sup>152</sup> In 1906, when the blacksmith first took possession and made the repairs, there was no statute on point. In 1907, a statute gave the blacksmith's possessory artisan's lien priority.<sup>153</sup> Was this statutory priority good *ab initio*? Indeed it was, for it was merely a reiteration of the common law artisan's lien and its priority so long as possessory:

In construing statutes on liens, the first consideration is whether the lien is one given at common law, or is instead dependent for its existence solely upon the terms of the statute. Where the statute is merely declaratory of the common law it is construed together with, and in the light

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149. *Id.*

150. *Id.* (quoting 9 Bac. Abr. Tit. "Statute," I, 245).

151. 148 N.W. 654 (N.D. 1914).

152. *Id.*

153. *Id.* at 656 ("Section 6295, Rev. Codes 1905, which does not declare priority of an artisan's lien over recorded mortgages or encumbrances, was the only statute on the subject in 1906, at the time plaintiff's lien became effective. Chapter 168, Laws of 1907, became effective a year after this mortgage was given, and in express terms granted artisan's liens priority over mortgages.").

of, the common law; the legislature being presumed to know the common law on the subject and to enact the statute as merely declaratory thereof, and to be so interpreted in the light of its origin and common-law definition where the statute does not depart from the governing common-law principles. And this here applies, as artisans' liens are a creation of the common law, and not a special lien originating under, and dependent upon, statute for its creation and existence.<sup>154</sup>

Again, the reasoning is transparent: absent the statute, the common law would have governed exactly as does the statute. Thrust #3 says no more.

*Parry #3*: "The common law gives way to a statute which is in consistent with it and when a statute is designed as a revision of a whole body of law applicable to a given subject it supersedes the common law."<sup>155</sup>

The first part of this Parry, "The common law gives way to a statute which is inconsistent with it," is merely a restatement of the democratic principle of legislative supremacy. In the context of Llewellyn's list, it is surplussage, having been dealt with in Pairs One and Two. The interesting, non-repetitive part is the rest.

The "defect" in the common law at the time of enactment may not have been in substance so much as in organization, formulation, or publicity, or, in the United States, in uniformity across more than fifty jurisdictions. Suppose a set of statutes replaces a whole field of common law. It may be declaratory of the common law, in derogation of it, or include elements of both. When it comes to applying an uncertain statute of this codification, what should guide interpretation?

*Parry #3* answers that if the statute or the code of which it is part "is designed as a revision of a whole body of law applicable to a given subject it supersedes the common law." An interpretive or interstitial decision should accord with the legislative scheme and not with the common law it displaces. *R.C.L.*, Llewellyn's cited secondary source, explains at section 280:

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154. *Id.*

155. Llewellyn, *Canons*, *supra* note 1, at 401.

A great many of our statutes . . . consist merely of codifications, sometimes general, but in most cases only partial, of some particular rule or principle of the common law; and should the courts hold that when any rule or principle of the common law is by the legislature partially incorporated into a statute, the remainder of the rule is thereby repealed or annulled, endless trouble and confusion would result . . . .<sup>156</sup>

This contrasts with an express legislative intent to abrogate or modify the common law. However: "Where the statute laws on a particular subject, taken together as forming one entire system, are wholly repugnant to and inconsistent with the common law on that subject, it must be assumed that it was the intention of the legislature to supersede the common law on that subject altogether."<sup>157</sup> Legislative intent, a fundamental aspect of the democratic principle of legislative supremacy, dominates and directs interpretation in both circumstances.<sup>158</sup>

Llewellyn cites two cases in support of Parry #3: *Hamilton v. Rathbone*, a District of Columbia Married Women's Property Act case from the United States Supreme Court of 1899,<sup>159</sup> and *State v. Lewis*, from the North Carolina Supreme Court of 1906.<sup>160</sup> *Hamilton*, although a rich and fascinating resource on statutory interpretation, is not at all relevant to Parry #3<sup>161</sup> *Lewis* is scarcely better. Lewis was charged by a grand jury in Union County with breaking into a jail in adjacent Anson County to remove an inmate, John V.

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156. 25 R.C.L. *Statutes*, *supra* note 11, § 280, at 1055.

157. 25 R.C.L. *Statutes*, *supra* note 11, § 280, at 1055 (citing *Rozelle v. Harmon*, 15 S.W. 432 (Mo. 1890)).

158. Llewellyn also cites 25 R.C.L. *Statutes* section 289 in support of Parry #3. The section, however, is about the interpretation of a revised statute in light of its predecessor, and basically states a plain meaning rule: "when a provision is plain and unambiguous the court cannot refer to the original statute for the purpose of ascertaining meaning." *Id.* § 289, at 1065. It thus has nothing to say about Parry #3.

159. 175 U.S. 414 (1899).

160. 55 S.E. 600 (N.C. 1906).

161. Perhaps the mistake arose because of the condition in Parry #3, "when a statute is designed as a revision of a whole body of law applicable to a given subject." *Hamilton* concerns the interpretation of the 1874 revision of an 1869 statute. It bears no relation to anything else related to the canon in question here, and in fact, is a fine illustration of the "plain meaning" rule. See Llewellyn, *Canons*, *supra* note 1, at 403; 25 R.C.L. *Statutes*, *supra* note 11, § 289.

Johnson, charged with murder, and with murder to “unlawfully, wickedly, willfully and feloniously . . . lynching, injuring and killing” him.<sup>162</sup> At common law, a grand jury indictment would have to be in the county in which the offence occurred; however, “[o]wing to the prejudice or sympathy which in cases of lynching usually and naturally pervades the county where that offense is committed, the General Assembly, upon grounds of public policy, deemed it wise to transfer the investigation of the charge to the grand jury of an adjoining county.”<sup>163</sup> The issue was whether the legislature had power under the United States’ and North Carolina’s Constitutions to change the common law. It had.

*Resolution:*

There is no clash between Thrust #3 and Parry #3. Each applies in circumstances quite different from and unlikely to be confused with the domain of the other. Thrust #3 is an element of the reasoning supporting Pair Two. Justification for it is hardly worth spelling out: If the legislative intent expressed in the statute and judicial intent in the common law are the same, the former being declarative of the latter, there is no ground for disagreement, so why disagree? Why even formulate a canon?

Parry #3 is an ill-mixed conglomeration. The first part is an expression of legislative supremacy, a basic precept of all statutory interpretation. The second part covers an interesting situation: Where a set of statutes is intended to cover a field hitherto governed by common law, how should a particular, under-determinate statute be construed? This is not a circumstance within the contemplation of Thrust #3. One has to struggle to find an overlap. Yet it is interesting on its own account.

Early 20th century writers were well aware of examples of statutes displacing the common law governing whole domains of social intercourse. The Negotiable Instruments Law<sup>164</sup> and the Uniform

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162. *Lewis*, 55 S.E. at 600.

163. *Id.* at 602. The North Carolina statute in question was also a revision — “Ch 461, p. 441, Laws 1893 . . . is now Revisal 1905, § 3698” — but this was not at issue. *Id.* at 601.

164. For the text of the Negotiable Instruments Law as enacted by the New York legislature, see JOHN J. CRAWFORD, *THE NEGOTIABLE INSTRUMENTS LAW* (1897). The Negotiable Instruments Law was eventually enacted in all states. It was based on the English Bills of Exchange Act of 1882, 45 & 46 Vict. Ch.61, itself a compilation of English

Sales Act<sup>165</sup> both included formulaic statements of standard common law provisions and some revisions of common law positions thought substantively maladaptive.<sup>166</sup> There were also the probate codes, such as that at issue before the 1890 Missouri Supreme Court in *Rozelle v. Harmon*.<sup>167</sup> Missouri's statutory probate did not expressly provide for the point at issue: plaintiff creditor would prevail under the preceding common law, defendant debtor if the gap was filled in the spirit of the statute. The key question in such a situation is whether the legislature intended its statutory scheme to occupy the field. The court found:

[T]he statute laws of this state on the subject of administration, taken together as forming one entire system, are wholly repugnant to, and inconsistent with, the common law in respect to administrators de son tort. We must, therefore, conclude that the intention of the legislature was to supersede the common law on that subject altogether.<sup>168</sup>

Thus, the defendant won.

In 1953 Llewellyn himself must have been acutely aware of the collection and organization of whole areas of common law, as he was one of those principally responsible for the U.C.C.,<sup>169</sup> at that

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common law. See Charles L. McKeehan, *The Negotiable Instruments Law*, 50 AM. L. REG. 437 (1902); Nathan M. Crystal, *Codification and the Rise of the Restatement Movement*, 54 WASH. L. REV. 239 (1979); Michael B.W. Sinclair, *The Case of the Air-Conditioned Allonge*, 9 ANN. REV. BANKING L. 143, 149-50 (1990); Michael B.W. Sinclair, *Codification of Negotiable Instruments Law: A Tale of Reiterated Anachronism*, 21 U. TOL. L. REV. 625, 640-42 (1990).

165. The Uniform Sales Act was eventually adopted by thirty-seven states and also derived from a set of English statutes based on common law. Samuel Williston, famous for his treatise on contracts, drafted the Uniform Sales Act early in the 20th century. He copied much of it from the English Sale of Goods Act of 1894, but made significant advances in some key places, such as section 15, governing warranty in the sale of goods. See SAMUEL WILLISTON, *THE LAW GOVERNING SALES OF GOODS AT COMMON LAW AND UNDER THE UNIFORM SALES ACT* (1909).

166. See Mooney, *supra* note 137, at 235.

167. 15 S.W. 432 (Mo. 1890).

168. *Id.*

169. Llewellyn was Chief Reporter of the U.C.C. See Robert Braucher, *The Legislative History of the Uniform Commercial Code*, 58 COLUM. L. REV. 798, 799-80 (1958); William A. Schnader, *Pennsylvania and the Uniform Commercial Code*, 37 TEMP. L. REV. 265, 271 (1964); Soia Mentschikoff, *Highlights of the Uniform Commercial Code*, 27 MOD. L. REV. 167 (1964) (Soia Mentschikoff was Llewellyn's principal assistant on the project).

time just coming on the market.<sup>170</sup> It contained both provisions following the common law and prior statutes, such as the Negotiable Instruments Law and Uniform Sales Act, and provisions changing them. Think, for example, of the contract formation rules of U.C.C. sections 2-203–2-207. How should a court interpret section 2-205, cautiously eliminating the requirement of consideration for a limited range of option contracts, or section 2-207, forthrightly doing away with the mirror image rule for contracts formed by exchange of paper? Should they be construed liberally as part of a remedial scheme or narrowly as in derogation of the common law? Llewellyn's solution was to pre-empt argument by statute. For areas covered expressly (if less than determinately) by a provision, section 1-102(1) tells us "This Act shall be liberally construed and applied to promote its underlying purposes and policies."<sup>171</sup> But if the subject was not covered, section 1-103 provides: "Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to the capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions."<sup>172</sup> Llewellyn himself, and his fellow drafters, knew better than to rely on uncertain, and certainly not well-known, canons of construction!

*Comment:*

Neither Thrust #3 nor Parry #3 should be on a list of canons. One would think that for a verbal formula to be a canon it should at least be somewhat canonical! That would require it to be: (a) familiar, at least to those professionally concerned with the law, and (b) significant.<sup>173</sup> Thrust #3 and Parry #3 fail.

Thrust #3 is not significant; it is so obvious it is not even sufficiently familiar to be a cliché. This, perhaps, is why its footnoted support is so thin: only one treatise — 25 R.C.L. *Statutes* — comes

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170. The U.C.C. was first enacted in Pennsylvania in 1953. See 12A PA. STAT. ANN. §§ 1-101 to 10-104, amended by 1959 Pa. Laws 1023 (revised to conform with revisions developed in New York). Other states adopted the Code throughout the 1950s and 1960s.

171. U.C.C. § 1-102(1) (2005). Those purposes and policies are immediately stated in section 1-102(2). *Id.* § 1-102(2).

172. *Id.* § 1-103.

173. See *supra* Part II.

close to mentioning something like it as a general observation, and one case — *Bandfield* — only comes close in a quotation in *dicta*. One can come up with an illustrative case — *Reeves* — but it did not rest on this platitude.

That Parry #3 falls short of canonical stature can be seen from its conglomerate formulation. Canons tend to be quite focused; they are implements for particular problem situations, not hodgepodes like this. This again is illustrated by the failure of the footnoted support, and the extreme paucity of cases. Only one case, *Rozelle*, exactly concerns the issue that Parry # 3 addresses. The problem here, I think, is that where there is a possible problem that Llewellyn's formula would address, the legislative intent behind the codification makes its solution clear. Thus Parry #3 fails to be significant, and the absence of historical use suggests obscurity, not familiarity or accessibility to legal decision makers, let alone authority.

*Pair Four*

THRUST: "Where a foreign statute which has received construction has been adopted, previous construction is adopted too."

PARRY: "It may be rejected where there is conflict with the obvious meaning of the statute or where the foreign decisions are unsatisfactory in reasoning or where the foreign interpretation is not in harmony with the spirit or policy of the laws of the adopting state"<sup>174</sup>

*Thrust #4*: "Where a foreign statute which has received construction has been adopted, previous construction is adopted too."<sup>175</sup>

This one deserves its place on a list of canons. Sources abound and the verbal variation is minor. For example, "Subject to the qualifications hereinafter stated, a statute adopted from another state or from another country will be presumed to have been adopted with the construction placed upon it by the courts of the state or country before its adoption."<sup>176</sup> The cases reciting a ver-

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174. Llewellyn, *Canons*, *supra* note 1, at 402.

175. *Id.*

176. 59 C.J. *Statutes*, *supra* note 9, § 627, at 1065-68. *See also* 25 R.C.L. *Statutes*, *supra* note 11, § 294, at 1069 ("It is the well settled general rule that when a statute has been

sion of this formula are numerous,<sup>177</sup> but so too are variations on the equivocation “in the absence of an expression of legislative intention to the contrary.”<sup>178</sup> *R.C.L.* gives a nice page of examples from England, including “for instance . . . the statute of frauds, or the statute of Elizabeth against fraudulent conveyances, or the statute of limitations.”<sup>179</sup>

The reason is apparent, a straightforward example of basic interpretive procedure, as ancient as Aristotle:

When the law speaks universally, then, and a case arises on it which is not covered by the universal statement, then it is right, where the legislator fails us and has erred by over-simplicity, to correct the omission — to say what the legislator himself would have said had he been present, and would have put into his law if he had known.<sup>180</sup>

It is the method of *Heydon's Case*,<sup>181</sup> and of Plowden.<sup>182</sup> Judicial thinking has not changed in the four centuries since. As Judge Frank wrote, “Most of the modern expositions of legislative construction are but restatements, with here and there a bit of embroi-

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adopted from another state or country, the judicial construction already placed on such statute by the highest courts of the jurisdiction from which it is taken accompanies it, and is treated as incorporated therein.”); BLACK, *supra* note 10, § 176, at 597 (stating the presumption that the legislature adopted it with the “design . . . that the act should be understood and applied according to that interpretation”).

177. See, e.g., 25 *R.C.L. Statutes*, *supra* note 11, § 294, at 1069 n.4 (giving one-and-a-half pages); *Harrill v. Davis*, 168 F. 187, 198 (8th Cir. 1909) (citations omitted):

[T]he statute under which this case arose was brought into the Indian Territory from the state of Arkansas, and the Supreme Court of that state had held, before it was adopted in the Indian Territory . . . and it is an established rule of statutory construction that the adoption of a statute previously in force in some other jurisdiction is presumed to be the adoption of the interpretation thereof which had been theretofore placed upon it by the judicial tribunal whose duty it was to construe it.

178. 25 *R.C.L. Statutes*, *supra* note 11, § 294, at 1070-71.

179. *Id.* at 1072.

180. ARISTOTLE, *NICOMACHEAN ETHICS* Bk.V, Ch.10. See also ARISTOTLE, *RHETORIC* Bk.1, Ch.13.

181. 3 Co. 7a, 7b, 76 Eng. Rep. 637, 638 (1584) (citations omitted).

182. Plowden included it in commentary after his report of *Eyston v. Studd*, 2 Plow. 459, 465-68, 75 Eng. Rep. 688, 695-700 (1574).

dery, of what Aristotle said."<sup>183</sup> Here, we might focus on the fourth of the *Heydon's Case* questions, "The true reason of the remedy."<sup>184</sup>

Why did the legislature choose to copy legislation already in place elsewhere? We may presume it was because that legislation had proven effective at remedying exactly the societal ill being addressed. And surely we may presume that the relevant legislators knew this because, *inter alia*, the cases of that jurisdiction had demonstrated its effectiveness. That is, we may presume "the law was enacted in the light of the construction given it by the courts of the state or country from which the statute was taken."<sup>185</sup> Of the English statute against monopolies, Justice Story wrote:

The words of our statute are not identical with those of the statute of James, but it can scarcely admit of doubt, that they must have been within the contemplation of those by whom it was framed, as well as the construction which had been put upon them by Lord Coke.<sup>186</sup>

Llewellyn illustrates with a picturesque case from the Illinois Supreme Court of 1873, *Freese v. Tripp*.<sup>187</sup> Freese, a saloon operator, may have sold liquor to William Tripp, a lush. Mary Ann, William Tripp's wife, won \$100 exemplary damages at trial under a

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183. Jerome Frank, *Words and Music: Some Remarks on Statutory Interpretation*, 47 COLUM. L. REV. 1259, 1259 (1947).

184. 3 Co. at 7b, 76 Eng. Rep. at 638.

185. 25 R.C.L. *Statutes*, *supra* note 11, § 294, at 1071; accord BLACK, *supra* note 10, § 176, at 599 (adding that the presumption is stronger if the statute is ancient and its meaning well settled, in which case the presumption would be "of great weight and practically conclusive"); *Metro. R.R. Co. v. Moore*, 121 U.S. 558, 570-72 (1887) (deciding that the District of Columbia, which had followed Maryland civil procedure prior to the legislation copying New York's, should follow New York decisions on point, and not Maryland decisions). In *Russell v. Jordan*, 147 P. 693, 694 (Colo. 1914), the court noted:

Sec. 526 was enacted in 1885, and appears to have been adopted bodily from the Ohio statutes. The statute was constructed by the supreme court of Ohio before it was enacted by our legislature. It has been held by this court that prior construction under such circumstances is at least strongly persuasive upon the courts of this state, for the reason that the presumption is that the law was enacted in the light of the construction given it by the courts of the state from which the statute was taken.

The Supreme Court of Ohio in an opinion rendered in 1880, in the case of *Upton v. Noble*, 35 Ohio St. 655, in construing the statute that now constitutes our Section 529, Rev. Stat. 1908, said. . .

186. *Pennock v. Dialogue*, 27 U.S. 1, 20-21 (1829).

187. 70 Ill. 496 (1873).

statute “entitled ‘An act to provide against the evils resulting from the sale of intoxicating liquors in this State,’ in force July 1, 1872.”<sup>188</sup> The statute provided a cause of action to “every husband, wife, child, parent, guardian, employee or other person who shall be injured in person or property or means of support” as a result of intoxicating liquor.<sup>189</sup> The statute was both penal and in derogation of the common law and so “should, according to the well understood canon, receive a strict construction.”<sup>190</sup>

Two of the questions involved concern us. First, did “the anguish or pain of mind, feelings the plaintiff suffered, if any, by reason of such intoxication of her husband”<sup>191</sup> count as injury in person in the absence of a physical injury? No, because “[t]he Supreme Court of Ohio, from which State our statute is derived, substantially, hold it is not proper, in such a case, to charge the wife has suffered mental anguish, disgrace or loss of society or companionship — all that does not amount to injury of the person, within the meaning of the statute.”<sup>192</sup> Second, in the absence of actual damages, was it proper to authorize the jury to award exemplary damages? Again, the Illinois Supreme Court answered “no”: “This is the construction placed upon the act by the highest court of the State of Ohio, and it is reasonable to suppose the legislature adopted the law with the construction put upon it, as generally held.”<sup>193</sup> It is a fine illustration of Thrust #4 in action, without thought to rationale, albeit with a little help from Thrust #2 and lenity.<sup>194</sup>

Thrust #4 is fragile. Treatise writers introduce it with equivocation: “Subject to the qualifications hereinafter stated . . .;”<sup>195</sup> “in the absence of an expression of legislative intention to the contrary.”<sup>196</sup>

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188. *Id.* at 497.

189. *Id.*

190. *Id.* at 499. *See supra* text accompanying notes 90-137 (discussing Pair Two).

191. *Id.* at 499.

192. *Id.*

193. *Id.* at 501. A three person “dissent” concurred in the judgment and concurred in this part of the majority decision for this reason. *Id.* at 502-03.

194. Lenity is the canon “Criminal statutes are to be construed narrowly.” Llewellyn did not include it on his list, even though it is as hoary an old canon as we have, and often disputed.

195. 59 C.J. *Statutes*, *supra* note 9, § 627, at 1065.

196. 25 R.C.L. *Statutes*, *supra* note 11, § 294, at 1070-71.

It is not "absolute, or imperative . . . but is subject to numerous exceptions,"<sup>197</sup> and should be followed only if the foreign interpretation is "sound and reasonable."<sup>198</sup> All this, of course, flows from basic principles of interpretation; no interpretive device should trump clear legislative intent to the contrary. But of Thrust #4, writers are more than usually equivocal; it is merely persuasive we are told, not binding, and not to be followed if there is "sound reason why it should not be followed."<sup>199</sup>

*Parry #4*: "It may be rejected where there is conflict with the obvious meaning of the statute or where the foreign decisions are unsatisfactory in reasoning or where the foreign interpretation is not in harmony with the spirit or policy of the laws of the state adopting it."<sup>200</sup>

This is little more than a list of exceptions to Thrust #4. Generally, they make good sense because they are reasons for doubting that the legislature enacting the foreign statute really did intend to adopt it as applied by the courts of the jurisdiction of the statute's origin.<sup>201</sup>

First, Thrust #4 "may be rejected where there is conflict with the obvious meaning of the statute . . . ."<sup>202</sup> If the meaning of the statute is plain, one does not need interpretive devices such as canons, nor, in case of Thrust #4, the foreign sources to which it refers, even when those foreign sources do not consist with the plain language. The Washington Supreme Court explained: "We think that the presumption that the legislature knew the plain import of the language they used is much stronger than the presumption that they knew of one or two decisions of the supreme court of California."<sup>203</sup> It is basic interpretation lore: one only needs resort to ex-

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197. *Id.* § 295, at 1073.

198. 59 C.J. *Statutes*, *supra* note 9, § 627, at 1068.

199. *Id.* § 628, at 1069.

200. Llewellyn, *Canons*, *supra* note 1, at 402.

201. 59 C.J. *Statutes*, *supra* note 9, § 628, at 1070 (stating Thrust #4 does not apply "where it is plain that the legislature adopting it had a different intention").

202. *Id.*; BLACK, *supra* note 10, § 176, at 600 (stating Thrust #4 does not apply where the meaning of the statute is plain).

203. *Spokane Mfg. & Lumber Co. v. McChesney*, 21 P. 198, 200 (Wash. 1889).

ogenous sources “where the terms of the statute are of doubtful import, so as to require construction.”<sup>204</sup>

Second, Thrust #4 “may be rejected . . . where the foreign decisions are unsatisfactory in reasoning.”<sup>205</sup> Indeed, one might sufficiently trust the legislature not to have intentionally adopted poorly reasoned, ill-decided cases as illustrative of its intentions!

Third, Thrust #4 “may be rejected . . . where the foreign interpretation is not in harmony with the spirit or policy of the laws of the adopting state.” This is exactly as in Black,<sup>206</sup> and very similar to other treatises.<sup>207</sup> The idea is plain: our legislature can be presumed not to have adopted a statute intending its meaning to be out of accord with prevailing values.

But on the other hand, to change the current values may sometimes be exactly what the legislature intended.<sup>208</sup> *Metropolitan Railroad Co. v. Moore*, dealt with such a situation.<sup>209</sup> The District of Columbia had followed Maryland civil procedure prior to the legislation, setting, one would think, “the spirit and policy of the laws.” The legislation at issue, however, copied New York’s. It was a general scheme, covering a field of behavior, so the Supreme Court held that prior New York decisions on point should be followed, and not Maryland decisions. The fulcrum is the intent of the legislature: to change the current legal spirit and policy or not? Parry #4 includes this debatable element, one would think, not to demand a decision contrary to the foreign precedents, but to alert the interpreter to the fragility of Thrust #4 and the need to look further.

Treatise writers add more equivocating exceptions. Was the decision from the highest court of the prior state? If not then fol-

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204. 25 R.C.L. *Statutes*, *supra* note 11, § 295, at 1073. This is Thrust #12. See Llewellyn, *Canons*, *supra* note 1, at 403.

205. BLACK, *supra* note 10, § 176, at 600.

206. *Id.* at 602.

207. 59 C.J. *Statutes* § 627-28, at 1068, 1070 (stating Thrust #4 does not apply where the foreign case law is not “in harmony with justice and public policy” or is “contrary to the spirit and policy of its [the adopting state’s] laws”).

208. This was the bifurcation in Pair Two. See *supra* text accompanying notes 90-137.

209. 121 U.S. 558, 570-72 (1887).

lowing it is optional.<sup>210</sup> Did the adopting state follow the language of the original statute exactly, or make changes to it? If the latter, how significant were the changes? Thrust #4 should not apply if the changes were substantial.<sup>211</sup> If "radical or material changes are made in the statute,"<sup>212</sup> it is reasonable to assume the legislature intended a difference motivated by the applications made of the original language of the statute. This too, is hardly a compelling inference, merely one that should provoke further investigation. The Supreme Court, in the oft-cited *Allen v. St. Louis Bank*,<sup>213</sup> stated:

If the legislature of Missouri had adopted the words of that provision of the New York Factors' Act, the meaning of which had been thus settled on full consideration by the highest courts of that state and by this court, there would be the strongest ground for holding, in accordance with a familiar canon of construction, that it had enacted those words with that meaning.<sup>214</sup> . . . But the statute of Missouri of March 4, 1869, differs widely, in language and in purpose . . . .<sup>215</sup>

Llewellyn's example, *Bowers v. Smith*, serves the purpose many times over, illustrates other canons, and more.<sup>216</sup> It was an election law case, in which plaintiff, the Democratic candidate for sheriff, lost by a mere thirty-three votes. If he could have more than three thousand ballots from the city of Sedalia declared invalid because of defects in their printing, he should win.<sup>217</sup> "Both parties rel[ied] on the recent statute concerning elections (Revised Statutes, 1889,

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210. *Smith v. Baker*, 49 P. 61, 65 (Okla. 1897) ("The meaning of a statute cannot be considered as settled by judicial construction, so as to carry that construction with it to the jurisdiction where it is adopted, when it has not been so settled by the highest judicial authority which can pass upon the question.").

211. BLACK, *supra* note 10, § 176, at 601-02.

212. 25 R.C.L. *Statutes* § 295, at 1073.

213. 120 U.S. 20 (1887).

214. *Id.* at 34 (citing *Cathcart v. Robinson*, 30 U.S. 264, 280 (1831); *McDonald v. Hovey*, 110 U.S. 619, 628 (1884); *Commonwealth v. Hartnett*, 69 Mass. (1 Gray) 450 (1855); *Scruggs v. Blair*, 44 Miss. 406 (1870); *Wiesner v. Zann*, 39 Wis. 188, 205 (1875)).

215. *Id.* at 34-35.

216. 20 S.W. 101 (Mo. 1892). Note that although Llewellyn chose to cite this case, Shepard's gave it a negative treatment.

217. *Id.* at 102 ("Plaintiff's contention is that the entire returns from Sedalia should be thrown out of the final count, for several reasons.").

secs. 4756-4794), commonly known as the 'Australian Ballot Law,' as first enacted in this state."<sup>218</sup> It had been enacted elsewhere in various forms and many interpretive decisions anteceded Missouri's adoption of it.

The court's analysis began with a statement of general policy in election cases, a very principled democratic policy, worthy perhaps of being called a canon.

The suffrage is regarded with jealous solicitude by a free people, and should be so viewed by those intrusted with the mighty power of guarding and vindicating their sovereign rights. Such a construction of a law as would permit the disfranchisement of large bodies of voters, because of an error of a single official, should never be adopted where the language in question is fairly susceptible of any other.<sup>219</sup>

Or, as a very able judge once tersely said: "All statutes tending to limit the citizen in his exercise of this right [of suffrage] should be liberally construed in his favor."<sup>220</sup>

The intent of the ballot law was to improve voting procedures, for the benefit of the public. Accordingly, it should be liberally construed to this end.<sup>221</sup> Thrust #4, not mentioned in so many words, gets a spin with precedents from England and New York:

So that, in England and New York to-day, the erroneous addition of a name to the official list of nominees, though not corrected before the election, is harmless in its effect upon the voter's right to use the official ballot without fear of possible disfranchisement. This, we consider, is also the proper meaning to be placed upon the law of Missouri.<sup>222</sup>

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218. *Id.*

219. *Id.* at 103 (citing *Wells v. Stanforth*, (1885) 16 Q.B.D. 245).

220. *Id.* (quoting *Owens v. State ex rel. Jennett*, 64 Tex. 500 (1885)).

221. *Id.* at 104.

222. *Id.* But also supporting the precedent with perspicuous argument:

Any other would metamorphose the supposed "reform" into a gigantic trap where the inoffensive citizen might readily be deprived of his most valuable right as a freeman by political manoeuvres in the form of "errors," the force of which he could not foresee until too late to avoid their consequences.

*Id.*

Parry #4 came into play next in the rejection of a poorly reasoned case from Montana<sup>223</sup> and one from Connecticut because the language of their statutes differed too greatly from that of Missouri's.<sup>224</sup> Generally, Thrust #4 must give way to stronger considerations of policy and legislative intent:

We mention these cases neither to approve nor to disapprove them; but to indicate how inapplicable they are to the case in hand, and to show that, even with language as positive as that they construe, how reluctant are the courts to adopt an interpretation, the effect of which is to deprive a large number of their fellow citizens of the electoral franchise.<sup>225</sup>

In general, then, it might be said that Parry #4, in some form, will supersede Thrust #4 "whenever it is plain that the legislature adopting it [the statute in question] had a different intention" from that found in the proposed precedent.<sup>226</sup> Discoverable legislative intent takes judicial priority over rules of presumption.

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223. In regard to that poorly reasoned case, *Price v. Lush*, 24 P. 749 (Mont. 1890), the court stated:

With all respect due to the court that decided it, we think it embodies a misapplication of the English precedents which it cites. It entirely omits to mention or consider the effect of section 19 of the Montana statute (General Laws Montana, 1889, p. 140, substantially the same as our section 4778), which should be given some significance to prevent such unjust consequences to voters as have been explained, and which are impossible under the English ballot act, which that case purports to follow and expound.

*Bowers*, 20 S.W. at 104.

224. In regard to the Connecticut case, the court explained, "In *Talcott v. Philbrick* (1890), 59 Conn. 472, 20 A. 436, the supreme court of Connecticut had to deal with a statute so unlike the Missouri law that it does not even provide for printing the list of candidates at public expense . . ." *Id.*

225. *Id.* at 105. This part of the decision then concluded solidly:

Having regard to the spirit and purpose of the Missouri statute, and to the general principles governing the treatment of popular elections by the courts in this country, we think it should be held that where a candidate for public office causes no timely objection to be made before the election (as permitted by section 4778), he should be regarded as having waived all objections that may exist to the presence on the official ballot of any names of nominees not properly entitled to be there.

*Id.*

226. 59 C.J. *Statutes*, *supra* note 9, §628, at 1070. This is cited as a source for Parry #4. See Llewellyn, *Canons*, *supra* note 1, at 402 n.10.

*Resolution:*

Thrust #4 and Parry #4 do not clash, even superficially. On its face, Parry #4 announces that it is an exception and proceeds to list circumstances in which it applies. In those circumstances, Thrust #4 does not apply.

*Comment:*

Thrust #4 should not be confused with, “The statutes of a foreign state will be interpreted in accordance with the decisions of the courts of that state.”<sup>227</sup> This applies to the judicial interpretation of another state’s statute, not one adopted by this state. For example, in *Usatorre v. The Victoria*,<sup>228</sup> Judge Frank had to interpret and apply Argentinean maritime law. He did so according to the intentions of the Argentinean legislature as interpreted by Argentinean authority, explaining the process in a remarkable series of footnotes, itself a treatise on statutory interpretation.<sup>229</sup> Of course this makes sense for the very same reason that Thrust #4 and Parry #4 make sense, even where the foreign legislature in question was not democratically elected.

*Pair Five*

THRUST: “Where various states have already adopted the statute, the parent state is followed.”

PARRY: “Where interpretations of other states are inharmonious, there is no such restraint.”<sup>230</sup>

*Thrust #5:* “Where various states have already adopted the statute, the parent state is followed.”<sup>231</sup>

Thrust #5 is ambiguous. Does “parent” refer to the state from which this state’s legislature actually copied the statute in question? Or, supposing more than one state has the statute in question or a

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227. 59 C.J. *Statutes*, *supra* note 9, § 614, at 1037. This source is cited by Llewellyn in support of Thrust #4. See Llewellyn, *Canons*, *supra* note 1, at 402 n.9.

228. 172 F.2d 434 (2d Cir. 1949).

229. *Id.* at 439-43 & nn.12-16.

230. Llewellyn, *Canons*, *supra* note 1, at 402.

231. *Id.*

substantially similar one, does it refer to the state of origin, the progenitor of the statute?<sup>232</sup>

Llewellyn seemed to have in mind the former. He cited only a single case, *Burnside v. Wand*, and no secondary sources.<sup>233</sup> That case, from the 1902 Missouri Supreme Court, illustrates the former. The statute under interpretation could have come from either of two ancestors, one England,<sup>234</sup> the other New York,<sup>235</sup> with England the originator. The court made a totally convincing argument that the Missouri legislature was looking to New York's statute, based not only on language similarities and differences<sup>236</sup> but also because "the mind is at once prompted to look to the statutes of the

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232. Curiously, in its decisions the second state probably did not follow the progenitor state's interpretation, thus violating Thrust #4. (One says "probably" because it is possible that all decisions interpreting the statute in the progenitor state came after it had been adopted in the second state.) Might there have been a reason for not following the progenitor state (for not following Thrust #4)? Perhaps some of those exceptions listed in Parry #4 are so common they make Thrust #4 tentative and unstable? See *supra* text accompanying notes 195-99.

233. 71 S.W. 337 (Mo. 1902).

234. The English statute was Statute 8 and 9 William III. *Id.* at 350.

235. The New York statute could be found at "sections 12 and 13 of title II of chapter VI, vol. 2, page 353, Revised Statutes of New York 1829." *Id.*

236. The court placed the two statutes in parallel columns for the purpose of perspicacity:

Sec. 468, R. S. Mo. 1899.

"When an action shall be prosecuted in any court upon any bond for the breach of any condition other than the payment of money, or shall be prosecuted for any penal sum for the non-performance of any covenant or written agreement, the plaintiff, in his petition, shall assign the specific breaches for which the action is brought."

The only differences between our statute and the New York statute are the four words italicized herein in the New York statute, and those are immaterial.

Now read the corresponding part of the Statute of 8 and 9 William III., which is as follows: "That in all actions which from and after the said five and twentieth day of March, one thousand, six hundred and ninety-seven, shall be commenced or prosecuted in any of his majesty's courts of record, upon any bond or bonds, or on any penal sum, for non-performance of any covenants or agreements in any indenture, deed or writing contained, the

Sec. 5 Art. 2, Title VI, Chap. VI, Rev. State. N. Y. 1829.

"When any action shall be prosecuted in any court of law, upon any bond for the breach of any condition other than for the payment of money, or shall be prosecuted for any penal sum for the non-performance of any covenant or Written agreement, the plaintiff, in his declaration, shall assign the specific breaches for which the action is brought."

State of New York, principally because so large a part of our statute laws have been borrowed from that State.”<sup>237</sup> The closest the opinion comes to Thrust #5 is a recitation — as a “rule of law” — of Thrust #4.<sup>238</sup> It thus followed New York’s interpretation. If *Burnside* is support for Thrust #5, it is by accident, not by the Missouri Supreme Court’s interpretive design.

Although he cited no secondary source, Llewellyn may have found Thrust #5 in Black, in the section he cited in support of Thrust #4:

Finally, if it appears (as is now frequently the case) that the statute under consideration is not peculiar to the state from which it is alleged to have been taken, but that another state or several states have identical or substantially similar statutes on their books, the endeavor should be made to ascertain which particular state was the parent of the statute as adopted by the state where it is in controversy. If this can be settled with certainty, the construction worked out in the parent state will ordinarily be followed in the adopting state.<sup>239</sup>

Citing *Burnside*, Black immediately launched into equivocations.

Thus, on this interpretation, Thrust #5 is a rather trivial lemma to Thrust #4, scarcely worthy of inclusion on its own. No wonder Llewellyn could find no sources for it as stated. If it is justified, it is as for Thrust #4:

For it is presumed that the Legislature adopting the statute of a sister State knew of the interpretation placed upon the statute by the courts of such sister State, and intended that a like interpretation should be put upon

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plaintiff or plaintiffs may assign as many breaches as he or they shall think fit,” etc.

*Id.*

237. *Id.*

238. *Id.* (“It is a rule of law that when a statute is borrowed from another State, the decisions of the State from which the statute is borrowed, interpreting such statute, are borrowed also.”).

239. BLACK, *supra* note 10, § 176, at 603. In all the sources he cites for Pairs Four and Five, only here does the word “parent” occur.

the statute, after it became a part of the laws of the adopting State.<sup>240</sup>

The other possibility is that "parent" refers to the original, the progenitor, even though it was not copied by the legislature. Unlike the above interpretation, this would at least not be a redundant tag-along to Thrust #4. Indeed, it exactly contradicts Thrust #4 and its justification, and flies in the face of prima facie legislative intent. Not surprisingly, support for this position is almost as scarce as for the former interpretation. There is a line in *R.C.L.*<sup>241</sup> supporting it: "Where a statute construed in the state where it was enacted is adopted by another state, where it receives a different construction, and is then borrowed from the latter by a third state, the original construction may be followed in preference to the different one."<sup>242</sup> And there is a case, *Coulam v. Doull*, from the 1904 Supreme Court.<sup>243</sup> In dicta the Court found that the difference between California's language — the immediate source of Utah's statute of wills — and that of the progenitor, Massachusetts, did not justify following an interpretation from the California Supreme Court, almost on point.<sup>244</sup> It may be thin, but it caught the notice of the *R.C.L.* editors.

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240. *Burnside*, 71 S.W. at 350. This quote follows immediately after the court recites its version of Thrust #4.

241. Llewellyn also used *R.C.L.* to support Pair Four.

242. 25 R.C.L. *Statutes*, *supra* note 11, § 295, at 1074.

243. 133 U.S. 216 (1904) (affirming that the omission of the plaintiff pretermitted heirs from decedent's will was intentional).

244. The Court wrote:

It is contended that the statutory provision in question was copied from that of California, and that we are bound by the construction previously put upon it by the courts of the latter State . . . . But in the Matter of the Estate of Garraud, 35 California, 336, it was held that evidence aliunde the will was not admissible to show that the omission to make provision for children was intentional, and, in respect to the Massachusetts decisions, the court was of opinion that the words "and not occasioned by any mistake or accident," found in the statute of Massachusetts but not in that of California, were very material, and furnished the real ground for the admission of extrinsic evidence. We do not think so. While those words may strengthen the argument in favor of the admissibility of the evidence, it by no means follows that the construction of the statute should be otherwise in their absence.

*Id.* at 231-32. Note in passing that apparently the Supreme Court here disregards Thrust #4, called a "rule of law" by the Missouri Supreme Court in *Burnside*. "Rule talk" when dealing with canons can be very misleading.

Parry #5: "Where interpretations of other states are inharmonious, there is no such restraint."<sup>245</sup>

What if several states had adopted the statute and their courts had given it a variety of constructions? *Corpus Juris*<sup>246</sup> says Thrust #4, which encompasses Thrust #5, "does not apply where other jurisdictions having the identical or substantially the same provision had given the language a different construction prior to the adoption in question."<sup>247</sup> Rather, a court "will in such case adopt that construction which it regards as most reasonable" — Parry #5.<sup>248</sup>

Llewellyn cited no secondary sources in support of Parry #5, but cited a case, *State v. Campbell*.<sup>249</sup>

It has been held that where the statute is not peculiar to the state from which it was adopted, but other states have substantially the same statute, which their courts have construed differently, and when the construction placed upon it by the courts of the state from which it was taken is contrary to the weight of authority, the decision is not binding.<sup>250</sup>

The Kansas Supreme Court then quoted from various treatises,<sup>251</sup> and concluded that:

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245. Llewellyn, *Canons*, *supra* note 1, at 402.

246. Llewellyn used *Corpus Juris* as a source to support Pair Four. *See id.* at 402 nn.9-10.

247. 59 C.J. *Statutes*, *supra* note 9, § 628, at 1071 (citing ten cases).

248. *Id.* at n.6[a].

249. 85 P. 784 (Kan. 1906).

250. *Id.* at 790.

251. A long quote used by the court is of historical interest:

Whilst admitting that the construction put upon such statutes by the courts of the state from which they are borrowed is entitled to respectful consideration, and that only strong reasons will warrant a departure from it, its binding force has been wholly denied, and it has been asserted that a statute of the kind in question stands upon the same footing, and is subject to the same rules of interpretation as any other legislative enactment. And it is manifest that the imported construction should prevail only in so far as it is in harmony with the spirit and policy of the general legislation of the home state, and should not, if the language of the act is fairly susceptible of another interpretation, be permitted to antagonize other laws in force in the latter, or to conflict with its settled practice.

*Id.* at 789-90 (quoting G.A. ENDLICH, A COMMENTARY ON THE INTERPRETATION OF STATUTES § 371, at 518 (1888)).

A statute copied from a similar statute of another state is presumed to be adopted with the construction it had already received. The presumption, however, is not conclusive, and where the same provision exists in several states, there is no presumption that the construction of any particular state was in view.<sup>252</sup>

It offers no reasoning, only conclusory quotes.<sup>253</sup>

How is a court to overcome the presumption that when the legislature copied another state's statute it adopted that state's interpretations? The 1901 Wyoming Supreme Court, in *Coad v. Cowhick*,<sup>254</sup> faced up to the task:

We fully concede that the rule relied upon, that in adopting the statute of another State we also adopt the construction which it has received, is one of great importance and very generally applied; but it is based upon a specific and sufficient reason, which is, that the Legislature are presumed to have known the construction which the words of the statute have received, and if they had intended any other construction, they would have used apt words to express the change. But this statute is not peculiar to the State of Ohio. Other States have the same provision, using either the identical words or language which is in substance the same. And they have, almost without exception, given to the language a different construction. Must it not also be presumed that the Legislature knew

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The court also quoted another treatise:

Thus it has been held that the presumption will not be indulged where other jurisdictions having the identical or substantially the same provision had, almost without exception, given to the language a different construction long prior to the adoption in question.

*Id.* at 790 (quoting 26 A. & E. ENCYCL. OF L. 703).

252. *Id.* (quoting 3 CURRENT LAW 739).

253. Nevertheless it is an oft-cited source of authority. See, e.g., *Sutton v. Heinzle*, 116 P. 614, 614 (Kan. 1911) ("We prefer, however, to base our judgment upon another proposition. The rule as to the binding effect of a decision rendered prior to the adoption of a statute is not absolute. It does not apply 'where other jurisdictions having the identical or substantially the same provision had given the language a different construction prior to the adoption in question.'" (quoting 36 Cyc. 1157; *Campbell*, 85 P. 784)).

254. 63 P. 584 (Wyo. 1901).

the construction given to it generally by the courts of this country and England?<sup>255</sup>

Ohio was the acknowledged source, but as it had followed other states with other interpretations, the presumption that the Ohio courts' interpretations were the only ones before the Wyoming legislature could not be made.<sup>256</sup> If there is enough noise in a system, the inference to legislative intent loses its security.

Llewellyn's illustration to Parry #4, *Bowers v. Smith*, is on point.<sup>257</sup> There were many prior enactments and interpretations of the "Australian Ballot Law," but the court didn't take the earliest, nor try to determine precisely which, if any, the legislature chose to copy. It sifted through interpretations and followed only those supporting its overarching criterion of enhancing the reality of the franchise, the legislative purpose.<sup>258</sup> In the terms used by Llewellyn in Parry #5 harmony is key: the court facing the question decides which "interpretations of other states are inharmonious" and which are harmonious. One would hope, and in the cases tends to find, as in *Bowers*, that the criterion of harmony sought out and applied was also the legislature's intent in enacting the statute.

*Resolution:*

Parry #5 is another in the list begun in Parry #4 of exceptions to Thrust #4. Where many states' legislatures have enacted and their courts interpreted a statute, even though our state's legislature may have adopted the particular wording of one of those state's statute, we cannot be confident that it did so in the light of that state's courts' interpretations alone. That seems reasonable. Its precise contrary would be Thrust #5.

Parry #5 thus is closer to basic, more nearly an expression of the default position. Thrust #5 is a confident assertion of its contrary, but the confidence is misplaced. Llewellyn must have created

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255. *Id.* at 585-86.

256. The Wyoming Supreme Court further stated:

The adoption of the identical words of the Ohio statute is not specially significant in view of the fact that they are but a part of our code of civil procedure, covering more than two hundred pages of our Revised Statutes, and adopted bodily, almost without change, from the code of Ohio.

*Id.*

257. 20 S.W. 101 (Mo. 1892).

258. See *supra* text accompanying notes 218-27.

it for the purpose, the support for it being notable only for its paucity. Worse, it is ambiguous and the two possible interpretations, both with minimal primary and secondary support, are precisely contrary to one another.

Of all the formulae in Llewellyn's list, Thrust #5 is probably the least qualified to be called a canon. It has no occurrences as a canonical formula in case law or secondary sources. At best, it is the most insecure of subcategories of Thrust #4, itself a tenuous, non-categorical default inference. If Thrust #5 has any claim to canonical stature, it is only in its presence on Llewellyn's inventory.

The word "harmony" in Parry #5 is key, but doesn't depend on that semantic choice: "the weight of authority"<sup>259</sup> will serve, as would any other synonym for judicial discretion. Always the court has power over harmony, weight, and wisdom. It is rather like *stare decisis*: whether a prior case is precedent on all fours or easily distinguished depends on the court's choice of criterion of similarity; whether the interpretation in one state or another is better depends on the court's choice of criterion of harmony, weight and wisdom. The justification for Thrust #5, as with Thrust #4, was its capturing a ground of inference to the intent of the enacting legislature. The justification for Parry #5, as with Parry #4, was its disruption of that inference in favor of another.

One would think the judicious course in the circumstances contemplated by Pair Five would be a further investigation of the context of enactment — legislative history — in case better determinants of legislative intent are available. *Bowers* is exemplary. Faced with a clutter of prior interpretations, the Missouri Supreme Court could not mechanically follow Thrust #4; thus, illustrating Parry #5, it sought the intent of the ballot law, to benefit the public by improving voting procedures, and chose its particular interpretation to enhance that objective.<sup>260</sup>

#### *Pair Six*

THRUST: "Statutes *in pari materia* must be construed together."

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259. *Campbell*, 85 P. at 790. *See supra* text accompanying notes 251-55.

260. *Bowers*, 20 S.W. at 102-04.

PARRY: “A statute is not *in pari materia* if its scope and aim are distinct or where a legislative design to depart from the general purpose or policy of previous enactments may be apparent.”<sup>261</sup>

*Thrust #6*: “Statutes *in pari materia* must be construed together.”<sup>262</sup>

Statutes “*in pari materia*” are “those which relate to the same person or thing, or to the same class of persons or things, or which have a common purpose,”<sup>263</sup> or those “which stand together, though enacted at different dates, relating to the same subject.”<sup>264</sup>

The reason for *Thrust #6* is to be found in the standard procedure for determining legislative intent.<sup>265</sup> “What was the common law before the making of the Act?”<sup>266</sup> It wasn’t necessarily common law alone, but law generally, including statutes on the subject matter under review. “What was the mischief and defect for which [that] law did not provide?”<sup>267</sup> It is not reasonable to think that a legislature would survey all law, or look to the entire fabric of the law when seeking to repair or reorient an aspect of it; but it is certainly to be expected that it will look to the aspect being ad-

261. Llewellyn, *Canons*, *supra* note 1, at 402.

262. *Id.*

263. *Milner v. Gibson*, 61 S.W.2d 273, 277 (Ky. 1933). *See also* BLACK, *supra* note 10, § 104, at 334.

264. SUTHERLAND, *supra* note 8, § 443, at 844. *See also* *Mitchell v. Witt*, 36 S.E. 528 (Va. 1900); 25 R.C.L. *Statutes*, *supra* note 11, § 285, at 1060-61. A Connecticut court stated:

Statutes are *in pari materia*, which relate to the same person or thing, or to the same class of persons or things. The word *par* must not be confounded with the term *similis*. It is used in opposition to it, as in the expression *magis pares sunt quam similes*; intimating not likeness merely, but identity. It is a phrase applicable to public statutes or general laws, made at different times, and in reference to the same subject. Thus, the *English* laws concerning paupers and their bankrupt acts, are construed together, as if they were one statute, and as forming a united system; otherwise the system might, and probably would be unharmonious and inconsistent. Such laws are *in pari materia*.

*United Society v. Eagle Bank of New-Haven*, 7 Conn. 456, 469-70 (1829).

265. 25 R.C.L. *Statutes*, *supra* note 11, § 285, at 1061 (“The object of the rule is to ascertain and carry into effect the intention of the legislature . . .”); *State ex rel. Perry v. Clark*, 54 Mo. 216, 218 (1873) (“The two acts were passed at the same session of the legislature, they relate to the same subject matter — they are *in pari materia*, and, to arrive at the true legislative intent, they must be construed together.”).

266. *Heydon’s Case*, 3 Co. 7 at 7b, 76 Eng. Rep., at 638.

267. *Id.*

dressed.<sup>268</sup> After all, that is why it is taking action. Thus, we might presume that in enacting this statute, and those preceding and subsequent to it on the same subject matter, the legislature will be pursuing a coherent theme, "a uniform and consistent design . . . to apply it [the original] to changing conditions or circumstances."<sup>269</sup> Accordingly, all the statutes in that plan of governance of the domain in question should be construed together.

In the same vein, we are entitled to presume that the legislature would not issue inconsistent control data, nor incoherent instructions to the governed. It is sometimes stated as a principle of construction that one ought to construe a statute "if possible, so as to avoid any repugnancy or inconsistency between different enactments of the same legislature."<sup>270</sup> One cannot expect perfect consistency across all the myriad legislation and rulemaking in the modern state, but one can within the same subject matter, that is within the bounds of the domain *in pari materia*. Especially would this be so if the statutes in question were enacted at the same time or by the same legislature.<sup>271</sup>

Sutherland gives seven pages of examples, as if it would be difficult to convince readers of the sense of this canon.<sup>272</sup> Black lists "all the statutes of the same state relating to the property rights and contracts of married women removing their common law disabilities,"<sup>273</sup> and "a statute relating to the segregation and confinement of dipsomaniacs is in *pari materia* with other laws providing for the detention, care, and discharge of insane patients."<sup>274</sup>

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268. 25 R.C.L. *Statutes*, *supra* note 11, § 287, at 1063 ("The legislature is presumed to have had former statutes before it" and their judicial construction, and to have acted "with reference thereto.").

269. BLACK, *supra* note 10, § 104, at 333. *See also* 25 R.C.L. *Statutes*, *supra* note 11, § 285, at 1061-62 ("[Thrust #6] proceeds upon the supposition that the several statutes relating to one subject were governed by one spirit and policy, and were intended to be consistent and harmonious in their several parts and provisions.").

270. BLACK, *supra* note 10, § 104, at 333.

271. *Mitchell v. Witt*, 36 S.E. 528, 528 (Va. 1900) ("Especially should effect be given, if possible, to statutes *in pari materia* enacted at the same session of the Legislature."); 25 R.C.L. *Statutes*, *supra* note 11, § 286, at 1062 ("[I]t is not to be presumed that the same body of men would pass conflicting and incongruous acts.").

272. SUTHERLAND, *supra* note 8, §§ 444-48, at 848-54.

273. BLACK, *supra* note 10, § 104, at 335.

274. *Id.* at § 104, 336-37 (citing *In re Schwarting*, 108 N.W. 125 (Neb. 1906)).

Llewellyn's illustration, *Milner v. Gibson*,<sup>275</sup> really concerned the constitutionality of a statute governing the liquidation of a bank,<sup>276</sup> but it did have a question of the application of two enactments, one in 1912 and its successor in 1932. Having quoted twenty-five R.C.L. *Statutes*,<sup>277</sup> the opinion continued:

The acts of 1912 and 1932 are statutes in pari materia and it should be conceded that the section of the former requiring and providing the manner of giving notice to, and providing for a hearing of, the depositors and creditors must be regarded as a part of the latter . . . .<sup>278</sup>

This illustrates the strength of the inference encapsulated in Thrust #6: it applies even to statutes one or more of which may have been repealed.

If there is uncertainty as to the meaning of a word in a particular statute, one might look to its use in another statute on the same subject matter for guidance.<sup>279</sup> Words notoriously can serve different purposes in different contexts, so one cannot presume similar meanings of lexicographically similar words across a wide range of

275. 61 S.W.2d 273 (Ky. 1933).

276. *Id.* at 275 ("The major question presented by this appeal is the constitutionality of an Act of the General Assembly, chapter 19 of the Acts of 1932, page 116.").

277. The quoted passage from *R.C.L. Statutes* reads:

"It is a fundamental rule of statutory construction that not only should the intention of the lawmaker be deduced from a view of the whole statute and of its every material part, but statutes in pari materia should be construed together. This means that, for the purpose of learning and giving effect to the legislative intention, all statutes relating to the same subject are to be compared, even though some of them have expired or been repealed, and, so far as still in force, so construed in reference to each other that effect may be given to all of the provisions of each, if that can be done by any fair and reasonable construction."

*Id.* at 277-78 (quoting 25 R.C.L. *Statutes*, *supra* note 11, § 285, at 1060).

278. *Id.* at 278.

279. *In re County-Seat*, 15 Kan. 500, 527 (1875):

Now when the legislature has used a word in a statute in one sense, and with one meaning, when it subsequently uses the same word in legislation respecting the same subject-matter, it will be understood to have used it in the same sense, unless there be something in the context, or the nature of things, to indicate that it intended a different meaning thereby. The courts may not give it a different meaning to sustain their views of what the law ought to be. They must seek simply to ascertain the legislative intent, and then enforce it.

statutes.<sup>280</sup> As we all love to quote, "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."<sup>281</sup> But among statutes *in pari materia*, one can reasonably expect similar uses,<sup>282</sup> especially if they are part of an intentionally coherent scheme.<sup>283</sup>

It should then be clear that, as with all canons, Thrust #6 applies only to the extent that a contrary interpretation is not clear on

280. A fine rhetorical flourish:

The tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of them runs all through legal discussions. It has all the tenacity of original sin and must constantly be guarded against.

WALTER WHEELER COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* 159 (Harv. Univ. Press 1942).

281. *Towne v. Eisner*, 245 U.S. 418, 425 (1918) (Holmes, J.). *See also* *Atl. Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932) ("Where the subject matter to which the words refer is not the same in the several places where they are used, or the conditions are different, or the scope of the legislative power exercised in one case is broader than that exercised in another, the meaning well may vary to meet the purposes of the law, to be arrived at by a consideration of the language in which those purposes are expressed, and of the circumstances under which the language was employed . . . It is not unusual for the same word to be used with different meanings in the same act, and there is no rule of statutory construction which precludes the courts from giving to the word the meaning which the legislature intended it should have in each instance."); *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 87 (1934).

282. *Glorieux v. Lighthipe*, 96 A. 94 (N.J. 1915), provides an excellent example. A claimed breach of a warranty deed turned on the meaning of "subsequent purchaser" in section 53. The court noted:

The words "subsequent purchaser" occur in section 54 as well as in section 53; in fact their use in connection with the other language of section 54 antedates as matter of legislative history their use in section 53; the former use goes back to the act of 1799 (Pat. L., p. 399); the latter to 1898 only. The words ought to have the same construction in both sections . . . Section 54 provides that an unrecorded deed shall be void as to a subsequent purchaser in good faith for value . . . If we give the words that meaning in section 54, we must give them the same meaning in section 53.

*Id.* at 95.

283. "Undoubtedly, there is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning." *Atl. Cleaners*, 286 U.S. at 433. *See also Helvering*, 293 U.S. at 87; *Stillwell v. State Bar of Cal.*, 173 P.2d 313, 315 (Cal. 1946).

the face of the statute;<sup>284</sup> one refers to other statutes *in pari materia* to *resolve*, not to *create* an interpretive problem.

Indeed, the cases are so numerous in this court to the effect that the province of construction lies wholly within the domain of ambiguity, that an extended review of them is quite unnecessary. The whole doctrine applicable to the subject may be summed up in the single observation that prior acts may be resorted to, to solve, but not to create an ambiguity.<sup>285</sup>

Naturally, clearly indicated legislative intent to the contrary should always defeat a mere rule of inference.<sup>286</sup>

*Parry #6*: “A statute is not *in pari materia* if its scope and aim are distinct or where a legislative design to depart from the general purpose or policy of previous enactments may be apparent.”<sup>287</sup>

This looks like an extension of the definition; perhaps even less: Llewellyn’s case for Thrust #6 included it in its definition of “*in pari materia*,” “or which have a common purpose,” along with “relate[d] to the same person or thing, or to the same class of persons or things.”<sup>288</sup> But we avoid, if we can, a definitional solution for two reasons. First, it turns Thrust #6 into mere semantics: if statutes to be *in pari materia* have to be, *inter alia*, consistent, then of course they should be interpreted as consistent.<sup>289</sup> Second, if Parry

284. 25 R.C.L. *Statutes*, *supra* note 11, § 285, at 1062 (“[Thrust #6] is, of course, applicable only when the terms of the statute to be construed are ambiguous or its significance is doubtful.”). *See also* BLACK, *supra* note 10, § 104, at 341.

285. *Hamilton v. Rathbone*, 175 U.S. 414, 421 (1899). *See also* BLACK, *supra* note 10, § 104, at 341.

286. “[I]t will be understood to have used it in the same sense, unless there be something in the context, or the nature of things, to indicate that it intended a different meaning thereby.” *In re County-Seat*, 15 Kan. 500, 527 (1875).

287. Llewellyn, *Canons*, *supra* note 1, at 402.

288. *Milner*, 61 S.W.2d at 277. *See also* BLACK, *supra* note 10, § 104, at 334.

289. Unfortunately many sources do it. For example, Llewellyn’s illustration/authority for Parry #6 quotes Sutherland: “Nor is an act *in pari materia* though it may incidentally refer to the same subject, if its scope and aim are distinct and unconnected.” *Wheelock v. Myers*, 67 P. 632, 634 (Kan. 1902) (quoting J.G. SUTHERLAND, *STATUTES AND STATUTORY CONSTRUCTION* § 286 (1st ed. 1891)). *See also* *Mitchell v. Witt*, 36 S.E. 528, 528 (Va. 1900) (“Statutes which are not inconsistent with one another, and which relate to the same subject matter, are *in pari materia*, and should be construed together.”); SUTHERLAND, *supra* note 8, § 449, at 855; BLACK, *supra* note 10, § 104, at 337.

#6 is merely definitional of "*in pari materia*," then there is no chance of incompatibility between it and Thrust #6. In principle,<sup>290</sup> we should look for interpretations maximizing Llewellyn's thesis, and never simply defining it away.

The idea should be that statutes *in pari materia* are about the same subject matter. But two statutes could be about one subject matter yet to utterly different purposes; then they would not need to be interpreted consistently. For example, consider a statute generally banning the use of vehicles on the highways while intoxicated. Is a bicycle a vehicle for that purpose? Probably it is. One would look to the harm the legislature sought to alleviate and decide accordingly. Another statute sets a price for all vehicles at the toll booth for the local turnpike. Is a bicycle a vehicle for its purpose? Most probably not. If vehicles are the common subject matter then, on a restricted definition of "*in pari materia*," Thrust #6 would apply, demanding a common interpretation of "vehicle." But we can construe Parry #6 to say, to the contrary, that because of the completely different purpose, the two statutes need not be construed together or as consistent in the meaning of "vehicle."<sup>291</sup>

Llewellyn's chosen case, *Wheelock v. Myers*, illustrates Parry #6 and Pair Six with all their difficulties.<sup>292</sup> Wheelock was the assignee of a note and mortgage made and granted by Myers to Rickert Investment Company in 1889, but he failed to record the assignment when made. In 1897 he sought to foreclose the mortgage. On the first round he failed. The law on point was new, "chapter 160 of the Laws of 1897."<sup>293</sup> It gave a six-month window to record, which Wheelock did not meet, and provided that unless recorded "no assignment of a mortgage should be received against the mortgagor . . . ."<sup>294</sup> The choice of words mattered. It was a rule of evidence, precluding the admission of the assignment of the mortgage.<sup>295</sup> That law "was repealed by chapter 168 of the Laws of 1899,"<sup>296</sup>

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290. The Principle of Charity: Always so construe the argument under scrutiny as to make its validity most probable, and thus to make it most difficult to knock down.

291. See *Williams v. Ellis*, (1880) 5 Q.B.D. 175. BLACK, *supra* note 10, § 104, at 337, uses this example, but as a definitional illustration, not as above.

292. 67 P. 632 (Kan. 1902).

293. *Id.*

294. *Id.*

295. *Id.*

296. *Id.*

which gave a new four-month window, and for unrecorded mortgages gave the mortgagor and successors “a complete defense to any action on such mortgage or note to the extent of payments made to the original mortgagee without knowledge on the part of the mortgagor of an assignment of the mortgage.”<sup>297</sup> This time Wheelock had recorded in time, prior even to the new statute’s coming into effect. This time he won.

There were many grounds of argument but the one that is relevant concerns another statute effective on the same date as chapter 168 of the Laws of 1899, “chapter 155 of the Laws of 1899.”<sup>298</sup> Defendant mortgagor Myers argued that chapter 168 should be interpreted in conjunction with and take meaning from chapter 155 as the latter was also about mortgages and assignments of them. The Kansas Supreme Court wouldn’t bite. Chapter 155’s “purpose [wa]s to legalize defective assignments of mortgages theretofore made,”<sup>299</sup> whereas “[c]hapter 168 ha[d] relation to the effect of payments made by mortgagors to original mortgagees who ha[d] assigned their mortgages but who ha[d] not recorded the assignments. The two acts [we]re not *in pari materia*.”<sup>300</sup>

That was all. But the point is clear: because the purposes of the different statutes were so different, they were not *in pari materia*, Thrust #6 did not apply. It is an example of Parry #6 in definitional form. But it begs the question of what counts as similarity — as “*in pari*” — among purposes. The opinion didn’t offer any help on that. Shifting the argument from the merely semantic, one might say the two statutes were about the same sort of thing, namely mortgages and their assignments, but that alone did not justify an inference that the legislature intended them to be construed together because the legislature plainly manifested such a different purpose for each.

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297. *Id.*

298. *Id.* at 634.

299. *Id.*

300. *Id.* See also *id.* (“Nor is an act in *pari materia* though it may incidentally refer to the same subject, if its scope and aim are distinct and unconnected.” (quoting J.G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 286 (1st ed. 1891))).

*Resolution:*

Latin "pari" means "equal;" "materia" means "material," "substance," "matter," or, in a word, "stuff." But if Thrust #6 were to be confined to *materia* as in Latin it would fail too often to be useful as a grounds of inference to legislative intent. Extending the definition to include the legislative intent — "scope and aim" in Llewellyn's Parry #6 — completely defangs the canon. One should construe together two statutes of similar legislative intent. It is captured by the rest of Parry #6 (so far ignored): "where a legislative design to depart from the general purpose or policy of previous enactments may be apparent." Thus, only by a restrictive definition can we construe this as a clash of maxims.

To create a clash between Thrust and Parry #6, one has to stipulate a narrow interpretation of "*in pari materia*," one in accord with the Latin and with one's intuitions on first reading it. Then statutes about the same sort of stuff will be *in pari materia* and still, if the "scope and aim" or "legislative design" or "general purpose or policy" of the statutes is, apparently, not the same, then they need not be construed together.

Is there a clash? Yes, but there is also no canon. Thrust #6 would then require joint construction of the statutes in question despite legislative intent to the contrary. Llewellyn's chosen sources exclude this interpretation of Thrust #6: Even if the statutes "may incidentally refer to the same subject, if [their] scope and aim are distinct and not connected" they need not be construed together.<sup>301</sup>

*Comment:*

One can see here the attraction of self-translating easily remembered Latin. It looks learned, authoritative even; once it's said, the argument is over. But to preserve its jurisprudential validity, this canon required either that the Latin be so broadly translated as to reduce the canon to a platitude, or if narrowly and accurately translated to make it inconsistent with fundamental principles, and denying its canonical status.

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301. BLACK, *supra* note 10, § 104, at 337; SUTHERLAND, *supra* note 8, § 449, at 855 (using almost identical words).

Like all canons, this one is no better than, nor more useful than its justification.

*Pair Seven*

THRUST: "A statute imposing a new penalty or forfeiture, or a new liability or disability, or creating a new right of action will not be construed as having a retroactive effect."

PARRY: "Remedial statutes are to be liberally construed and if a retroactive interpretation will promote the ends of justice, they should receive such construction."<sup>302</sup>

*Thrust #7*: "A statute imposing a new penalty or forfeiture, or a new liability or disability, or creating a new right of action will not be construed as having a retroactive effect."<sup>303</sup>

Black: "A statute imposing a new penalty or forfeiture, or a new liability or disability, or creating a new right of action, will not be construed as having a retroactive operation, if such consequences can fairly be avoided by interpretation."<sup>304</sup> Except for a misplaced comma, Llewellyn has tracked Black down to the latter's condition, changing only a single word. He does not cite any other secondary source. This is not surprising as his other three favored secondary sources have plenty about Thrust #7, but as parts of general discussions of retroactive legislation, to which there is a strong antipathy.<sup>305</sup>

Thrust #7 is a consequence of the fundamental principle of jurisprudence that a person cannot be bound by a law of which he or she has no notice.<sup>306</sup> Justice Marshall: "[B]ecause we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly . . . [and] must provide explicit standards for those who apply

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302. Llewellyn, *Canons*, *supra* note 1, at 402.

303. *Id.*

304. BLACK, *supra* note 10, § 119, at 401.

305. See SUTHERLAND, *supra* note 8, §§ 641-51, at 1157-75; 59 C.J. *Statutes*, *supra* note 9, §§ 690-713, at 1157-79; 25 R.C.L. *Statutes*, *supra* note 11, §§ 34-40, at 785-93.

306. See *supra* note 96.

them."<sup>307</sup> One does not have an opportunity to know law yet to be made; one cannot plan or restrict one's conduct according to a law or social standard to be set only in the future. Hence the emphasis in Thrust #7 on newness, and on changing rights. The Alabama Supreme Court explained:

The statutes excluded from judicial favor, and subjected to this strictness of judicial construction — statutes which may be properly denominated retrospective, are such as take away or impair vested rights, acquired under existing laws, or create a new obligation, impose a new duty, or attach a new disability, in respect to transactions or considerations already past . . . Such statutes are offensive to the principles of sound and just legislation, and it is of these the authorities to which we have been referred, use the term "odious," and other epithets expressive of judicial opprobrium.<sup>308</sup>

If the standard codified is already part of the law, be it common law or a prior statute, or if it is not one governing conduct, then retroactivity may be acceptable. But a novel standard of behavior set by legislation cannot be known in advance of its promulgation. Therefore, one can see abhorrence of retroactive legislation or interpretation as a corollary of Thrust #2: both rest on the same foundation.

Many of the cases using Thrust #7 or variations on it involve railways as defendants. In the 18th century there were many serious railway worker accidents.<sup>309</sup> But the common law defenses of assumption of risk, fellow servant negligence, and contributory negligence protected the employer railroad from liability notwithstanding its own causal negligence.<sup>310</sup> When this inhumane state of

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307. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

308. *Ex parte Buckley*, 53 Ala. 42, 54-55 (1875) (citations omitted).

309. In *Johnson v. S. Pac. Co.*, 196 U.S. 1, 19-20 (1904), the Supreme Court, quoting President Harrison's annual message to Congress, commented:

Statistics furnished by the Interstate Commerce Commission show that during the year ending June 30, 1891, there were forty-seven different styles of car couplers reported to be in use, and that during the same period there were 2,660 employees killed and 26,140 injured. Nearly 16 percent of the deaths occurred in the coupling and uncoupling of cars, and over 36 percent of the injuries had the same origin.

310. A North Carolina court explained:

the law was changed by statute,<sup>311</sup> persons injured prior to the date of enactment claimed causes of action. Were they to be dismissed following Thrust #7 or was the statute remedial thus permissibly retroactive, as in Parry #7?<sup>312</sup> One court wrote:

The statute may be expedient, just, and salutary in its objects and purposes, and it shows a manifest legislative intent to remedy what was regarded as existing evils arising from extra state judicial decisions; but, as the statute contains no express provision for retrospective operation, I must conclude to observe the general and sound rule for the construction of statutes, and give this state statute only prospective operation . . . I will not consider such questions further than to say that, in my opinion, a retrospective operation of the statute in this case would clearly and injuriously affect vested rights acquired by contract, and impose new liabilities, which were not in existence, and were not contemplated by the parties, when they entered into the relation of master and servant for the operation of the railway.<sup>313</sup>

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A person who enters into the service of a railway company impliedly assumes the risks and hazards usually incident to such employment, including liability to injury caused by the negligence of a fellow servant; and that he will exercise ordinary care to protect himself from obvious danger and injury while engaged in his employment.

*Wright v. S. Ry. Co.*, 80 F. 260, 260 (C.C.W.D.N.C. 1897).

311. At issue in *Johnson*, for example was the interpretation of [T]he act of Congress of March 2, 1893, 27 Stat. 531, c. 196, entitled "An act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes."

*Johnson*, 196 U.S. at 13.

312. One aspect of *Johnson* involved possible retroactivity. The Eighth Circuit had made that argument in denying relief: "An ex post facto statute which would make such an innocent act a crime would be violative of the basic principles of Anglo-Saxon jurisprudence. An ex post facto construction which has the same effect is equally abhorrent to the sense of justice and of reason." *Johnson v. S. Pac. Co.*, 117 F. 462, 467 (8th Cir. 1902). The Supreme Court in reversing gave explicit refutations of the many other arguments based on canons on which the Eighth Circuit had relied, but not this one. *See Johnson*, 196 U.S. 1.

313. *Wright*, 80 F. at 263. Numerous cases are similar. *See, e.g., Kelley v. Boston & Maine R.R.*, 135 Mass. 448, 449 (1883) ("There is nothing in the act of 1881 to show that the Legislature intended to give this new remedy for acts already past; and, in accordance with the well settled and often declared rule, the statute must be construed

Usually defendants prevailed.

Llewellyn's example, *Keeley v. Great Northern Railway Co.*, is a railway employee injury claim with a twist.<sup>314</sup> Keeley was crushed between two railroad cars that collided because of engineer and company negligence, yet, to his advantage, a statute removing the traditional common law defenses had already been enacted.<sup>315</sup> Although the original statute limited damages to \$5,000, in 1907, the same year as Keeley's death, a replacement statute reset the damage limit at \$10,000.<sup>316</sup> The jury awarded Keeley's executrix \$6,615 under an instruction that the latter statute controlled. Wrong:

When this accident happened the plaintiff had a claim for the recovery of not exceeding \$5,000. Beyond this amount she had no claim or cause of action. When the legislature afterward said that in such cases there might be a recovery up to the sum of \$10,000, they in effect created a new cause of action for the second \$5,000. It was not a mere change in remedy, but to all practical purposes it created a new right of action. If it created a new right and did not merely change the remedy, it is not applicable to prior transactions. This is familiar law.<sup>317</sup>

The usual justification for hostility to retroactive statutes did not apply here: the defendant railroad was on notice of its duty. Perhaps it was on notice that it need only take precautions or insure to \$5,000, but that would be an exceedingly strained argument in these circumstances.<sup>318</sup> Thus, the judge woodenly and formalistically followed a rule. Does it accurately reflect the intent of the

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as merely prospective in its operation."); *Plummer v. N. Pac. Ry. Co.*, 152 F. 206, 211 (C.C.W.D. Wash. 1907) ("Therefore this statute creates a new right and a new obligation. I do not question the justice of the rule of comparative negligence, as it may be applied in actions for injuries suffered after its legalization, but it cannot be applied to past occurrences without working a deprivation of property in a manner which the Constitution forbids; for if so applied, the statute, and not the injury, would fix the plaintiff's rights and the defendant's obligation, which are the important elements of the cause of action.").

314. 121 N.W. 167 (Wisc. 1909).

315. *Id.* at 167.

316. *Id.* at 170.

317. *Id.*

318. The engineer mistakenly backed a line of cars into those Keeley was working between. *Id.* at 167.

legislature? In any event, it very well illustrates, by misuse, the importance of Thrust #7.

*Parry #7*: “Remedial statutes are to be liberally construed and if a retroactive interpretation will promote the ends of justice, they should receive such construction.”<sup>319</sup>

It is easy to be confused over this. The Texas Appeals Court in Llewellyn’s illustrative case, *Falls v. Key*, certainly was.<sup>320</sup> What does it mean for a statute to be remedial?

A remedial statute could be about remedies, not substantive behavior. One would not ordinarily think of this as a genuine possibility as such statutes are usually addressed as a separate, special exception to the “prohibition” on retrospective interpretations. But the Texas court in *Falls* discussed it as though relevant to the case, and with no differentiation from other possibilities.<sup>321</sup>

Or, a remedial statute could be about a glitch in the prior state of the law, as addressed by the first two *Heydon’s Case* questions.<sup>322</sup> *Falls* offers Blackstone’s definition, a rough equivalent: “A remedial statute is one which supplies defects, and abridges superfluities in the former law.”<sup>323</sup> But that was the sense in which it was used in *Parry #2*, generalized to include statutory as well as common law. Alone it does not justify retroactivity, although it does justify a liberal reading to effect the legislature’s purpose.<sup>324</sup>

A third sense is the relevant one here. Something is awry between a statute and the law as understood by the governed. It needs to be fixed and in such a way as not to disturb the settled expectations of those who acted in reliance on their common misunderstanding. The problem with the impossibility of notice if a statute is given retrospective force thus does not arise. The classic

319. Llewellyn, *Canons*, *supra* note 1, at 402.

320. 278 S.W. 893 (Tex. App. 1925).

321. *Id.* at 896 (“The presumption against the retrospective construction of statutes is founded on the principle that they should not be given such a construction as will make them unconstitutional or unjust, and therefore as a general rule does not apply to statutes that relate merely to remedies and modes of procedure.”).

322. “1st. What was the common law before the making of the Act. 2nd. What was the mischief and defect for which the common law did not provide.” *Heydon’s Case*, 3 Co. at 7b, 76 Eng. Rep., at 638.

323. *Falls*, 278 S.W. at 896 (citing WILLIAM BLACKSTONE, 1 COMMENTARIES \*86).

324. *See supra* text accompanying notes 310-14.

explanatory example is in the opinion of Justice Willes in *Phillips v. Eyre*:

One instance of retrospective legislation obviously just, to render valid the acts of persons who had fallen honestly into error, and by which infinite actions were killed in embryo, may suffice. When the result of the judgment, finally affirmed by the House of Lords, in the *Queen v. Millis* was to declare null and void numerous marriages celebrated in Ireland by Presbyterian ministers and others not episcopally ordained, one effect of the decision was to disclose, by the new light thrown upon the relations of families previously supposed to be legitimate, a prospect of vast and interminable litigation, springing from a host of vested rights of action of every description. This result was averted (in so far as it was possible without making persons liable to prosecution who were not so liable before) by the Acts 5 & 6 Vict. c. 113, 6 & 7 Vict. c. 39, and 7 & 8 Vict. c. 81, s. 83. By these beneficial and just statutes the past marriages were ratified and confirmed as from the beginning, for it was in terms enacted that they should "be adjudged and taken to have been and to be" of the same force and effect as if canonically had and solemnized.<sup>325</sup>

Such remedial or curative legislation affirms as proper what everyone had taken to be the law anyway; it "restores a situation that was affirmatively anticipated and provided for."<sup>326</sup>

Contrast the situation in which there was no doubt as to the law prior to the enactment of the statute — and no doubt that it was not how it ought to be. Think, for example, of the workings of the "mirror image rule" in contract formation prior to U.C.C. section 2-207. So the statute cures the law, but in a quite different

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325. (1870) 6 L.R.Q.B. 1, 24-25.

326. W. David Slawson, *Constitutional and Legislative Considerations in Legislative Law-making*, 48 CAL. L. REV. 216, 239 (1960). See also *Collins v. Spicer*, 99 N.Y. 225, 233 (1885) ("When the plain object and design of a statute seems to be to obviate controversies between innocent parties, arising out of defective legislation, or the negligent or improper conduct of public officers, it would seem to be the plain duty of a court as well as the requirement of a wise public policy to adopt such a construction, if not inconsistent with its terms, as will accomplish the purpose of the act."); Frederick A. Ballard, *Retroactive Federal Taxation*, 48 HARV. L. REV. 592, 596 (1935).

sense. Everyone had behaved under the prior law knowing what it required and knowing that was unwise but nevertheless still law. Now the maladaptivity has been fixed. But it would be utterly inappropriate — in fact exactly contrary to principle — to make that new, *remedial* statute retroactive.

Parry #7 should be interpreted in the third sense, for only in this sense is it justified. The limitations built into it, *viz.*, “and if a retroactive interpretation will promote the ends of justice,” should ensure its application being limited to the proper situations, although propriety here, as always, is for judicial judgment.

As with Thrust #7, Llewellyn appears to have derived Parry #7 directly from Black, although this time more heavily editing the caption.<sup>327</sup> Black uses the following splendid quote to offer the basic justification of giving effect to legislative intent:

[T]he general proposition [is] that statutes are to be construed and applied prospectively, unless a contrary intent is manifested in clear and unambiguous terms. This is undoubtedly the general rule, and it is sometimes held that, to work an exception, the intent favoring retrospective application must affirmatively appear in the words of the statute. The better rule of construction, and the rule peculiarly applicable to remedial statutes, however, is, that a statute must be so construed as to make it effect the evident purpose for which it was enacted, and if the reason of the statute extends to past transactions, as well as to those in the future, then it will be so applied, although the statute does not in terms so direct, unless to do so would impair some vested right or violate some constitutional guaranty.<sup>328</sup>

Black’s interest here may be more general,<sup>329</sup> but the argument does support Parry #7.

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327. BLACK, *supra* note 10, § 120, at 403-04 (“Remedial statutes are to be liberally construed; and if a retrospective interpretation will promote the ends of justice and further the design of the legislature in enacting them, or make them applicable to cases which are within the reason and spirit of the enactment, though not within its direct words, they should receive such a construction, provided it is not inconsistent with the language employed.”). Some caption!

328. Conn. Mut. Life Ins. Co. v. Talbot, 14 N.E. 586, 589 (Ind. 1887).

329. See BLACK, *supra* note 10, § 117, at 385.

Llewellyn illustrates Parry #7 with *Falls*. But while it may include recitations in accord with Parry #7, it doesn't follow it. Ms. Falls, married to but estranged from Meguiar, had purchased real estate in 1916.<sup>330</sup> At that time, her ability to own and administer land independently of her husband was provided by a 1913 statute;<sup>331</sup> however, it required her husband's signature in addition to her own in order to alienate real property, allowing her to avoid the requirement by judicial order only in case "the husband shall refuse to join in such incumbrance, or conveyance, or transfer of such property . . . ."<sup>332</sup> In 1917 the statute was amended, allowing judicial permission to do without the husband's signature also in case "the husband shall have permanently abandoned his wife."<sup>333</sup> In 1920 Ms. Falls sold the land to Key without Meguiar's signature, Key having full knowledge of the situation.<sup>334</sup> Ms. Falls retained a vendor's lien.<sup>335</sup> After a series of mesne conveyances, the property, still subject to the lien, came to Simon in 1922; he did not know of the problem with the signatures.<sup>336</sup> Falls and Meguiar's divorce had become final in 1923.<sup>337</sup> When Simon learned of the cloud on the conveyance, he stopped paying.<sup>338</sup> Falls said she'd get Meguiar's signature but instead she sued to foreclose the mortgage, naming Simon, all intermediate purchasers, and Meguiar as defendants.<sup>339</sup> The trial court said "No" and denied the foreclosure.<sup>340</sup>

Falls first argued that at common law courts permitted an exception to the requirement of the husband's signature when "the two are permanently separated,"<sup>341</sup> but to no avail: That, said the court, "rested entirely on the necessity of the situation, and the injustice of permitting an abandoned wife and her children to suffer for the necessities of life, by reason of her statutory inability to in-

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330. *Falls*, 278 S.W. at 894.

331. *Id.*

332. *Id.* at 895 (quoting TEX. REV. CIV. STAT. art 4621 (1913)).

333. *Id.* at 895 (quoting TEX. REV. CIV. STAT. ANN. art. 4621 (Supp. 1918)).

334. *Id.* at 894.

335. *Id.*

336. *Id.*

337. *Id.*

338. *Id.*

339. *Id.*

340. *Id.* at 896.

341. *Id.* at 895.

cumber or sell her separate property.”<sup>342</sup> The opinion continued in hopeful style for Ms. Falls: “The amendment to article 4621, enacted in 1917, was merely remedial to the terms of the statute as it existed prior thereto, by adding the words ‘if the husband shall have permanently abandoned his wife, be insane,’ etc., to the act.”<sup>343</sup> As an illustration to Parry #7, this should have allowed Ms. Falls to succeed, especially as her reliance (if indeed she did rely on the statute) came later, in 1920. But such was not to be:

We conclude that the plaintiff below, merely by the fact that she purchased the land in question prior to the amendment of article 4621, in 1917, did not acquire a vested right in the procedure necessary for her to dispose of said land without the signature of her husband some three years later, and believe that the trial court committed no error.<sup>344</sup>

It may have been remedial, but the 1917 statute still failed as to both Parry #2 and Parry #7. Perhaps the court thought “remedial” applied only to remedies, or procedure; the language immediately prior to this quoted conclusion suggests as much. But, as decided, the case exemplifies Thrust #7, not Parry #7.

*Resolution:*

If “remedial” is used in the appropriate sense, the sense that accords with the underlying jurisprudential basis of judicial abhorrence of retroactive legislation and interpretation, there is no clash between Thrust #7 and Parry #7. Thrust #7 applies to statutes creating new rights, powers, liabilities or disabilities, thus encroaching on old or previously accepted legal standards and relations. The governed should have been justified in planning and acting on the law of the time; having that law changed retrospectively by judicial interpretation would be indeed unjust. Parry #7 applies only where the previous state of rights and duties, *qua* legal standards and relations, was not known or accepted, but generally misunderstood or ignored. No reliance interests are disturbed by applying a statute retroactively in such a situation. To the contrary, the generally ac-

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342. *Id.* at 896.

343. *Id.*

344. *Id.*

cepted — if misunderstood — rights will be ratified by the retrospective application of the statute.

If a statute is purely about procedure, then it does not disturb settled expectations based upon prior law. "The Legislature has full control over the mode, times, and manner of prosecuting suits; and whenever, upon consideration of an entire statute relating to these matters, it appears to have been the legislative intent to make it retroactive, it will be given this effect."<sup>345</sup> Secondary sources agree,<sup>346</sup> but sometimes with the sensible caveat that retroactive application not "take away existing substantive rights or . . . create new liabilities in connection with past transactions."<sup>347</sup>

And if the statute changes a remedy only, and does not change the duty the breach of which gave rise to the remedy, then retroactive activity may be permissible. *Falls*, Llewellyn's illustration to Parry #7, may in part have relied on this.<sup>348</sup> Secondary sources are not as common, however,<sup>349</sup> and *Keeley*, Llewellyn's illustration of Thrust #7, is precisely to the contrary.

The thrust and parry of Pair Seven are not especially antipathetic. They both fit their justifications and natural exceptions. Only if used mindlessly should they generate potential conflict. Llewellyn's illustrative cases exemplify such use.

#### IV. INTERIM ASSESSMENT

It is too early to draw any conclusions. There are twenty-one pairs of dueling canons yet to examine, and among them are some of the better known and more controversial. The first seven included more than a fair proportion of thrusts and parries that one has difficulty calling canonical; that should improve over the next three quarters of the list. The first seven also include a surprising

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345. *Id.* at 896.

346. BLACK, *supra* note 10, § 117, at 385 ("Except in the case of remedial statutes and those that relate to procedure in the courts . . ."); 25 R.C.L. *Statutes*, *supra* note 11, § 38, at 791-92; SUTHERLAND, *supra* note 8, § 651, at 1175.

347. 25 R.C.L. *Statutes*, *supra* note 11, § 40, at 793.

348. 278 S.W. at 896 ("The presumption against the retrospective construction of statutes is founded on the principle that they should not be given such a construction as will make them unconstitutional or unjust, and therefore as a general rule does not apply to statutes that relate merely to remedies and modes of procedure.")

349. Among Llewellyn's favorites, SUTHERLAND, *supra* note 8, § 647, at 1169, and 59 C.J. *Statutes*, *supra* note 9, § 697, at 1172-73, mention it.

number that are not well-supported by the material cited. Llewellyn deserved better in research assistance and editing.

Genuine contrariety between the members of the first seven pairs is not evident. Only Pair Five could produce a clash, but that is only because Thrust #5 seems to have been created on no authority simply to contradict Parry #5. In the remaining six pairs discussed above, the difference in conditions of application, sometimes stated in the formulation, meant no serious clash was possible.

But the seven pairs or fourteen canons investigated so far have clearly demonstrated Llewellyn's point that canons do not stand alone, that they always require and rest upon justification "by means other than the use of the canon."<sup>350</sup> Canons rest on reasoning. Their canonical quality functions more as an assurance of the validity of a mode of reasoning than as an independent command. This is why those who would rigidify canons into rules of law<sup>351</sup> are wrong: reasons and reasoning are beyond judicial or legislative control. A legislature might enact a formula, say "*expressio unius est exclusio alterius*," as interpretive law for a particular code or quite generally, but it could not prevent a court from looking to legislative intent and grounds for inferring it — even the reasons underpinning this canon — and not applying the formula when it was to the contrary.

A canon gets its status from the regularity of occurrence of its conditions of application and from the robustness of the reasoning associated with it. One might think of a canon as a conduit: it collects a set of applicable conditions and focuses them, producing a conclusion. Of course, if the applicable conditions do not obtain, then the canon will not apply and the conclusion will not follow. It is a mistake to apply a canon without paying attention to its required conditions of application; it is this mistake that often produces the appearance of antipathy between otherwise compatible canons.

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350. Llewellyn, *Canons*, *supra* note 1, at 401.

351. *See, e.g.*, Vermeule, *supra* note 18; O'Connor, *supra* note 19; Rozenkranz, *supra* note 20.