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"Only a Sith Thinks Like That": Llewellyn's "Dueling Canons," Pairs Thirteen to Sixteen

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Of course there are pairs of maxims susceptible of being invoked for opposing conclusions. Once it is understood that meaning depends upon context, and that contexts vary, how could it be otherwise?[1]

I. INTRODUCTION

This is the third installment in a series of articles examining the famous twenty eight pairs of "dueling canons" left to us in 1950 by Karl N. Llewellyn.[2] After more than half a century, Llewellyn's assault on the legitimacy of canons remains an imposing landmark in statutory interpretation scholarship. For example: "Karl Llewellyn largely persuaded two generations of academics that the canons of construction were not to be taken seriously. . . . [His] critique of the canons is one of the most influential realist works of the last century."[3]

Canons of construction are established wise saws of statutory interpretation, rules of relatively stable verbal form, and of sufficiently frequent use in the past to give them a reliability, a validity independent of the reasoning on which they rest. A formula without at least these qualities can scarcely be called canonical: if you can not quote it, or something very like it, from several authoritative sources, then you probably do not have a canon.[4] A canon of construction is, and can be no more than, an aid to that judicial function. Thus a canon will always be trumped by express statutory language or by clear evidence of legislative intent to the contrary. Such evidence might come from the statutory environment or from extrinsic resources such as legislative history.[5] Eminent legal historian Willard Hurst summed it up succinctly: "A rule of construction was only an aid to fulfilling the legislature's intent; as such it was always rebuttable by more specific matter from the statutory text or from legislative history."[6]

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1. Henry M. Hart, Jr. & Albert M. Sacks, The Legal Process: Basic Problems in the Making of Law 1191 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

2. 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 (1950) [hereinafter *Canons*].

3. John F. Manning, *Legal Realism and the Canons' Revival*, 5 Green Bag 2d 283, 283–84 (2002); *see also* James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 Vand. L. Rev. 1, 8 (2005) ("Professor Karl Llewellyn's classic critique, which listed a counter-canon for each of twenty-eight canons, highlighted what he viewed as the canons' radical indeterminacy.").

4. *See* Michael Sinclair, "*Only a Sith Thinks Like That": Llewellyn's "Dueling Canons," One to Seven*, 50 N.Y.L. Sch. L. Rev. 919, 921–25 (2006) [hereinafter Sinclair, *Pairs One to Seven*]; Michael Sinclair, "*Only a Sith Thinks Like That": Llewellyn's "Dueling Canons," Eight to Twelve*, 51 N.Y.L. Sch. L. Rev. 1002, 1006–07 (2007) [hereinafter Sinclair, *Pairs Eight to Twelve*].

5. 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 when that proves inadequate.

6. Gooch v. United States, 297 U.S. 124, 128 (1943) ("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."); James Willard Hurst, Dealing

In *Canons,* 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, with cites.[7] Llewellyn's argument, by demonstration—widely considered by statutory interpretation theorists to be devastating to the legitimacy of canons—is the subject of this project.

Two great and fundamental principles underlie any argument to do with statutory interpretation, the principle of legislative supremacy and the principle of the necessity of notice.[8] First, legislative supremacy is a structural feature of our system of government through separated powers: the legislative branch has law making power,[9] requiring the judiciary to defer to it.[10] Legislative intent is thus central to the resolution of interpretive problems; the essence of statutory construction is to determine and apply the intention of the enacting legislature.[11] Second, it is jurisprudentially fundamental that a person cannot be bound to comply with a law of which she could not have notice.[12] Statutes are the vehicle by which the government disseminates control data to the governed; statutes properly enacted are the *only* au-

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WITH STATUTES 56–57 (1982) (citing United States v. Dotterwiech, 320 U.S. 277, 289 (1943) ("Giving all proper force to the contention of 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.")).

7. *Canons*, *supra* note 2.

8. *See* Sinclair, *Pairs Eight to Twelve*, *supra* note 4, at 1004–06.

9. U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives.").

10. REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 8 (1975) ("[A]ny conflict between the legislative will and the judicial will must be resolved in favor of the former."); *see also* 59 C.J. *Statutes* § 568 at 948 (1932) ("As the intention of the legislature, embodied in the statute, is the law, the fundamental rule of construction, to which all other rules are subordinate, is that the court shall . . . ascertain and give effect . . . to the intention or purpose of the legislature as expressed in the statute."); THE FEDERALIST Nos. 78, 81, 83 (Alexander Hamilton); THOMAS HOBBES, LEVIATHAN 139–40, 145 (Prometheus Books 1988) (1651).

11. 2 J.G. SUTHERLAND, STATUTORY CONSTRUCTION § 363, at 693–96 (John Lewis ed., Callaghan & Co. 1904) (1891) ("The intent is the vital part, the essence of the law, and the primary rule of statutory construction is to ascertain and give effect to that intent." (citations omitted)). Sutherland further notes: "To find out the intent is the object of all interpretation." *Id.* § 364, at 696. The idea of legislative intent itself has come under fire periodically since the publication of Max Radin's article, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930). For a general discussion of the arguments, see MICHAEL SINCLAIR, GUIDE TO STATUTORY INTERPRETATION 85–102 (2000).

12. Grayned v. City of Rockford, 408 U.S. 104, 108 (1972); Lambert v. California, 355 U.S. 225, 228–29 (1957); SAINT THOMAS AQUINAS, *Summa Theologiae, I–II, QQ. 90 Through 97*, *in* THE TREATISE ON LAW 118, 118–27, 135–40 (R.J. Henle, ed. & trans., University of Notre Dame Press 1993) (1273); JEREMY BENTHAM, *Essay of the Promulgation of Laws, and Promulgation of the Reason Thereof*, *in* I THE WORKS OF JEREMY BENTHAM 157 (John Bowring ed., 1962); 1 WILLIAM BLACKSTONE, COMMENTARIES *79–80; LON L. FULLER, THE MORALITY OF LAW 34, 34–35, 39 (Yale University Press rev. ed. 1969); JOHN LOCKE, THE SECOND TREATISE ON GOVERNMENT § 136, at 76 (Prometheus Books 1986) (1690). *See generally* SINCLAIR, *supra* note 11, at 94.

thoritative legislative voice.[13] These two principles usually work in sympathy. When they do not, the tension between them gives rise to problems of interpretation and thus underlies most of the arguments that follow.

The structure of the following is straightforward. I shall treat the pairs of canons *seriatum*; 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; nothing more. Llewellyn relies on four secondary sources: Sutherland in its 1904 edition;[14] *Corpus Juris Statutes* from 1932;[15] Black's *Handbook on the Construction and Interpretation of Laws*, 1911;[16] and *Ruling Case Law*, 1919.[17] I follow that pattern, only with the secondary sources first, as these sometimes give explanations. After a general introduction to the thrust or parry, I brief Llewellyn's cited case and how it supports the canon. Llewellyn's cases are sometimes not quite adequate as support, or support the canon in only one of its aspects, in which case I provide further illustrative cases. After analyzing both thrust and parry, I offer a "resolution" or not, according as the conflict is genuine or pseudo. In some cases, one is forced to query whether Llewellyn's choice of dueling thrust and parry should properly be called "canons." Out of respect for the justifiably high regard in which Llewellyn is held, and so as not to appear merely "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.

The first installment of this project examined Pairs 1 through 7.[18] Llewellyn's "fiendish deconstruction"[19] of these fourteen canons proved quite innocuous. In all but one instance, looking at the reasons underlying the canons in a pair and the appropriate context for their use completely dissolved the superficial contrariety.[20] The exception, Pair 5, included as its "thrust"—supposedly the base of the pair—an ambiguous formulation for which Llewellyn provided neither provenance nor support in case law or secondary sources, which seemed contrived solely for the purpose of op-

13. Max Radin, *A Case Study in Statutory Interpretation:* Western Union Co. v. Lenroot, 33 Cal. L. Rev. 219, 223 (1945) ("[T]he constitutional power granted to Congress to legislate is granted only if it is exercised in the form of voting on specific statutes."). A corollary is that statutes must be promulgated: "That a law may be obeyed, it is necessary that it should be known; that it may be known, it is necessary that it be promulgated." Bentham, *supra* note 12, at 157; *see also* Aquinas, *supra* note 12, at 140; Locke, *supra* note 12, at 75–76.

14. 2 Sutherland, *supra* note 11.

15. 59 C.J. *Statutes*, *supra* note 10.

16. Henry Campbell Black, Handbook on the Construction and Interpretation of Laws (2d ed. 1911).

17. 25 Ruling Case Law *Statutes* (1919) [hereinafter R.C.L. *Statutes*].

18. Sinclair, *Pairs One to Seven*, *supra* note 4.

19. Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 Vand. L. Rev. 533, 535 (1992) (quoting Robert Weisberg, *The Calabresian Judicial Artist: Statutes and the New Legal Process*, 35 Stan. L. Rev. 213, 213 (1983)).

20. *See* Varity Corp. v. Howe, 516 U.S. 489, 511 (1996) ("To apply a canon properly one must understand its rationale.").

posing its counterpart, Parry #5. Thus Pairs 1 through 7 failed to support the thesis that "there are two opposing canons on almost every point."[21]

The second installment examined Pairs 8 through 12. Pair 12 should have started Llewellyn's list and the first installment of this series as it is simply Llewellyn's formulation of the Plain Meaning Rule, not so much a canon of construction as a condition on construction.[22] To create the appearance of conflict in thrust and parry, Llewellyn took one of the two usual congeries of conditions out of a typical formulation and called it Parry #12.[23] Of course there have always been disagreements about the stringency with which the Plain Meaning Rule should be applied, but to claim that by splitting the conditions of an acceptable rule one could create opposing canons is simply fallacious.[24]

Pairs 8 through 11 form a natural group, all being about legislated interpretive controls, but none of them should count as canons. Pair 8 is about statements of purpose; Pair 9 is about interpretation clauses, including both definitions and interpretive instructions; Pair 10 is about interpretive instructions; and Pair 11 treats titles, preambles, and section captions together.[25] What a mix up! Yet even reconstructing them in some sensible pattern does not generate anything more than a description of a variety of interpretive situations. Not surprisingly, there are no serious problems of incompatibility here. In combination and separately Pairs 9 through 11 provide little in the way of duels.[26] Once again the canons came through unscathed, and once again Llewellyn's oppositions appeared artificial and contrived.

In this installment I have finally been forced to come to grips with the problem of the provenance of the actual language Llewellyn chose for many of his formulations: they are too often reduced or paraphrased versions of Black's captions, without appropriate quotation marks, ellipses, or pincites. I address this in a subsection of the conclusion.

II. LLEWELLYN'S PAIRS

Pair 13

THRUST #13: "Words and phrases which have received judicial construction before enactment are to be understood according to that construction."

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21. *Canons*, *supra* note 2, at 401.

22. *See* Sinclair, *Pairs Eight to Twelve*, *supra* note 4, at 1007.

23. Parry #12 contains the condition that following the plain meaning "[n]ot . . . lead to absurd or mischievous consequences or thwart manifest purpose," *Canons*, *supra* note 2, at 403; the other condition—that the statutory language "is plain and unambiguous"—he left in Thrust #12. *Id.*

24. *See* Sinclair, *Pairs Eight to Twelve*, *supra* note 4, at 1008–18.

25. *Id.* at 1007. On the interpretive importance of titles, Llewellyn failed to mention the ubiquitous "one subject in the title" provisions in most state constitutions! *Id.* at 1040.

26. *See id.* at 1053–54.

PARRY #13: "Not if the statute clearly requires them to have a different meaning."[27]

Thrust #13: "Words and phrases which have received judicial construction before enactment are to be understood according to that construction."[28]

As Justice Holmes said, "The law uses familiar legal expressions in their familiar legal sense . . . ."[29] Thrust #13 should be on most lists of canons. Llewellyn's odd expression of it comes from his first cited secondary source, Black section 65:

> WORDS JUDICIALLY DEFINED
>
> 65. Words and phrases in a statute which have received a settled judicial construction before its enactment are to be understood according to that construction, unless the statute clearly requires them to bear a different meaning.[30]

Apart from omitting "in a statute" and "settled," Llewellyn's Thrust #13 tracks Black section 65 down to the comma.

Llewellyn also cites Sutherland section 363, but this must be a mistake. Sutherland section 363 is about the centrality of legislative intent to statutory interpretation, with nothing on the subject of Thrust #13.[31] But he might easily have cited his other secondary sources, for example *Corpus Juris Statutes* section 613[32] or R.C.L. section 236.[33] That Pair 13 occurs so uniformly in the treatises and in similar formulations shows that it properly counts as a canon of construction.

The reason for the principle is not hard to see. Statutes give notice of legal constraints; those who consult statutes to guide their own or their clients' behaviour either understand a statute's words in their accustomed legal usage or consult settled judicial usage. Their legitimate expectations should not be upset by a random shift in judicial interpretation. Legislatures know this, as well as judges and counselors, and accordingly "it must be presumed that a legislative body, using such terms in its

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27. *Canons*, *supra* note 2, at 403.

28. *Id*.

29. Henry v. United States, 251 U.S. 393, 395 (1920); *accord* Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 537 (1947) ("Words of art bring their art with them.").

30. BLACK, *supra* note 16, § 65, at 186.

31. 2 SUTHERLAND, *supra* note 11, § 363, at 693–96 ("**The intent of a statute is the law.**—If a statute is valid it is to have effect according to the purpose and intent of the law-maker."); *see also id.* at 693–95 (quoting illustrative cases).

32. 59 C.J. *Statutes*, *supra* note 10, § 363, at 1036 ("[W]hen words have a well-settled meaning, through judicial construction, they must be understood, when used in a statute, to have that meaning, unless a different meaning is unmistakably indicated.").

33. 25 R.C.L. *Statutes*, *supra* note 17, § 236, at 992 ("Where the terms used in a statute have acquired a settled meaning through judicial interpretation, and the same terms are used in a subsequent statute upon the same subject, they are to be understood in the same sense, unless by qualifying or explanatory addition the contrary intention of the legislature is made clear.").

enactment, is aware of the construction already placed upon them and expects that that construction will be adhered to."[34]

Llewellyn's cited case, *Scholze v. Scholze*,[35] from the Tennessee Court of Appeals in 1925, is a fine illustration. In essence the dispute was over seven promissory notes made to "'E. W. and Sue Scholze' jointly."[36] The late E. W. Scholze bequeathed his widow, Sue Fonda Scholze, a half interest in certain promissory notes; Sue Fonda claimed to hold a 100% interest in the notes by tenancy by the entireties or right of survivorship, concepts resting on common law, judicial definition.[37] Tennessee had enacted its Married Women's Property Acts in 1874,[38] emancipating women's property ownership, but the key statutes came in 1913 and 1919, the first abolishing tenancy by the entireties and the right of survivorship,[39] and its successor reinstating tenancy by the entireties.[40] Tenancy by the entireties thus became a newly enacted, statutory concept. With ownership by survivorship eliminated by statute, Sue Fonda's case rested on the scope of tenancy by the entireties.[41] The court, after a very thorough and scholarly research essay, found that at common law there was no tenancy

34. Black, *supra* note 16, § 65, at 187; *accord* Case of the Sewing Machine Companies, 85 U.S. (18 Wall.) 553, 584 (1873) ("[T]he well-established rule applies in construing the later act, that words and phrases, the meaning of which in a statute have been ascertained by judicial interpretation, are, when used in a subsequent statute, to be understood in the same sense. Such a construction in the case supposed becomes a part of the law, as it is presumed that the legislature in passing the later law knew what the judicial construction was which had been given to the words of the prior enactment." (citation omitted)); 25 R.C.L. *Statutes*, *supra* note 17, § 236, at 993 ("Such a construction becomes part of the law, as it is presumed that the legislature . . . knew what the judicial construction was which had been given to the words of the prior enactment.").

35. 2 Tenn. App. 80 (M.S. 1925).

36. *Id.* at 87.

37. *Id.* at 87–88.

38. *Id.* at 90–91 ("By the Act of 1784 (Shannon's Code, section 3677) the right of survivorship in all estates, real and personal, held in joint tenancy was abolished in Tennessee. But our Supreme Court held that this statute applied to technical joint tenancy only, and did not apply to tenancy by the entirety, because the husband and wife took one indivisible estate, which continued after the death of one spouse; that husband and wife were in the law, one person, and each was seized by the entirety, and that, therefore, they were not technically joint tenants.").

39. *Id.* at 91 ("Tenancy by the entirety was abolished by the Act of 1913, chapter 26, emancipating married women, and a married woman then could hold and dispose of her property the same as if she were a feme sole, and the husband and wife could no longer be considered as one in so far as their property was concerned. It necessarily follows that the right of survivorship in personalty was also abolished by said act." (citations omitted)).

40. *Id.* at 91–92 ("Since then, said act has been repealed, in 1919, and another act containing the same language, emancipating married women, has been enacted, with the provision 'that nothing in this act shall be construed as abolishing tenancies by the entirety,' etc., as hereinabove set out. Evidently the original act was repealed and the latter act enacted for the purpose of preserving tenancies by the entirety and the husband's estate by the curtesy." (citation omitted)).

41. *Id.* at 89 ("By far the most serious question in this suit, and one that has given us the most concern is, was tenancy by the entirety in choses in action recognized at common law and by the laws of Tennessee before the Act of 1919, chapter 126, emancipating married women?").

by the entireties in personalty.[42] Accordingly, on language very similar to Thrust #13, it followed that the legislature must not have intended to create such an interest by the 1919 legislation.[43] And so Sue Fonda kept only a half share in the notes.

But surely a legislature has command of the words it chooses to enact; surely it can use words in whatever sense it chooses, provided only that it makes its choice clear to the governed.[44]

Parry #13: "Not if the statute clearly requires them to have a different meaning."[45]

Of course! If by the democratic principle of legislative supremacy the legislature can overrule the substantive decision of its jurisdiction's supreme court, then it can use words differently from the prior usage settled in that court. Like anyone else it can, to the extent of its statutory speech,[46] give its words the meanings it chooses.[47] The only limitation is that we, the governed, and our advisors and judges must be told about it, either expressly as in a definition or by inescapable implication.[48]

Thrust #13 copies the "unless" clause of the heading of Llewellyn's only relevant cited secondary source, Black section 65, quoted above: "unless the statute clearly requires them to bear a different meaning."[49] In the text, Black emphasizes the importance of communicating the different meanings being used: "unless an intention of the legislature to have them understood in a different sense is unmistakably indi-

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42. *Id.* at 91 ("It will be seen, by an examination of all our cases, so far as we have been able to ascertain, that none of them holds that there may be a tenancy by the entirety in personalty. They all speak of it as 'the right of survivorship.'"); *id.* at 92 ("We are of the opinion that tenancy by entirety in personalty never existed at common law . . . .").

43. *Id.* at 92 ("It is an established rule in the construction of statutes that words with a fixed meaning at common law, or by decisions of the court, are presumed to be used in a statute later enacted in the same sense and with the same meaning that they had at common law or in such decisions, unless a different sense is apparent from the context or the general purpose of the statute, or unless expressly defined by statute.").

44. Thus avoiding the charge of "Humpty-Dumpty-ism." *See* Lewis Carroll, Alice in Wodnerland and Through the Looking-Glass and What Alice Found There 267 (Book-of-the-Month Club, Inc. 1994) (1871) ("'When *I* use a word,' Humpty Dumpty said in rather a scornful tone, 'it means just what I choose it to mean—neither more nor less.'").

45. *Canons*, *supra* note 2, at 403.

46. Statutes are a legislature's only official speech. Radin, *supra* note 13, at 223 ("[T]he constitutional power granted to Congress to legislate is granted only if it is exercised in the form of voting on specific statutes."); *see also* Sinclair, *supra* note 11, at 7–8.

47. Of course although it may have greater power to influence popular and conventional meanings than most authors, a legislature has no such formal power beyond its own statutory enactments. *See* Richard Robinson, Definition (1954); Sinclair, *supra* note 11, at 67.

48. This is simply a variation on the requirement that the legislature communicate its laws to those governed, a requirement about as old as law making and jurisprudence. *See* Grayned v. City of Rockford, 408 U.S. 104 (1972); Lambert v. California, 355 U.S. 225 (1957); Aquinas, *supra* note 12, at 118–27, 135–40; Bentham, *supra* note 12, at 155; Blackstone, *supra* note 12, at *79–80; Fuller, *supra* note 12, at 34–35, 39; Locke, *supra* note 12, § 136, at 76.

49. Black, *supra* note 16, § 65, at 186; *see also* text accompanying note 31.

cated . . . ."[50] Much the same is found in the formulations of *Corpus Juris Statutes* section 613 ("unless a different meaning is unmistakably indicated")[51] and R.C.L. section 236 ("unless by qualifying or explanatory addition the contrary intention of the legislature is made clear").[52]

Llewellyn's cited case, *Dixon v. Robbins*, from the renowned New York Court of Appeals of 1927, is a fine illustration of Thrust #13, but fails even in dicta to support Parry #13.[53] Although recitations of the exception are common, good illustrative cases are not easy to find; but Llewellyn's research assistant, even without the aid of an electronic search engine, should have found the Supreme Court's *Plummer v. United States* in the footnotes of one of his favoured four secondary sources.[54] Plummer was an assistant surgeon in the United States Navy, and thus entitled to what they called "longevity pay," a 10% bonus for serving five-year periods. The dispute was over the meaning of "his current yearly pay,"[55] specifically as to the base year on which that 10% was calculated. The same language in the predecessor statute had been

> construed in *United States v. Tyler*, to require that the calculation of the longevity pay should be made, not upon the sum of the base pay, but on the base pay and previous increases thereof, that the same rule must be applied to the words as used in the provision of the statute above quoted. But, subsequent to the Tyler Case, by the act of June 30, 1882, Congress expressly directed that the ten per cent longevity increase provided for in § 1262, Rev. Stat., should be "computed on the yearly pay of the grade . . . ." That this act was passed for the express purpose of commanding a method of computation which would render inapplicable the construction adopted in the Tyler Case is not open to controversy.[56]

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50. BLACK, *supra* note 16, § 65, at 187.

51. 59 C.J. *Statutes*, *supra* note 10, § 613, at 1036 ("[W]hen words have a well settled meaning, through judicial construction, they must be understood, when used in a statute, to have that meaning, unless a different meaning is unmistakably indicated.").

52. 25 R.C.L. *Statutes*, *supra* note 17, § 236, at 992 ("Where the terms used in a statute have acquired a settled meaning through judicial interpretation, and the same terms are used in a subsequent statute upon the same subject, they are to be understood in the same sense, unless by qualifying or explanatory addition the contrary intention of the legislature is made clear.").

53. 246 N.Y. 169 (1927).

54. *See* 25 R.C.L. *Statutes*, *supra* note 17, at 994 n.17 (citing Plummer v. United States, 224 U.S. 137 (1912)).

55. *Plummer*, 224 U.S. at 143–44 ("The controversy as to the sum of the longevity pay arises from a portion of the text of the act of May 13, 1908, reading as follows: 'There shall be allowed and paid to each commissioned officer below the rank of rear admiral ten per centum of his current yearly pay for each term of five years' service in the Army, Navy, and Marine Corps. The total amount of such increase for length of service shall in no case exceed forty per centum on the yearly pay of the grade as provided by law.'" (citation omitted)).

56. *Id*. at 144 (internal citations omitted).

The argument to the contrary is that for the legislature to include an interpretation would be (unconstitutionally) to usurp an exclusively judicial function.[57] It is a transparently weak argument—in essence it denies the legislature the power to correct judicial decisions with which it disagrees—and is easily dismissed.[58]

Resolution:

Thrust #13 is transparently good sense, summarizing the reasons on which it rests. But those reasons are completely negated if the legislature itself in the legislation announces a different meaning for the words in the context of that legislation. Accordingly Parry #13 encapsulates not so much an exception to Thrust #13 as the appropriate canon of construction in the case of authoritative and public negation of the reasons for Thrust #13. It is an instance of legislative supremacy, one with which we are now familiar as legislatures increasingly resort to a compendia of definitions at the beginning of an enactment. And it does not compromise the principle of notice.

A canon of construction does not purport to be a universal mandate of interpretation with something like constitutional inviolability.[59] A canon offers prima facie wisdom in capsule form, binding neither court nor legislature even though, as prima facie *wisdom*, it should shift a burden of persuasion. Even so, most versions of Pair 13 include both Thrust #13 and Parry #13 connected by "unless" in the same sentence, lest anyone be deceived by a bald statement of the underlying reason (as in Thrust #13). Simply splitting the two parts creates only the most superficial contrariety.

Pair 14

THRUST #14: "After enactment, judicial decision upon interpretation of particular terms and phrases controls."
PARRY #14: "Practical construction by executive officers is strong evidence of true meaning."[60]

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57. Getz v. Brubaker, 25 Pa. Super. 303, 305 (1904) ("Two objections are made against the constitutionality of the statute. (a) . . . . (b) The legislature usurped judicial functions in defining the meaning of certain words used in the statute."); State Bd. of Assessors v. Plainfield Water Supply Co., 67 N.J.L. 357, 358 (1902) ("The relators contend that the provision quoted is nugatory for the reason that it is an attempt by the legislature to control the courts in the performance of their function of interpreting statutes.").

58. *Getz*, 25 Pa. Super. at 305 ("The second objection does not seem to be seriously pressed by the appellant's counsel. It is clearly within the power of the legislature to declare in the statute the sense in which it used certain words therein contained."); *Plainfield Water Supply Co.*, 67 N.J.L. at 358 ("We do not consider this to be the import of the words, 'This act shall not be construed to apply to,' when used in the connection in which they appear in this provision. Their purpose is not to curtail to any extent the judicial power of interpretation, but to limit the scope of the act itself; being equivalent to 'This act shall not apply to.'").

59. Sinclair, *Pairs One to Seven*, *supra* note 4, at 922–23.

60. *Canons*, *supra* note 2, at 404.

Pair 14 follows naturally from Pair 13 as an aspect of the judicial prerogative to interpret in order to apply legislation to particular situations. Parry #13 has just told us that the legislature has power over meanings of words in its enactments, provided it says so in legislated form. Now, with Parry #14, we get the same principle of judicial authority over meanings not defined in the statute with the principal rival branch of government, the administration and its agencies.

Thrust #14: "After enactment, judicial decision upon interpretation of particular terms and phrases controls."[61]

Black section 93 is the only secondary source cited for Thrust #14; its caption is:

> JUDICIAL CONSTRUCTION
>
> 93. Judicial decisions previously made upon the interpretation of particular terms and phrases used in a statute, and decisions subsequently rendered upon its effect, purpose, or scope, are strong evidence of its meaning, and are generally of controlling force in establishing its correct construction.[62]

Apart from the phrase "upon interpretation of particular terms and phrases," Thrust #14 is not such a clear copy, although variations on Black's more cautious and qualified version are common enough. Black offers two justifications, both also justifications for Pair 13. First, an established judicial meaning of an expression will be presumed adopted in new legislation unless it says otherwise.[63] Second, a judicial construction of a statute, "especially where [it] is supported by a line of uniform decisions, and where it has been acquiesced in by the legislature . . . . [It will] become[] as much a part of the statute as if it had been written into it originally."[64]

In other words, as Black continues, stare decisis, the doctrine of precedent, applies to the application of statutes.[65] Thrust #14 enunciates foundational judicial method. Justice Cardozo: "*Stare decisis* is at least the everyday working rule of our law."[66] It is basic to our system of legal governance, dating at least since 1803 and Chief Justice Marshall's "[I]t is emphatically the province and duty of the judicial department to say what the law is."[67] I prefer Lord Wilberforce's more recent, more dogmatic version:

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61. *Id.* at 404.

62. BLACK, *supra* note 16, § 93, at 298.

63. *Id.* § 65, at 186, § 93, at 298.

64. *Id.* § 93, at 298.

65. *Id.* ("[T]his rule rests upon the well-known principle of stare decisis.").

66. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 20 (1921).

67. Marbury v. Madison, 5 U.S. 137, 177 (1803); *see also* BLACKSTONE, *supra* note 12, *69; MATTHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 44 (Charles M. Gray ed., 1971) (1713); THE FEDERALIST No. 78, at 407 (Alexander Hamilton) (Gideon ed., 2001) ("To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them . . . ."); *id.* No. 78, at 404–05 (Alexander Hamilton), No. 81, at 417–18 (Alexander Hamilton).

> [It is the function of Parliament to enact statutes] and it is the function of the Courts to say what the application of the words used to particular cases or individuals is to be. . . . [I]t would be a degradation of that process if the Courts were to be merely a reflecting mirror of what some other interpretation agency might say.[68]

The doctrine arguably applies more strictly to the judicial application of statutes than to either common law or constitutional decisions because if the legislature disagrees it can readily amend the statute.[69] Contrast constitutional interpretation, the only non-judicial cure for which is amendment of the constitution, a near impossibility; thus *stare decisis* in constitutional cases should be relatively weak.[70]

Llewellyn's only cited case, *Eau Claire National Bank v. Benson*,[71] is also cited by Black.[72] A disappointed creditor of a corporation sued to recover from one of the corporation's stockholders. At this the Wisconsin Supreme Court was not happy:

> No new question is presented for consideration on this appeal. Most of the questions discussed in the brief filed by counsel for appellant have been presented to this court over and over again and with the same result as when first presented some forty years ago. There must come a time when the presentation of a question to a court of last resort, and the consumption of its time in going over ground that has been repeatedly explored before, will be a mere waste of judicial labor.[73]

This is the efficiency justification for *stare decisis*. Following that, Wisconsin's Justice Marshall gave us the language followed by Black and encapsuled in Thrust #14:

> Courts are not responsible for the law. It is their province to declare and apply it and to construe statutes and constitutions in accordance with the will of the lawmaking power, where construction becomes necessary. When such construction has once been given to a law and finally established as a part

68. Black-Clawson Int'l Ltd. v. Papierwerke Waldhof-Aschaffenburg A.G., [1975] A.C. 591 (H.L.).

69. Neal v. United States, 516 U.S. 284, 295 (1996) ("One reason that we give great weight to *stare decisis* in the area of statutory construction is that 'Congress is free to change this Court's interpretation of its legislation.'" (quoting Ill. Brick Co. v. Illinois, 431 U.S. 720, 736 (1977))); *see also* William N. Eskridge, Jr., *The Case of the Amorous Defendant: Criticizing Absolute Stare Decisis for Statutory Cases*, 88 MICH. L. REV. 2450 (1990); Lawrence C. Marshall, *Contempt of Congress: A Reply to the Critics of an Absolute Rule of Statutory Stare Decisis*, 88 MICH. L. REV. 2467 (1990); Lawrence C. Marshall, *"Let Congress Do It": The Case for an Absolute Rule of Statutory Stare Decisis*, 88 MICH. L. REV. 177 (1989).

70. Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406–08 (1932) (Brandeis, J., dissenting) ("[I]n cases involving the Federal Constitution, where correction through legislative action is practically impossible, th[e] court has often overruled its earlier decisions. The court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function." (footnotes omitted)).

71. 82 N.W. 604 (Wis. 1900).

72. BLACK, *supra* note 16, at 298 n.61.

73. *Eau Claire National Bank*, 82 N.W. at 605.

> thereof, it is as much a part of it as if embodied therein in plain and unmistakable language.[74]

Only the legislature could change the law thus construed.[75] The plaintiff lost.

Parry #14: "Practical construction by executive officers is strong evidence of true meaning."[76]

Here Llewellyn cites R.C.L. section 274, in addition to Black section 94.[77] Black:

> EXECUTIVE CONSTRUCTION
>
> 94. A practical construction put upon a doubtful or ambiguous statute by the officers of the executive department, who are charged with its execution, if long acted upon and generally acquiesced in, is regarded as strong evidence of the true meaning of the law; and though it is not binding upon the courts, they will not interpret the law differently unless there are weighty reasons for so doing.[78]

The paraphrase to suitable "canon size" here is sufficiently colorable, although the omission of Black's qualifiers ("put upon a doubtful or ambiguous statute," "if long acted upon and generally acquiesced in," and "though it is not binding upon the courts, they will not interpret the law differently unless there are weighty reasons for so doing") lends Parry #14 a generality and dogmatism that undermine its accuracy. R.C.L. is as qualified as Black on the interpretive authority of the administrative branch:

> **274. Executive or Departmental Construction; Opinion of Attorney General.**—It is a well settled rule that the contemporaneous construction of a statute by those charged with its execution and application, especially when it has long prevailed, while not controlling, is entitled to great weight, and should not be disregarded or overturned except for cogent reasons, and unless it is clear that such construction is erroneous.[79]

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74. *Id.*

75. *Id.* ("When that situation exists it is the province of the legislature alone to change the law.").

76. *Canons*, *supra* note 2, at 404.

77. *Id.* at 404 n.30.

78. BLACK, *supra* note 16, § 94, at 300.

79. 25 R.C.L. *Statutes*, *supra* note 17, § 274, at 1043. *Corpus Juris Statutes* is even more qualified:

> **Executive Construction—(a) General Rules.** The contemporaneous construction placed upon a statute by the officers or departments charged with the duty of executing it is entitled to more or less weight, especially if such construction has been made by the highest officers in the executive department, or has been observed and acted upon for a long period of time; and, while not generally controlling, where the case is not extreme and no vested rights are involved, such construction should not be disregarded or overturned except for the most cogent reasons, and unless clearly erroneous.

59 C.J. *Stautes*, *supra* note 10, § 609, at 1025–28.

Reliance is a powerful principle in statutory interpretation. If there has been no judicial interpretation, but the executive branch has adopted and acted on an interpretation not clearly erroneous, then surely a person or a legal advisor would be well advised to follow that interpretation. Such an interpretative practice, says Black, "for a long period of time, and generally acquiesced in, and not questioned by any suit brought, or any public or private action instituted, to test and settle the construction in the courts, is entitled to great respect . . . ."[80] In contrast, if the administration's interpretation is recent and there has been little action taken in reliance upon it, it "will have no weight or influence with the courts in their search for the true meaning of the law."[81] But this contrast is less available as a justification for Llewellyn's sweeping and unequivocal Parry #14: its only equivocation is "strong evidence," a reduction in force from the mandatory that is required by *Marbury v. Madison*.[82]

Llewellyn cites *State ex rel. Bashford v. Frear* from the Wisconsin Supreme Court as judicial support.[83] Bashford was appointed to finish the final six months of the term of a deceased Wisconsin Supreme Court justice and took office on the very day the state legislature approved a twenty percent salary increase for such justices. The Wisconsin constitution[84] "creates an absolute disability of the lawmaking body to change, in any way, either by increasing or decreasing, any public officer's compensation 'during his term of office,'"[85] so the defendant Secretary of State refused to pay Bashford the incremental $500 and Bashford brought this writ of mandamus, successfully.[86] Does "'his term of office' . . . mean[] term of office created, . . . or 'during the term for which they are respectively elected'"?[87] After a long and con-

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80. Black, *supra* note 16, § 94, at 301–02; 25 R.C.L. *Statutes*, *supra* note 17, § 274, at 1043–44 ("The courts are especially reluctant to overturn a long standing executive or departmental construction where great interests have grown up under it and will be disturbed or destroyed by the announcement of anew rule, or where parties who have contracted with the government upon the faith of such construction ill be prejudiced." (citation omitted)).

81. Black, *supra* note 16, § 94, at 301.

82. *Id.* (noting that "such practical constructions are never *binding* upon the courts" (emphasis added)).

83. *Canons*, *supra* note 2, at 404 n.30 (citing State *ex rel.* Bashford v. Frear, 120 N.W. 216 (Wis. 1909)).

84. Wis. Const. art. IV, § 26.

85. *Bashford*, 120 N.W. at 218.

86. The curious expression "is entitled to more or less weight" appears in both *Corpus Juris Statutes* and *Brashford*. *See* 59 C.J. *Statutes*, *supra* note 10, § 609, at 1025; *see also Bashford*, 120 N.W. at 216. Specifically, Justice Marshall offers the following guidance regarding practical construction:

> 7. In case of an ambiguous law being executed by administrative officers as having a particular meaning which is reasonable, such practical construction *is entitled to more or less weight*, according to circumstances, in determining the intent of the lawmakers.
>
> 8. In case of such practical construction obtaining uninterruptedly for a very long period, particularly so long as fifty years, it is entitled to controlling weight in determining the intent of the lawmakers.

Id.

87. *Bashford*, 120 N.W. at 218.

fusing opinion[88] and conceding that "[i]f those who had early to do with the matter had had the benefit of the judicial reasoning on like provisions, which was postponed for some twenty years, a different conclusion might have been reached,"[89] Justice Marshall finally reached and rested upon a form of Parry #14:

> It requires a very clear case to justify changing the construction of a law, conceded to be somewhat involved, which has been uninterruptedly acquiesced in for so long a period as fifty years. . . .
>
> . . . .
>
> So the conclusion is . . . that "his term of office," as used in sec. 26, art. IV, of the constitution, has regard, primarily, to the personal element, the incumbent of the office; contemplates the period of incumbency, whether of a whole term, or a part of the entirety, under art. VII. As to the particular incumbent's term of service, during its pendency, the legislature is under complete disability to change the salary incident in any manner or to any extent; but as to any period, within a whole term, filled by appointment or election, the legislature has power, before the commencement thereof, to fix the compensation, different from that incident to the office during the preceding period.[90]

Many cases also reiterate that the interpretation relied upon must have been long established[91] and that administrative acquiescence in a usage cannot outweigh clear legislative intent.[92]

The unequivocal, assertive form of Llewellyn's Parry #14 lacks support from either primary or secondary sources, or in the reasoning underlying this Pair and Pair 13.

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88. In assessing conflicting authority from other states, Justice Marshall makes other arguments, but not as dispositive, see generally *Bashford*, 120 N.W. at 216. *Bashford* includes a straightforward Thrust #13 argument:

> The words "term of office," as regards changes in salary, had by long usage and many rulings, as we have seen, come to mean, under sec. 26, art. IV, of the constitution, the period of incumbency whether for a full term or a fraction thereof. It is fair to presume that it was used by the legislature in such sense, no other having obtained here during the life of our constitution.

Id. at 223.

89. *Id.*

90. *Id.* at 223–24.

91. *See, e.g.*, Merritt v. Cameron, 137 U.S. 542, 552 (1890) ("There is no such long and uninterrupted acquiescence in a regulation of a department, or departmental construction of a statute, as will bring the case within the rule announced at an early day in this court, and followed in very many cases, to wit, that in case of a doubtful and ambiguous law the contemporaneous construction of those who have been called upon to carry it into effect is entitled to great respect, and should not be disregarded without the most cogent and persuasive reasons.").

92. *See, e.g.*, Houghton v. Payne, 194 U.S. 88, 100 (1904) ("A custom of the department, however long continued by successive officers, must yield to the positive language of the statute.").

Resolution:

For there to be a conflict here would require first that Parry #14 as stated be a canon, and second that it require administrative determinations of meaning to be given great weight as against a prior judicial interpretation. Neither condition obtains.

Thrust #14, in some form, has a place on any list of canons. It is simply the doctrine of precedent applied to the interpretation and application of statutes. As written, Parry #14 would have us believe that an administrative interpretation could be given great weight as against prior judicial construction which has "become[] as much a part of the statute as if it had been written into it originally."[93] As of 1950, when *Canons* was published, this was not the case. Black, Llewellyn's primary source, expressly denies it: "When the courts shall have interpreted the laws, these officers are of course bound to accept and abide by their decisions."[94] No "great weight" or even "respect"; judicial interpretation governs. Without the equivocations in the formulations of secondary commentators, Parry #14 is too general, too absolute, and too contrary to judicial practice to be valid, let alone a commonplace of interpretation.

If the meanings in question have antecedently been judicially determined, then (historically) a different "[p]ractical construction by executive officers" was *not* "strong evidence of true meaning";[95] it was not evidence at all. The Michigan Supreme Court addressed this situation in *Ewing v. Ainger*.[96] It was a petition for rehearing expressly to raise the point that, contrary to statute as interpreted in the prior decision, county supervisors had made a practice of paying fees to county committee members, and asking for acquiescence in this common, practical construction. It was met with swift rejection: "The fact that the several boards of supervisors have put a different construction upon the statute does not affect the question of its true construction. We are satisfied that the interpretation we gave it in the former opinion is correct, and a rehearing must be denied."[97]

Only if there has been no prior judicial interpretation does Parry #14 come into play: "But in advance of such judicial construction, they [administrative officers] must interpret the statutes for themselves . . . ."[98] In that situation, Thrust #14 does not apply, as there is no judicial decision against which to give the interpretations of executive officers great weight.

Not until 2005 and the Supreme Court's decision in *National Cable & Telecommunications Ass'n v. Brand X Internet Services* did Llewellyn's Parry #14 achieve

93. Black, *supra* note 16, § 93, at 298.

94. *Id.* § 94, at 301.

95. *Canons*, *supra* note 2, at 404.

96. 56 N.W. 767 (Mich. 1893).

97. *Id.* at 768.

98. Black, *supra* note 16, § 94, at 301.

a semblance of validity.[99] This was a major step in administrative law jurisprudence beyond the *Chevron* analysis we have come to know and love since 1984.[100]

In *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, the Court held that where a statute is ambiguous or under-determinate, "has not directly addressed the precise question at issue,"[101] a court should defer to the interpretation of an administrative agency, provided that is a *permissible* interpretation.[102] The generally accepted justification for this extraordinary shift of power from the judiciary to the administration is that the legislature, either expressly or by implication, intended that the administrative agency should interpret and apply the statute more specifically in its regulations and decisions.[103] On its own *Chevron* does not support Parry #14; that took another twenty-one years.

National Cable & Telecommunications Ass'n was about regulations under Title II of the Communications Act governing all providers of "telecommunications service"—"the offering of telecommunications for a fee directly to the public . . . regardless of the facilities used."[104] Also in the Act is a related, defined term, "information service"—"the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."[105] Regulation of the former is mandatory, of the latter is not. Is broadband internet service by cable an "information service" or a "telecommunication service"? In 2000 the Ninth Circuit had decided that a cable modem service was a *telecommunication service*.[106] Subsequently the Federal Communications Commission ("FCC") regulations found the contrary; that broadband Internet was an *information service* under the Communications Act, and thus not subject to mandatory regulation.[107] Hence the litigation.

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99. 545 U.S. 967 (2005).

100. Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837 (1984).

101. *Id.* at 843 & n.9. "Step 1" of the *Chevron* two-step process is determining the under-determinacy of the statute. *Id.* at 842–43 ("First, always, is the question whether Congress has spoken directly to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

102. *Id*. at 843. Determination of whether the agency's interpretation of the statute's ambiguity is permissible is called "step 2." *Id.* ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.").

103. *See id*. at 865–66; Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516 ("The extent to which courts should defer to agency interpretations of law is ultimately a 'function of Congress' intent' on the subject as revealed in the particular statutory scheme at issue." (citing Process Gas Consumers Group v. U.S. Dep't of Agric., 694 F.2d 778, 791 (D.C. Cir. 1982))).

104. 47 U.S.C. § 153(46) (2006).

105. *Id.* § 153(20).

106. AT&T Corp. v. Portland, 216 F.3d 871 (9th Cir. 2000).

107. *Nat'l Cable & Telecomms. Ass'n*, 545 U.S. at 978 (citing *In re* High-Speed, 17 F.C.C.R. 4798, 4802–03, P9 (2002)) (accepting the Commission's reasoning that "[b]ecause Internet access provides a capability for manipulating and storing information . . . [and] the integrated nature of Internet access and the

When *National Cable & Telecommunications Ass'n* came before the Ninth Circuit, the court simply followed its precedent, as it thought itself bound to do, and found the FCC's rule invalid. The Supreme Court said, "Wrong." On *Chevron*'s first step, Justice Thomas found there was an ambiguity in the statutory definition, thus an implicit but intentional delegation of interpretive power to the agency. As to the Ninth Circuit's prior decisions resolving that ambiguity, Justice Thomas wrote:

> A court's prior judicial construction of a statute trumps an agency's construction otherwise entitled to *Chevron* deference *only if* the prior court decision holds that its construction follows from the unambiguous terms of the statute and leaves no room for agency discretion. . . . [A]llowing judicial precedent to foreclose an agency from interpreting an ambiguous statute . . . would allow a court's interpretation to override an agency's. *Chevron*'s premise is that it is for agencies, not courts, to fill statutory gaps.[108]

In dissent, echoing Lord Wilberforce,[109] Justice Scalia (joined by Justices Souter, and Ginsburg) said the decision creates "a breathtaking novelty: judicial decisions subject to reversal by executive officers" even in such a circumstance as "when the agency itself is party to the case."[110]

Later that same year, in *IBP, Inc. v. Alvarez*, the Court perhaps took a step back, suggesting that its own interpretations of ambiguous statutes did govern an agency and allowing that "[c]onsiderations of *stare decisis* are particularly forceful in the area of statutory construction, especially when a unanimous interpretation of a statute has been accepted as settled law for several decades."[111] We might expect this matter to be revisited, but until then, Llewellyn's Parry #14 has at last achieved a measure of validity, and with it the conflict in Pair 14 has become genuine.

Pair 15

THRUST #15: "Words are to be taken in their ordinary meaning unless they are technical terms or words of art."

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high-speed wire used to provide Internet access . . . cable companies providing Internet access [were] not telecommunications providers").

108. *Id.* at 982 (emphasis added).

109. *Black-Clawson International Ltd.*, A.C. 591, 629 ("[I]t is the function of Parliament to enact statutes and it is the function of the courts to say what the application of the words to particular cases or individuals is to be . . . it would be a degradation of that process if the courts were to be merely a reflecting mirror of what some other interpretation agency might say.").

110. *Nat'l Cable & Telecomms. Ass'n*, 545 U.S. at 1016 (Scalia, J., dissenting). The dissent also found fault at *Chevron*'s step 2: "[T]he Commission has chosen to achieve [a whole new regime of *non*-regulation] through an implausible reading of the statute, and thus has exceeded the authority given it by Congress." *Id.* at 1005.

111. 546 U.S. 21, 32 (2005).

PARRY #15: "Popular words may bear a technical meaning and technical words may have a popular signification and they should be so construed as to agree with the evident intention or to make the statute operative."[112]

Thus Pair 15 continues the theme of Pairs 13 and 14, viz., the determinates of the meanings of words and phrases within statutes. Pair 13 is the canon that words with an established legal meaning prior to the enactment of a statute should be presumed to have that meaning in the statute, but that a legislature could override that presumption provided it did so clearly. Pair 14 said that judicial interpretation of meanings controls subsequent decisions (*stare decisis*). What if there has been no judicial interpretation of the statute, and there is no special legal meaning?

Thrust #15: "Words are to be taken in their ordinary meaning unless they are technical terms or words of art."[113]

Llewellyn might have followed his common pattern of separating the "unless" clause as the parry, but here he has chosen a more complicated parry, with exceptions to both the main thesis *and* the "unless" clause of Thrust #15. In this he appears once more to be following Black, in the caption of his cited section 63:

> 63. TECHNICAL AND POPULAR MEANING OF WORDS. The words of a statute are to be taken in their ordinary popular meaning, unless they are technical terms or words of art, in which case they are to be understood in their technical sense.[114]

He also cites both Sutherland and *Corpus Juris Statutes* for both Thrust and Parry #15. In the first of the cited sections, Sutherland section 390 says the same in somewhat different words.

> **§ 390 (248). Words and phrases should be construed as they are generally understood.**—As a general rule the words of a statute are to be taken in their ordinary and popular sense, unless it plainly appears from the context or otherwise that they are used in a different sense.[115]

Llewellyn cites both sections 577 and 578 of *Corpus Juris Statutes*, but section 577 is more on point, beginning:

> While the meaning to be given a word used in a statute will be determined from the character of its use, words in common use are to be given their natural, plain, ordinary, and commonly understood meaning, in the absence of any statutory or well established technical meaning, unless it is plain from the

112. *Canons*, *supra* note 2, at 404.

113. *Id.*

114. BLACK, *supra* note 16, § 63, at 175.

115. 2 SUTHERLAND, *supra* note 11, § 390, at 749–50. Immediately he repeats it, slightly differently: If "two significations" are possible, take "that meaning which is generally given to it in the community" but not if that "would contravene the manifest intention of the legislature." *Id.* § 390, at 750.

> statute that a different meaning was intended, or unless such construction would defeat the manifest intention of the legislature.[116]

Llewellyn's continued preference for Black as a base text to paraphrase is evident as he might equally well have chosen either of Sutherland's or *Corpus Juris Statutes*' rather more careful formulations.

Pair 15 continues the interplay of two fundamental principles of our law: the democratic principle of legislative supremacy and the requirement of notice, i.e., that the legislature communicates its laws to those governed.[117] Thrust #15, the most commonplace of rules of interpretation, follows naturally: in the absence of indicia of legislative intent to the contrary, meanings are those of common usage—ordinary meanings. Justice Frankfurter: "[W]e assume that Congress uses common words in their popular meaning, as used in the common speech of men. The cases speak of the 'meaning of common understanding,' 'the normal and spontaneous meaning of language,' 'the common appropriate use,' 'the natural straightforward and literal sense,' and similar variants."[118] That is Thrust #15's primary thesis.

On the other hand, a technical word would ordinarily be understood by the ordinary reader in its technical sense, and a term of art as such. And if a statute is directed at a specific community with its own jargon, we should presume the legislature was aware of and spoke in that jargon. In section 393, which Llewellyn also cites for Thrust #15, Sutherland makes this a thesis with Parry #15 as its exception:

> **§ 393. Technical Words.**—Technical words relating to an art, science or trade, when used in a statute dealing with the subject-matter of such art, science or trade, are ordinarily to be taken in their technical sense and will be so construed, unless the context or other considerations plainly show a contrary intent.[119]

Sutherland follows with a good example from the 1897 Missouri Supreme Court.[120] In a statute governing mine work, the phrase "shooting coal off the solid" was to be understood as miners and mine operators would understand it. "The phrase is and has for many years been in common use and well understood among those owning and operating coal mines and their miners."[121] A legislature should be

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116. 59 C.J. *Statutes*, *supra* note 10, § 577, at 974–78 (including almost four full pages of citations!).

117. *See supra* text accompanying nn.9–14.

118. Frankfurter, *supra* note 29, at 536.

119. 2 Sutherland, *supra* note 11, § 393, at 751.

120. *Id*. at 751 ("[I]t is a well recognized canon of construction that where legal terms are used in a statute, they are to receive their technical meaning, unless the contrary plainly appears to have been the intention of the legislature." (quoting Williams v. Dickerson, 9 So. 847, 849 (Fla. 1896))). The *Williams* court further states: "There is nothing in the act of 1845 that indicates any other intention on the part of the Legislature than that the disqualifying crimes therein denominated as murder, perjury, piracy, forgery, larceny, robbery, arson, etc., should be considered or construed in any other than their technical sense as known and recognized by the common law. Applying to this statute the familiar rule of construction above, it must be held . . . ." *Id*.

121. State v. Murlin, 38 S.W. 923, 925 (Mo. 1897).

presumed to have in mind the audience addressed in an enactment, and verbal usages peculiar to it.

Llewellyn followed this presumption in Article 2 of the inchoate Uniform Commercial Code of 1950 with his emphasis on usage of trade as determining meanings of contract terms.

Llewellyn's cited case, *Hawley Coal Co. v. Bruce*, is not a very good illustration.[122] Walter E. Price died in bankruptcy, and a judgment debtor for room and board from Eliza Bruce. Walter once owned the Hawley Coal Company, but he transferred all stock in it to his wife, Mary E. Price, for consideration although he failed to record the assignment. Mrs. Bruce wanted to get her legal hooks in the assets of the Hawley Coal Company, two parcels of real estate; to do that she first needed to get the company's stock certificates, now in the hands of his widow, Mary E. Price. Under Missouri's Married Women's Property Act, a wife could purchase, own, and transfer property, but to avoid deception of creditors section 2128, Kentucky Statutes requires

> [a] gift, transfer or assignment of personal property between husband and wife shall not be valid as to third persons, unless the same be in writing, and acknowledged and recorded as chattel mortgages are required by law to be acknowledged and recorded; but the recording of any such writing shall not make valid any such gift, transfer or assignment which is fraudulent or voidable as to creditors or purchasers.[123]

Did "personal property" in that language mean all personal property, including stock certificates, or only tangible personal property, which would not include stock certificates? The latter interpretation was Mary E. Price's first line of defense.

There is quotable language along the lines of Thrust #15 ("Words and phrases are used in their technical meaning, if they have acquired one, and in their popular meaning if they have not.")[124] but the court found the language of the statute unambiguous,[125] and only debated whether it could or should imply an exception.[126]

> As the words employed are not ambiguous, and no injustice, oppression, or absurd consequences will follow if they are given their usual meaning, it is not

122. 67 S.W.2d 703 (Ky. 1934).

123. *Id.* at 704–05.

124. *Hawley Coal Co.*, 67 S.W.2d at 705.

125. *Id.* ("When language is clear and unambiguous, it will be held to mean what it plainly expresses. . . . The statute uses the words 'personal property.' Whether given their ordinary or technical meaning, they embrace all kinds of personal property, and therefore intangibles. The word 'assignment' is peculiarly applicable to intangible personal property.").

126. *Id.* ("Where the Legislature has made no exception to the positive terms of a statute, the presumption is that it intended to make none, and it is not the province of a court to introduce an exception by construction. The power to create exceptions by construction can never be exercised where the words of the statute are free from ambiguity, and its purpose plain. Exceptions will not be recognized unless it be necessary to avoid injustice, oppression, or absurd consequences." (citations omitted)).

> perceived how we may incorporate an exception that will do violence to the act construed as a whole.[127]

So Mary E. Price lost this argument.[128]

Over one hundred and seventy years ago, Justice Story laid out the reasoning of Thrust #15 in *United States v. Breed*, a lovely case, precious but consequential.[129] How is a court to distinguish the varieties of sugar specified in a statute: "brown sugar," "white, clayed, or powdered sugar," "lump-sugar," "loaf-sugar," and "sugar-candy"?[130]

> The question then is, whether, in the sense of the act, the sugar is, or is not loaf-sugar. . . .
>
> What, then, is meant by "loaf-sugar," in a commercial sense, by which I mean, not merely among merchants, but among buyers and sellers generally in the domestic trade? Has it any generally received, uniform meaning? If it has, then, that must be presumed to be the meaning adopted by the legislature in the act of 1816. I agree to the law laid down in the case of Two Hundred Chests of Tea. That case was as fully considered, and as deliberately weighed, as any which ever came before the court. It was there laid down, that, in construing revenue laws, we were to consider the words, not as used in their scientific or technical sense, where things were classified according to their scientific characters and properties, but as used in their known and common commercial sense, in the foreign and domestic trade.[131]

On this basis the question was easily decided by reference to trade usage: "All the witnesses, whether merchants, or refiners, or grocers, or confectioners, have spoken pointedly to this fact" that the "crushed sugar" at issue was not "loaf-sugar."[132]

Usually the principles of legislative supremacy and the necessity of notice work in sympathy, but when they do not, the democratic ideal behind legislative supremacy requires that it should prevail.

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127. *Id*.

128. *Id*. ("Therefore we are constrained to hold . . . that the statute applies to transfers of corporate stock between husband and wife, and, as the transfer or assignment of the stock in the Hawley Coal Company from Walter E. Price to his wife was not acknowledged and recorded as required by the statute, it was invalid as to third parties, including Mrs. Bruce.").

129. 24 F. Cas. 1222 (C.C.D. Mass. 1832).

130. *Id*. at 1222 ("The words of the act of 1816, c. 107, as to duties on the article (sugar) now in controversy, are as follows: 'On brown sugar, three cents per pound; white, clayed, or powdered sugar, four cents per pound; on lump-sugar, ten cents per pound; on loaf-sugar and sugar-candy, twelve cents per pound.'").

131. *Id*. at 1222–23 (citation omitted).

132. *Id*. at 1224 ("Upon one point, however, the testimony, as well of the government witnesses, as of those of the defendants, entirely agrees; and that is, that 'loaf-sugar' in a commercial sense in the common business of life, in buying and selling, means sugar in loaves. The name doubtless carries, in some degree, an implication of quality, arising from the fact, that quality is usually associated with form; but the designation is primarily derived from, and depends upon the form. All the witnesses, whether merchants, or refiners, or grocers, or confectioners, have spoken pointedly to this fact. All of them say, that the sugar in controversy, in the form, in which it was imported (crushed sugar), is not known as, or even called, 'loaf sugar.' Whatever may be its quality, it is still not 'loaf-sugar,' for it wants the form.").

Parry #15: "Popular words may bear a technical meaning and technical words may have a popular signification and they should be so construed as to agree with the evident intention or to make the statute operative."[133]

Again Black seems to be the source; the caption of Black section 63, the first sentence of which (quoted above) is the source of Thrust #15, continues: "Popular words may bear a technical meaning and technical words may have a popular signification and they should be so construed when that is the evident intention of the legislature or when it is necessary in order to make the statute operative."[134]

Sutherland, in the cited section 395, weighs the emphases differently:

> **§ 395 (254).** Words in common use, and also having a technical sense, will, in acts intended for general operation and not dealing specially with the subject to which such words in their technical sense apply, be understood primarily in their popular sense, unless they are defined in the act or a contrary intention is otherwise manifest. Such words, however, will be understood in a technical sense when the act treats of the subject in relation to which such words are technically employed. . . . But by the cardinal rule that the intention of the law-makers is the essence of the law, when a technical word is obviously intended to have a broader than its strict technical sense, it will receive that interpretation.[135]

Llewellyn also cites the same two sections of *Corpus Juris Statutes* he cited for Thrust #15, but the second, section 578, is the relevant one:

> **§ 578(2) Technical Terms.** Words and phrases having a technical meaning are to be considered as having been used in their technical sense unless it appears that they were intended to be used otherwise . . . or unless such interpretation would defeat the legislative purpose.[136]

Parry #15 replicates most of the quoted sentence of Black's caption, even down to the stylistic choice of "signification" over the more accurate repetition of "meaning," varying only in its last lines.

Black builds two justifications into his formulation. The first is legislative intent: following the evident intention of the legislature is, as Sutherland says, "the cardinal rule," a concomitant of the democratic principle of legislative supremacy. The second is that we should construe words so as "to make the statute operative." We are entitled to believe the legislature was intending its enactment to have some effect, that it was not merely wasting time and publication space.[137] What other presumption could we make? It follows that if one alternative interpretation is nec-

133. *Canons*, *supra* note 2, at 404.

134. *Id*.

135. 2 SUTHERLAND, *supra* note 11, § 395, at 753–54.

136. 59 C.J. *Statutes*, *supra* note 10, § 578(2), at 979.

137. *See Canons*, *supra* note 2, at 404.

essary for the statute to make sense, to be operative, then that is the only proper choice.[138]

Llewellyn's cited case, *Robinson v. Varnell*, may have historically shameful facts, but illustrates the thesis well.[139] To a breach of contract action, defendant lessee pleaded the statute of limitations, not as to the claim for his failure to pay the price which was clearly an action for debt, but as to his failure to return the property. Texas at the time distinguished between "actions of debt, grounded on any contract in writing," with a four year time bar, and "parol or verbal . . . contracts," with a two year time bar.[140] The argument, it seems, is that not being of the specific kind designated for four years, (an "action of debt,") this aspect of the suit must be time barred under the remainder, a parol contract.

The court had to concede the premise, viz., that this was "not an action of debt, nor an action to recover a debt, technically so called."[141] However,

> we have no such action as an action of debt. If we were to construe the statute literally, according to the technical signification of its terms, it is plain, the present case would not come within any of its provisions. It is not technically an action of debt, or an action to recover a debt; but it is an action to recover a sum of money, technically damages, founded on the breach of a contract in writing for the delivery of specific property.[142]

Accordingly,

> [w]e have seen that the expression in the statute, "actions of debt," cannot receive a strict literal interpretation, without defeating the provision altogether: for we have no actions which come strictly and technically within that denomination. It must, then, receive such a reasonable and liberal interpretation as will give it effect according to the spirit and intention of the statute. To do this, we must disregard the technical distinctions of forms and terms, and look to the substance and manifest object of the statute.[143]

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138. Black, *supra* note 16, § 63, at 181 ("[I]f the effect of construing the words of a statute according to their technical signification would be to render it inoperative, but it would have a reasonable operation by construing them according to their common meaning, the latter mode of construction should be adopted.").

139. 16 Tex. 382 (1856). Defendant had rented a slave from plaintiff, but had so "cruelly treated and abused the slave" that he ran away and was never recovered (perhaps the only redeeming feature of the story); defendant did not pay, so plaintiff brought action for breach of contract, first for failing to pay, and second for not returning the rented "property." *Id.* at 382–88.

140. *Id*. at 389–90.

141. *Id*. at 388.

142. *Id*.

143. *Id*. at 389. Also, to treat two aspects of the same suit to quite different statutes of limitations would make little sense, too little to attribute to the legislature. *See id*. at 390 ("Both demands arise upon the breach of the same written contract; and it cannot have been intended in such a case, that one period of limitation should bar one part of the cause of action, and a different period another part, arising upon the same contract, merely because, in technical legal phrase, the one is called debt, and the other damages.").

Ergo, the plaintiff had the full four years in which to bring both aspects of the action.[144]

Resolution:

As with Pairs 13 and 14, any inconsistency between the thrust and the parry of Pair 15 is superficial at best. Together Pairs 13 to 15 map some of the contours of meanings in legal governance by statute. Those contours are generated by the interaction of two fundamental principles, legislative supremacy and the necessity of notice.

Usually the two basic principles work in sympathy. From the democratic principle of legislative supremacy flows "the cardinal rule that the intention of the law-makers is the essence of the law."[145] But the legislature must communicate with the denizens it governs, so it must be presumed to use words in accord with ordinary, popular usage, with meanings familiar to the governed. And when the legislature is addressing a subgroup of the governed with its own "technical terms or words of art,"[146] it may be presumed to be aware of that fact and to use that jargon. This is simply an instance of the Wittgensteinian dictum that words take their meanings in the language-game which is their home.[147]

Yet a legislature may use a word or phrase in an odd or irregular sense, compromising communication with the governed. Legislative supremacy may dominate,[148] but the legislature will fail in its legislative purpose if it does not tell the governed of the special sense in which it intends the words in question. Given the ubiquity of "usage of trade" in Article 2 of the Uniform Commercial Code, this reasoning must have been quite familiar to Karl Llewellyn in 1950.

Pair 16

THRUST #16: "Every word and clause must be given effect."
PARRY #16: "If inadvertently inserted or if repugnant to the rest of the statute, they may be rejected as surplusage."[149]

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144. *Id*. at 390 ("The suit being for the recovery of money for the breach of a written contract, comes within the reason and intention of the provision prescribing the limitation of actions for money demands, arising upon written contracts; which being four years, the Court did nor [sic] err in holding that the right of action was not barred by the statute.").

145. 2 Sutherland, *supra* note 11, § 394, at 753–54.

146. *Canons, supra* note 2, at 404.

147. Ludwig Wittgenstein, Philosophical Investigations § 116, at 48e (G.E.M. Anscombe trans., 3d ed. 1953).

148. Black, *supra* note 16, § 63, at 180 ("[T]his rule is subordinate to the great fundamental rule that the real intention of the legislature must in all cases prevail."); 59 C.J. *Statutes*, *supra* note 10, § 577, at 978 ("The meaning of doubtful words must be determined by the sense in which they are used by the legislature without regard to their primary meaning.").

149. *Canons*, *supra* note 2, at 404.

Pair 16 breaks the three previous pairs' theme of determining semantic meanings, but develops one of the exceptional circumstances justifying Parry #15, viz., the need to give some meaning to a statute. We are entitled to presume that when the legislature enacts a string of words, the chief administrator signs off on them, and they are duly promulgated, some meaning was intended; it was not merely huffing and puffing.

Thrust #16: "Every word and clause must be given effect."[150]

This is a familiar canon of construction,[151] although it is usually expressed in less absolute, universal terms. Llewellyn's formulation appears to paraphrase Black's caption in the cited section 60, Rejection of Surplusage, which begins: "It is the duty of courts to give effect, if possible, to every word of the written law."[152] Llewellyn's omission of "if possible" is significant in light of his aim of finding a contradiction in Parry #16. Sutherland, Llewellyn's other cited secondary source, is similarly qualified.

> **§ 380. Some effect, if possible, to be given every word, clause and sentence.**—It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute." Statutes should be so construed that effect be given to all their provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another.[153]

It is not just an exhortation not to ignore inconvenient statutory language. Rather, between alternative interpretations a court should take that which gives all the statute's language some effect, not that which leaves any part of the statute with no effect.

Sutherland in the cited section[154] offers a clear example, *State of Nebraska, ex rel. First Nat'l Bank of Crete v. Bartley*.[155] Nebraska law at the time required Joseph S. Bartley, state treasurer, "to keep on deposit in the several banks designated as depositories all money received by him belonging to the state."[156] Only four banks qualified, and of those Bartley snubbed plaintiff First National Bank of Crete, which sought a writ of mandamus. Bartley demurred; the statute, he said, required him only to deposit monies in the general fund in the qualified banks, and it had all been deposited in the other two, leaving nothing for the plaintiff.[157] But the statute's ac-

150. *Id*.

151. *See* Sinclair, *supra* note 11, at 146.

152. Black, *supra* note 16, § 60, at 165.

153. 2 Sutherland, *supra* note 11, § 380, at 731–32 (citation omitted).

154. *Id*. at 731 n.30.

155. 58 N.W. 172 (1894).

156. *Id*. at 173.

157. *Id*. ("[T]he respondent contends that the moneys belonging to what is commonly known as the 'general fund,' a fund created for the purpose of paying the salaries of the state officers and defraying the general

tual words were "the amounts of money in his hands belonging to the several current funds in the state treasury"[158] so the question hinged on the meaning of "the several current funds in the state treasury":[159] Did it refer only to the general fund—"created for the purpose of paying the salaries of the state officers and defraying the general expenses of the state government"—or to all government funds?[160]

If "the several current funds" was intended to refer only to the general fund, why the plural "funds," and why "several"? "It is an elementary rule of construction that effect must be given, if possible, to every word, clause, and sentence of a statute."[161] Thrust #16 ("if possible"). If the plural "funds" and the adjective "several" are to have any effect, the whole phrase "the several current funds" must refer to other funds, such as the "sinking fund, permanent school fund, and others which it is unnecessary to stop now to enumerate."[162] Accordingly, under Thrust #16 "it is not a difficult task to ascertain the legislature's intent."[163] Of course, the ultimate question of the writ of mandamus was not decided by this argument, but the state treasurer's demurrer was disposed of.[164]

Llewellyn's chosen case, *In re Terry's Estate*, is not especially illustrative.[165] The decedent had made gifts to charities, automatically leaving a right of reverter to the residuary beneficiary, perhaps a donee charity. Was that right of reverter subject to New York's transfer tax? Of course the state said it was, and not only that, at the full

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expenses of the state government, are the only moneys to which the depository act applies.").

158. *Id*.

159. *Id*. ("The principal controversy in the case is as to the meaning of the term 'several current funds' as used in the section first above quoted.").

160. *Id*. at 174 ("Of course, the phrase 'current funds,' as employed in commercial transactions, has a fixed, known signification. Thus, these words as used in notes or bank checks have been frequently defined by various courts as meaning current money; lawful money; par funds, or money circulating without any discount. All will agree, we think, that the phrase 'current funds' was not employed by the legislature in enacting the statute under consideration in the same sense in which that term is used in commercial dealings. The term 'current funds,' like many other words in our language, is susceptible of more than one meaning. Where a word is employed in a contract or statute which has different meanings, the sense in which it is used is to be gathered from the context.").

161. *Id*.

162. *Id*.

163. *Id*. ("It is obvious, therefore, that the words 'several current funds' were employed by the legislature with reference to the various designations or divisions of the public moneys of the state. Manifestly the construction placed upon the provisions of the statute by respondent's counsel is entirely too narrow and strained, and should not obtain. To adopt it would violate the rule above stated for the construction of statutes, which requires that some meaning, if possible, must be given to every word in the act, since the construction insisted upon cannot prevail unless we attach no meaning to the word 'several' in the above phrase of the first section of the law. The statute declares that 'the amounts of money in his hands belonging to the several current funds in the state treasury' shall be deposited. This language was without doubt intended to apply to more than one fund. This is manifest by the use of the plural of the word 'fund' and the employment of the adjective 'several.'").

164. *Id*. at 178.

165. 218 N.Y. 218 (1916).

present value of the gift, and the Second Department agreed. The late Tootie McG., Terry's personal representative appealed; after all, what would you pay for that right of reverter?

In reversing, the New York Court of Appeals did give us one line supporting Thrust #16: "The Tax Law must be given a meaning whereby, if possible, all its provisions are read together and made effective."[166] But this was not the ground on which the decision rested.

> Such construction presents no unsurmountable difficulties when we consider the further rule of construction that the Transfer Tax Law is to be construed favorably to the persons *taxed*, and that the transfer tax is imposed on the right of succession and not on the property transferred. The question is wholly one of *valuation for taxation* first and taxation afterwards.[167]

There was a potential inconsistency between sections 222 and 230,[168] but this was completely resolved by determining that only section 230 pertained to the charitable gift in question.[169]

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166. *Id*. at 222.

167. *Id*. at 222–23 (citations omitted).

168. *Id*. at 221–22. In discussing the inconsistency, the court noted:

> [T]he clause of *section 230* which provides: "In *estimating the value* of any estate or interest in property, to the beneficial enjoyment or possession whereof there are persons or corporations *presently* entitled thereto, no allowance shall be made on account of any contingency upon the happening of which the estate or property or some part thereof or interest therein might be abridged, defeated or diminished," and which provides also for the return of a proportionate amount of the tax if the present estate is in the future diminished; that the interest of the heirs therein under the terms of the will cannot now be valued, and is, therefore, not presently taxable, and, therefore, the provisions of *section 222 of the Tax Law* apply, which read as follows: "All taxes imposed by this article shall be due and payable at the time of the transfer, except as herein otherwise provided. Taxes upon the transfer of any estate, property or interest therein limited, conditioned, dependent or determinable upon the happening of any contingency or future event *by reason of which the fair market value thereof cannot be ascertained at the time of the transfer as herein provided*, shall accrue and become due and payable when the persons or corporations beneficially entitled thereto shall come into actual possession or enjoyment thereof"; that this provision alone has to do with the valuation of such future contingent interests as cannot be taxed at any rate until the fair market value thereof can be ascertained.

Id.

169. *Id*. at 223–24. The rules of valuation, as discussed by the court, include in relevant part:

> (2) The value of the interest of the legatee presently entitled to receive the money must be estimated for taxation without deduction on account of any contingency which might defeat it, although the present interest may be exempt from taxation, no exception to the rule for that reason being stated in the statute. There is no inconsistency in the two provisions. The *value for taxation* is one thing, the *rate of taxation* an entirely distinct thing. A contingency is one thing and a contingent or defeasible estate in expectancy is an entirely distinct thing. A contingency is a mere possibility of happening. A contingent estate is an interest in property dependent upon an uncertain future event. A contingency may exist which creates no present interest in any one, contingently or otherwise. Contingent interests may be valued by the method above stated. Contingencies do not reduce the valuation of the present interest, when they are nothing more than mere

Thrust #16 most commonly comes up when there is an inconsistency between two applicable statutory provisions. If you apply one, the other has no application, is rendered nugatory; surely the legislature could not have intended such an interpretation. At best, *In re Terry's Estate* might be seen as an example. The appropriate counter-argument is to find some alternative application for the disfavored provision, so that applying the one does not make the other meaningless.

But the presumption that our legislature would never enact two inconsistent provisions, or provisions with inconsistent applications, is becoming increasingly implausible in our ever more complex regulatory society.[170] It has long been unreasonable to expect a legislature to be aware of all previously enacted provisions that might pertain to a factual eventuality even when that eventuality is foreseen at the time of the proposed legislation. Statutes enacted at different times, by different legislatures, perhaps even about prima facie different subjects, may clash intractably. In such a situation courts have often had to resort to one of the most simplistic of canons: viz., "[A]n old statute gives place to a new one."[171] The presumption is that the more recent legislature intended to rescind inconsistent prior statutes.[172]

And sometimes a legislature may simply botch the job.

Parry #16: "If inadvertently inserted or if repugnant to the rest of the statute, they may be rejected as surplusage."[173]

Again, Llewellyn has paraphrased Black, in the latter's rather more cautious continuation of section 60:

> But if a word or clause be found in a statute which appears to have been inserted through inadvertence or mistake, and which is incapable of any sensible meaning, or which is repugnant to the rest of the act and tends to nullify it, and if the statute is complete and sensible without it, such word or clause may be rejected as surplusage.[174]

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possibilities and are neither future nor contingent estates or interests. The removal or discontinuance of the Home is such a contingency.

(3) When the transfer or possible reverter to the heirs which defeats or delimits the possession or right of possession of those presently entitled thereto is subject to a contingency so remote that it cannot be measured by lives or years or any definite rule, its fair market value cannot be ascertained. It will, therefore, be ascertained and the tax thereon will "accrue and become payable only when the persons beneficially entitled thereto shall come into actual possession and enjoyment thereof."

Id. (citations omitted).

170. *See* Âgredano v. Mutual of Omaha Companies, 75 F.3d 541, 544 (9th Cir. 1996) (noting that "[t]here is no . . . presumption where the terms appear in different statutes enacted at different times").

171. Blackstone, *supra* note 12, at *89.

172. Sinclair, *supra* note 11, at 138.

173. *Canons*, *supra* note 2, at 404.

174. Black, *supra* note 16, § 60, at 165.

He also cites Sutherland: "Where a word or phrase in a statute would make the clause in which it occurs unintelligible, the word may be eliminated and the clause read without it."[175] These are descriptions of circumstances in which satisfying Thrust #16 is not possible, a condition contemplated by both Black and Sutherland.

Corpus Juris Statutes makes this problem the focus, with Thrust #16 merely a background presumption:

> **§ 592 f. Surplusage and Unnecessary Matter.** While, as a general rule, every word in a statute is to be given force and effect, words inadvertently used, or words having no meaning in harmony with the legislative intent as collected from the entire act, will be treated as surplusage, and will be wholly disregarded in the construction of the act in order to effectuate the legislative intent.[176]

R.C.L. has a more discursive account, generally taking a much more sympathetic attitude towards legislative text and its problems. For example,

> **221. Awkward or Inartificial Language.**—The application of the general rule that the intention of the legislature is to be determined from the language of the statute is not affected by the fact that the phraseology may be awkward, slovenly or inartificial.[177]

or

> **222. General Principles.**—It often happens that the true intention of the lawmaking body, though obvious, is not expressed by the language employed in a statute when that language is given its literal meaning. In such cases, the carrying out of the legislative intention, which, as we have seen, is the prime and sole object of all rules of construction, can only be accomplished by departure from the literal interpretation of the language employed.[178]

or

> **227. Correction of Mistakes, Errors, or Omissions.**—Legislative enactments are not more than any other writings to be defeated on account of mistakes, errors or omissions, provided the intention of the legislature can be collected from the whole statute. Where one word has been erroneously used for another, or a word omitted, and the context affords the means of correction, the proper will be deemed substituted or supplied. This is but making the strict letter of the statute yield to the obvious intent.[179]

Llewellyn's four favored secondary sources cover the problem of intractably inconsistent or irrelevant language quite extensively, with legislative intent dominating their reasoning and examples.

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175. 2 SUTHERLAND, *supra* note 11, § 384, at 739.

176. 59 C.J. *Statutes*, *supra* note 10, § 592(f), at 992.

177. 25 R.C.L. *Statutes*, *supra* note 17, § 221, at 966.

178. *Id.* § 222, at 967.

179. *Id.* § 227, at 978.

Llewellyn's cited illustration, *United States v. York*, provides a very pretty illustration, although one that turned out to be irrelevant to the outcome of the case.[180] York was charged under U.S. Revenue Statute section 5424 and section 5427 for aiding another to utter as true a false statement. Although the details are not explicit, it seems that he was the forger who provided a certificate of naturalization to Bunoro to help Caggiano become a citizen.[181] Section 5424 describes the primary offense[182] and section 5427 adds aiding and abetting.[183] These sections were part of the 1874 revision of the original 1870 statute.[184]

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180. 131 F. 323 (C.C. S.D.N.Y. 1904). The case was decided on a very pretty scope ambiguity in section 5424, boosted by the rule of lenity and a plain language argument. *See id*. at 326–31. In expounding upon the lenity rule, the Court noted that "[t]he rule that penal laws are to be construed strictly is perhaps not must [sic] less old than construction itself." *Id*. at 328 (quoting United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820) *per* (Marshall, C.J.)). The case is a striking omission from Llewellyn's list of canons.

181. *Id.* at 324 ("[The first count] charges that the defendant 'did knowingly and intentionally and feloniously aid and abet' one Bunoro 'to do and commit the said felony in manner and form aforesaid.' The felony which the defendant, York, is charged with thus aiding and abetting, is charged earlier in the indictment as follows: That such Bunoro 'did feloniously utter as true a certain false and forged certificate, purporting to be a certificate authorized by the laws of the United States of America relating to and providing for the naturalization of aliens, knowing the same to be false and forged, the tenor whereof is as follows.' Thereupon is set out a certificate of naturalization purporting to have been issued to one Donato Caggiano, and conforming to that usually issued by the District Court for the Southern District of New York to a person successfully applying for admission to citizenship.").

182. *Id*. at 326–27. Section 5424 provides:

> Every person applying to be admitted a citizen or appearing as a witness for any such person, who knowingly personates any other person than himself, or falsely appears in the name of a deceased person, or in an assumed or fictitious name, or falsely makes, forges, or counterfeits any oath, notice, affidavit, certificate, order, record, signature, or other instrument, paper, or proceeding required or authorized by law, relating to or providing for the naturalization of aliens; or who utters, sells, disposes of, or uses as true or genuine, or for any unlawful purpose, any false, forged, ante-dated, or counterfeit oath, notice, certificate, order, record, signature, instrument, paper, or proceeding above specified; or sells or disposes of to any person other than the person for whom it was originally issued any certificate of citizenship, or certificate showing any person to be admitted a citizen, shall be punished by imprisonment at hard labor not less than one year, nor more than five years, or by a fine of not less than three hundred nor more than one thousand dollars, or by both such fine and imprisonment.

Id.

183. *Id*. at 325. Section 5427 provides:

> Every person who knowingly and intentionally aids or abets any person in the commission of any felony denounced in the three preceding sections, or attempts to do any act therein made felony, or counsels, advises, or procures, or attempts to procure, the commission thereof, shall be punished in the same manner and to the same extent as the principal party.

Id.

184. *Id*. at 324 ("The first question presented arises out of the revision of the statutes in 1874. Sections 5424, 5425, 5426, and 5427 of the Revised Statutes [U.S. Comp. St. 1901, pp. 3668–3670] are a revision of part of section 2 of chapter 254 of the act of Congress of July 13, 1870, with certain changes of phraseology to be hereafter noted." (citation omitted)).

In making the revisions, the legislators contemplated defining "felony" as "a crime, punishable with death, or by imprisonment at hard labor," thus enabling the omission of serial statutory declarations that doing such-and-such is a felony in addition to prescribing the punishment.[185] Accordingly sections 5424 to 5426 did not say their listed offenses were felonies. Section 5427 followed the previous 1870 version in referring to "[e]very person who knowingly and intentionally aids or abets any person in the commission of any felony denounced in the three preceding sections . . . . "[186] But then, in the final enacted version, they neglected to include the definition of "felony."[187]

York (and Bunoro) demurred. To allow a charge of aiding and abetting under section 5427 would make the words "any felony" inoperative, mere surplusage, as there were no felonies named in sections 5424–5426;[188] Thrust #16. On this argument they lost. Legislative intent was simply too clear, the history of the section showing unequivocally how this oversight in drafting arose.[189] It was a clear case of inadvertent use of language, "repugnant to the rest of the statute."[190] "It does not seem the better judgment to hold that this inaccurate use of a term should be re-

185. *Id.* at 325.

186. *Id.*

187. *Id.* at 325–26.

> The revisers, in their first draft of the revision, as reported to the House committee, reported certain definitions, and, among others, one as follows: 'A felony under any law of the United States, is a crime, punishable with death, or by imprisonment at hard labor.' This definition, if adopted by Congress, obviated the necessity of specifically denouncing as felonies the offenses named in sections 5424–5426, as section 2 of the act of 1870 had done. The House committee and Congress did not adopt such definition, but finally did adopt sections 5424–5427, as reported by the revisers and the House committee.

Id. (citation omitted).

188. *Id.* at 326 ("Therefore the system proposed by the revisers was disturbed, so that the offenses named in sections 5424-5426 ceased to be felonies, as they had been named under the act of 1870, but section 5427 was not changed. Hence none of the offenses in sections 5424-5426 are felonies, and section 5427, made applicable to them alone, has no application to them, if the word 'felony,' as used in section 5427, must be given its strict legal meaning. It is argued with much force that the court should give it such meaning, and thereby hold that section 5427 performs no office in the revision as adopted.").

189. *Id.* at 326.

> It is quite obvious that Congress intended to make section 5427 applicable to three sections that precede it, and to the offenses therein named. If it failed to do so, it is because it called such offenses by the wrong name. It called them by the wrong name because it inadvertently omitted to observe the result of omitting the revisers' definition of "felony." But inasmuch as it is clear that section 5427 was intended to have some effect, inasmuch as it is in terms related to the three preceding sections, and must cover the offenses named in those sections, or none, and inasmuch as the phraseology used in section 5427 is substantially that used in section 2 of the act of 1870, and inasmuch as the reason that led to the erroneous use of the word "felony" in section 5427 is clear, it seems a warranted conclusion that the misuse of the word "felony" in section 5427 may be disregarded. In other words, Congress inadvertently described offenses as felonies that it had refused to make felonies.

Id.

190. *Canons, supra* note 2, at 404.

garded as showing the intention of Congress, when the section otherwise, and the history of the revision, point clearly to a different intention."[191] Parry #16.

Resolution:

York illustrates one way in which some resolution between Thrust and Parry #16 is inescapable. Dogmatically to follow defendants' Thrust #16 on "any felony," pumped up by pronouncements of plain meaning,[192] would, pretty much, make all the rest of section 5427 surplusage. The obvious intent to make aiding and abetting also an offense would completely fail. A court must make a decision: enforce legislative intent or pedanticism.

When the presumption underlying Thrust #16 fails demonstrably, so too must the canon itself fail. As with all canons, it is no more than the reasoning on which it rests. Superficially one could say that Thrust and Parry #16 are opposed, but surely not often, let alone "on almost every point."[193]

III. CONCLUSION

A. Interim Assessment

As with Pairs 1 through 12, there is no genuine contrariety between the thrusts and parries of Pairs 13 through 15. Superficially, there is some inconsistency between Thrust and Parry #16, but looking to the reasons underlying the pair resolves it. In Pairs 13 through 15, the duels fail to appear; thrusts and parries quoted are merely parts of more complex, less superficial generalities from treatises. In the next exciting episode we shall follow Llewellyn's path through grammatical reading rules to the paradigmatic Latin favorite, "*expressio unius est exclusio alterius*" and the controversy that it always brings to a discussion of canons of construction.

B. The Provenances of Llewellyn's Formulae

By Pair 14 one could not escape the impression that Llewellyn's formulation of the pairs of canons too often bore a close resemblance to the captions of the sections cited from Black. Accordingly I checked the pairs in the whole list which offered Black as a secondary source, looking for signs of copying or paraphrase.

Pair 7

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."

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191. *York*, 131 F. at 326.

192. *Id.* 325–26; *see also* United States v. Goldenberg, 168 U.S. 95, 102–03 (1897) ("The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used. He is presumed to know the meaning of words and the rules of grammar. The courts have no function of legislation, and simply seek to ascertain the will of the legislator.").

193. *Canons*, *supra* note 2, at 401 (asserting that "there are two opposing cannons on almost every point").

PARRY #7: "Remedial statutes are to be liberally construed and if a retroactive interpretation will promote the ends of justice, they should receive such a construction."[194]

Llewellyn's only secondary cite for Thrust #7 is Black section 119: "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."[195] Except for a misplaced comma, Llewellyn has tracked Black down to the latter's condition, changing only a single word, "operation" to "effect."

He cites only Black section 120, as a secondary source for Parry #7:

> REMEDIAL STATUTES
>
> 120. Remedial statutes are to be liberally construed; and if a retroactive 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.[196]

Parry #7 changes only punctuation and deletes some qualifications, viz., "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, . . . provided it is not inconsistent with the language employed."

Pair 17

THRUST #17: "The same language used repeatedly in the same connection is presumed to bear the same meaning throughout the statute."
PARRY #17: "This presumption will be disregarded where it is necessary to assign different meanings to make the statute consistent."[197]

Black section 53 is the only secondary source Llewellyn cites for both Thrust and Parry #17:

> USE OF SAME LANGUAGE AND CHANGE OF LANGUAGE
>
> 53. Where the same language is used repeatedly in a statute in the same connection, it is presumed to bear the same meaning throughout the act; but this presumption will be disregarded where it is necessary to assign different meanings to the same terms in order to make the statute sensible, consistent, and operative.[198]

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194. *Id.* at 402.

195. BLACK, *supra* note 16, § 119, at 401.

196. *Id.* § 120, at 403–04.

197. *Canons*, *supra* note 2, at 404.

198. BLACK, *supra* note 16, § 53, at 145.

The paraphrase is too obvious; nor is the language so commonplace that its close repetition could be excused as a stock recitation of the familiar. Were that the case, Black section 53 would not be the only secondary cite.

Pair 18

THRUST #18: "Words are to be interpreted according to the proper grammatical effect of their arrangement within the statute."
PARRY #18: "Rules of grammar will be disregarded where strict adherence would defeat purpose."[199]

Llewellyn cites Sutherland section 408 for Thrust #18 and section 409 for Parry #18, in addition to Black section 55, which he cites for both and which looks like his primary source for his text.[200] Black:

> GRAMMATICAL INTERPRETATION
>
> 34. Primarily, a statute is to be interpreted according to the ordinary meaning of its words and the proper grammatical effect of their arrangement in the act. But if there is any ambiguity, or if there is room for more than one interpretation, the rules of grammar will be disregarded where a too strict adherence to them would raise a repugnance or absurdity or would defeat the purpose of the legislature.[201]

Again, the paraphrase is clear, with the previously used substitution of "statute" for "act." It becomes even more clear when contrasted with Sutherland's cited sections 408 and 409.

> **§ 408 (258). Interpretation with reference to grammatical sense.**—Statutes as well as other writings are to be read and understood primarily according to their grammatical sense, unless it is apparent that the author intended something different. . . . This presumption gives way when it appears from a perusal of the context or the whole statute that the legislature did not grammatically express its intentions.[202]
>
> . . . .
>
> **§ 409 (259).** It is better always to adhere to a plain, common-sense interpretation of the words of a statute than to apply to them a refined and technical grammatical construction. . . . Neither bad grammar nor bad language will vitiate a statute.[203]

Sutherland's section 408 would be an adequate source for the sense of both Thrust and Parry #18, but not for their language. Sutherland's section 409 hardly looks like an appropriate source for Parry #18. Yet apart from a sentence about not presuming

199. *Canons*, *supra* note 2, at 404.

200. *Id.* at 404 nn.37–38.

201. Black, *supra* note 16, § 55, at 148.

202. 2 Sutherland, *supra* note 11, § 408, at 792–93.

203. *Id.* at 794.

grammatical competence in draftsmen and two examples, the quoted lines are all there is to it.

Pair 21

THRUST #21: "General terms are to receive a general construction."
PARRY #21: "They may be limited by specific terms with which they are associated or by the scope and purpose of the statute."[204]

In addition to Black section 68, Llewellyn cites *Corpus Juris Statutes* section 580 for Thrust #21.[205] Black puts sections 68–70 under the same heading, "General and Specific Terms." Section 68: "General terms in a statute are to receive a general construction, unless restrained by the context or by plain inferences from the scope and purposes of the act."[206] For Parry #21 he cites Black section 69 and also Sutherland, section 347.[207] Black section 69: "General terms or provisions in a statute may be restrained and limited by specific terms or provisions with which they are associated."[208] The "unless" exception in Black's section 68 (the canon known familiarly as "*noscitur a sociis*"[209]) has joined a paraphrase of section 69 in Parry #21, leaving the main clause of section 68 for Thrust #21.

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204. *Id.*

205. *Id.* at 405 n.43.

206. Black, *supra* note 16, § 68, at 196.

207. *Canons*, *supra* note 2, at 405 n.44.

208. Black, *supra* note 16, § 69, at 196. Black includes section 70 under the same heading as sections 68 and 69: Section 70: "70. Special terms in a statute may sometimes be expanded to a general signification by the consideration that the reason of the law is general." *Id.* § 70, at 196.

209. Neal v. Clark, 95 U.S. 704, 708 (1878) ("[T]he rule of *noscitur a sociis* is very frequently applied; the meaning of a word, and, consequently the intention of the legislature, being ascertained by reference to context and by considering whether the word in question and the surrounding words are, in fact, *ejusdem generis*, and referable to the same subject-matter" (quoting Herbert Broom, Legal Maxims 455 (1845))). The court further comments on statutory construction:

> It is a familiar rule in the interpretation of written instruments and statutes that "a passage will be best interpreted by reference to that which precedes and follows it." *So, also*, "the meaning of a word may be ascertained by reference to the meaning of words associated with it." In Broom's Legal Maxims it is said: "It is a rule laid down by Lord Bacon, that *copulatio verborum indicat acceptationem in eodem sensu,*—the coupling of words together shows that they are to be understood in the same sense. And where the meaning of any particular word is doubtful or obscure, . . . the intention of the party who has made use of it may frequently be ascertained and carried unto effect by looking at the adjoining words." The same author says: "In the construction of statutes, likewise, the rule *noscitur a sociis* is very frequently applied; the meaning of a word, and, consequently the intention of the legislature, being ascertained by reference to the context, and by considering whether the word in question and the surrounding words are, in fact, *ejusdem generis,* and referable to the same subject-matter."

Id. at 708–09; *see also* Jarecki v. G.D. Searle & Co., 367 U.S. 303, 307 (1961) ("The maxim *noscitur a sociis*, that a word is known by the company it keeps, is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress."); 59 C.J. *Statutes*, *supra* note 10, § 579, at 979; Sinclair, *supra* note 11, at 151–53.

Might Thrust #21 have come from one of the alternate secondary citations? *Corpus Juris Statutes* section 580(4)(a): "General words in a statute should receive a general construction; but they must be understood as used with reference to the subject matter in the mind of the legislature, and strictly limited to it."[210] It elaborates for another few lines, following the pattern of the exceptions in Parry #21, but allowing also for the avoidance of "injustice, oppression, or an absurd consequence."[211] Sutherland section 347 has a caption, "Words expanded or limited to accord with intent," followed by a sentence on the importance of finding and following legislative intent. Once that intent has been ascertained, the section continues: "general words may be restrained to it [legislative intent], and those of narrower import may be expanded to embrace it to effectuate that intent."[212] The source of Llewellyn's words appears to be Black, not *Corpus Juris Statutes* or Sutherland.

His confining *noscitur a sociis*—a canon worth its own place on any list—to a conjoint position in Parry #21, especially when the very next thrust, Thrust #22, is its running mate *ejusdem generis*, suggests that Llewellyn was, perhaps, not giving much thought to the list, but merely cobbling together paraphrases instead.

Pair 25

THRUST #25: "It must be assumed that language has been chosen with due regard to grammatical propriety and is not interchangeable on mere conjecture."
PARRY #25: "And" and "or" may be read interchangeably whenever the change is necessary to give the statute sense and effect."[213]

Llewellyn's only cited secondary source for Thrust #25 is Black:

> The word "and," in a statute, may be read "or," and vice versa, whenever the change is necessary to give the statute sense and effect, or to harmonize its different parts, or to carry out the evident intent of the legislature.[214]

It looks rather more like a source for Parry #25—for which Llewellyn does not cite it.[215] But three pages later, in the text, not the headline (which so far all the Black sources quoted have been), Black writes: "It must be assumed that the language of a statute is chosen with due regard to grammatical propriety. And therefore the courts are not at liberty to treat these words as interchangeable on mere conjecture or according to their own notions of expediency or policy."[216] My heart sank at this.

210. 59 C.J. *Statutes*, *supra* note 10, § 580(4)(a), at 980 (citations omitted).

211. *Id.* (citation omitted).

212. 2 SUTHERLAND, *supra* note 11, § 347, at 663.

213. *Canons, supra* note 2, at 406.

214. BLACK, *supra* note 16, § 75, at 228.

215. *See Canons*, *supra* note 2, at 406 n.52.

216. BLACK, *supra* note 16, § 75, at 231.

Surely Thrust #25 should be in quotes with ellipsis, and with an appropriate pincite.[217]

In Parry #25 the somewhat idiosyncratic turn of phrase "whenever the change is necessary to give the statute sense and effect" for the key condition seems to have come from Black's "whenever the change is necessary to give the statute sense and effect."[218] But instead of Black section 75 for Parry #25, Llewellyn cites Sutherland section 397 and R.C.L. section 226.

The closest R.C.L. comes to the language of Parry #25, and the exception itself, is: "Whenever it is necessary to effectuate the obvious intention of the legislature the courts have power to change and will change 'and' to 'or' and vice versa."[219] Sutherland is excellent, but not the source of Llewellyn's chosen formulation:

> **§ 397 (252). Use of the words "or" and "and."**—The popular use of "or" and "and" is so loose and so frequently inaccurate that it has infected statutory enactments. While they are not to be treated as interchangeable, and should be followed when their accurate reading does not render the sense dubious, their strict meaning is more readily departed from than that of other words, and one read in place of the other in deference to the meaning of the context.[220]

Pair 26

THRUST #26: "There is a distinction between words of permission and mandatory words."
PARRY #26: "Words imparting permission may be read as mandatory and words imparting command may be read as permissive when such construction is made necessary by evident intention or by the rights of the public."[221]

Llewellyn cites Black section 150 for Thrust #26 and section 151 for Parry #26, but adds *Corpus Juris Statutes* section 631 for Parry #26.[222] Black puts sections 150 and 151 under the same heading:

> PERMISSIVE AND MANDATORY TERMS
>
> 150. Such terms and phrases as are susceptible of being read in either a mandatory or a directory sense are presumed to have been used in their natural and primary signification, and should not be interpreted otherwise, unless it is necessary to carry out the purpose of the legislature, effect justice, secure public or private rights, or avoid absurdity.

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217. And we should have noticed and inserted a "[*sic*]" for the dubious grammar: "interchangeable" of a singular, "language": interchangeability presumes more than one.

218. Black, *supra* note 16, § 75, at 228.

219. 25 R.C.L. *Statutes*, *supra* note 17, § 226, at 977.

220. 2 Sutherland, *supra* note 11, § 397, at 756–57.

221. *Canons, supra* note 2, at 406.

222. *Id.* at 406 nn.53–54.

> 151. But words in a statute importing permission or authorization may be read as mandatory, and words importing a command may be read as permissive or enabling, whenever, in either case, such a construction is rendered necessary by the evident intention of the legislature or the rights of the public or of private persons under the statute.[223]

Thrust #26 appears to be cut from whole cloth, a truism about language in general, hardly worth stating and not peculiar to law. But at least it is not a copy or paraphrase of Black section 150. Parry #26, however, is a paraphrase of Black's section 151:

> [W]ords . . . [imp*a*rting] permission . . . may be read as mandatory[,] and words . . . [imp*a*rting] . . . command may be read as permissive . . . [when] . . . such . . . construction is [made] . . . necessary by the evident intention of the legislature or [by] the rights of the public . . . .[224]

"Imp*a*rting" for "imp*o*rting"?![225] "Made" for "rendered"?!

Corpus Juris Statutes section 631[226] follows a short section verbally distinguishing "mandatory" and "directive." Although it has more content, it would have made a suitable cite for Thrust #26. The cited section 631 is an excellent general account of the point of Parry #26, emphasizing that "in the determination of this question, as of every other question of statutory construction, the prime object is to ascertain the legislative intent"[227] The closest it comes to the actual language of Parry #26 is further on in the text: "Words of permissive character may be given a mandatory significance to effect the legislative intent . . . ."[228] Clearly this was not the source of Parry #26. One might question the point of citing it.

Pair 27

THRUST #27: "A proviso qualifies the provision immediately preceding."
PARRY #27: "It may clearly be intended to have wider scope."[229]

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223. Black, *supra* note 16, §§ 150–151, at 529.

224. *Id.* § 151, at 529.

225. It is curious that "importing" (bringing in from somewhere else) and "imparting" (putting in from oneself) can be substituted in the context of statutory interpretation without changing relevant meaning.

226. 59 C.J. *Statutes*, *supra* note 10, § 630, at 1072 Section 630:

> **Construction as Mandatory or Directory—(a) In General.** A mandatory provision in a statute is one, the omission to follow which renders the proceeding to which it relates illegal and void, while a directory provision is one the observance of which is not necessary to the validity of the proceeding; and a statute may be mandatory in some respects, and directory in others.

Id. (footnotes omitted).

227. *Id*. § 631, at 1072 (footnotes omitted).

228. *Id*. § 631, at 1073 (footnote omitted).

229. *Canons, supra* note 2, at 406.

In addition to Black section 130, Llewellyn cites Sutherland section 352 and *Corpus Juris Statutes* section 640 for Thrust #27, but only Black section 130 for Parry #27. Black:

> PROVISO LIMITED TO PRECEDING MATTER
>
> 130. The natural and appropriate office of a proviso to a statute, or to a section thereof, is to restrain or qualify the provisions immediately preceding it. Hence it is a rule of construction that it will be confined to that which directly precedes it, or to the section to which it is appended, unless it clearly appears that the legislature intended it to have a wider scope.[230]

Thrust #27 appears to be a minimal selection of this language but still encapsulates the main thesis of Black section 130. *Corpus Juris Statutes* section 640 says much the same in slightly different words,[231] as does Sutherland section 352.[232] Similarly, Parry #27's words can be found in Black section 130. Had one's suspicions not been previously aroused it would have gone unnoticed.

It may be appropriate to have cited only Black section 130 for Parry #27 as it is simply that section's "unless" clause in passive voice. But just as for Thrust #27, both *Corpus Juris Statutes* section 640[233] and Sutherland section 352[234] have the same qualification, and might equally have been cited.

Pair 28

THRUST #28: "When the enacting clause is general, a proviso is construed strictly."
PARRY #28: "Not when it is necessary to extend the proviso to persons or cases which come within its equity."[235]

Llewellyn cites Black section 131 for both Thrust and Parry #28, and adds Sutherland section 322 for Thrust #28. Section 131, entitled "construction of provisos" provides: "A proviso in a statute, where the enacting clause is general in its terms and objects, must ordinarily be construed strictly."[236] Thrust #28 is equivalent to and does not appear to be a copy of Black's section 131. Citing Sutherland section

230. BLACK, *supra* note 16, § 130, at 432.

231. 59 C.J. *Statutes*, *supra* note 10, § 640, at 1090 ("The operation of a provisio is usually and properly confined to the clause or distinct portion of the enactment which immediately precedes it . . . .").

232. 2 SUTHERLAND, *supra* note 11, § 352, at 673 ("The natural and appropriate office of the proviso being to restrain and qualify some preceding matter, it should be confined to what precedes it . . . .").

233. 59 C.J. *Statutes*, *supra* note 10, § 640, at 1090 ("But where necessary to effectuate the legislative intent, a proviso will be construed as applying also to other sections, either preceding or subsequent, or to the entire act in which it appears.").

234. 2 SUTHERLAND, *supra* note 11, § 352, at 673 ("[U]nless it clearly appears to have been intended to apply to some other matter.").

235. *Canons, supra* note 2, at 406.

236. BLACK, *supra* note 16, § 131, at 434.

322 appears to be a mistake. It is under the heading "Private statutes"[237] and contains nothing but a definition of "private statute"[238] and two examples.

Parry #28 does not fit the language of the caption to Black's section 131. But a couple of pages further on in the text of the section one finds:

> But this rule is not invariably applicable. There are cases in which a proviso to a statute will be liberally construed. This is the case when it is necessary to extend the proviso to persons or cases which come within its equity, though not its strict letter, in order to effectuate justice or secure the benefits or remedies which the proviso had in contemplation, and especially when the statute is penal in its nature.[239]

Parry #28 is copied from the third sentence of this paragraph ("when it is necessary to extend the proviso to persons or cases which come within its equity"), but without quotes and without pincite.

This makes one feel sick at heart. Llewellyn was a very bright star in my jurisprudential pantheon, for the twentieth century perhaps matched only by Lon Fuller and maybe H.L.A. Hart. *Canons* is his best known article and has been called a monument of legal realist scholarship. At this stage I think we should most charitably conclude that *Remarks on the Theory of Appellate Decision and the rules or Canons of about how Statutes are to be Construed* was to Llewellyn a throw-away, dashed off, perhaps at short notice, and with little attention[240] (but let's not blame his research assistant).[241] I should like to think its subsequent fame was an embarrassment to him, about which there was nothing he could do but stay silent.[242] Nevertheless the legal academic profession cannot avoid the fact that the article has retained an iconic status, relatively unscathed, now for fifty-eight years.

237. 2 SUTHERLAND, *supra* note 11, § 321, at 624.

238. *Id.* § 322, at 626 ("A private statute is one confined to a special case.").

239. BLACK, *supra* note 16, § 131, at 436.

240. *See* Manning, *supra* note 3, at 283 n.3. ("Interestingly, Llewellyn's discussion of the canons comes at the end of his piece, and appears to have been added almost as an afterthought. Although we can never know, perhaps Professor Llewellyn had the familiar experience of finally confronting a symposium deadline, and sent his research assistant to check out a 'hunch' that Llewellyn had long held. Such experiences usually yield less success.").

241. Llewellyn credited (Manning says "graciously acknowledged," *Id.*) his research assistant, Charles Driscoll, for the lists. *Canons*, *supra* note 2, at 395 n.*.

242. A hypothesis which, unfortunately, one must cling to in the face of Llewellyn's re-publishing the list.