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Statutory Interpretation: Lord Coke Revisted

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STATUTORY INTERPRETATION: LORD COKE REVISITED†

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TABLE OF CONTENTS

I. INTRODUCTION

There is nothing new to say about statutory interpretation, but we can try to be clear, that is, to say what can be said more clearly. There is nothing new because the general problem of interpretation has been well canvassed, and the crux of the problem has been identified. The crux is that words in statutes have multiple meanings (they are equivocal). The cure for this problem is also well known. One attends to the context; one uses the context to limit the multiplicity.[1]

Unfortunately, although this advice is reasonably sound, it is not very helpful. The advice—using the context of statutory language as a guide to its meaning—is a broad generalization, and itself must be interpreted. A maxim for interpretation that itself demands interpretation is not much help. This particular maxim tells us to attend to the "context," but the word "context" is a word like any other word; it too is equivocal. Consequently, unless there is some way to limit the multiplicity of possible contexts, the maxim raises as many questions as it answers.

In the course of this Article, I hope to clarify the notion of "context" and make some observations about how one can attend to context when interpreting statutes. My thesis is that Lord Coke has some

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1. Many texts could be cited, but my favorite is J. ELLIS, THE THEORY OF LITERARY CRITICISM: A LOGICAL ANALYSIS (1974), especially ch. 5, "The Relevant Context of a Literary Text," at 104-54.

excellent advice, that his advice has been neglected, and that we should revive his thoughts and learn from him.

II. The Use of Context in Statutory Interpretation

There are at least four different contexts that might limit the multiple and equivocal meanings of words. The first is the immediate context of the sentence. Normally, words appear in sentences, and the sentence in which a word appears is itself a context which might clarify meaning. Consider the following two sentences:

> "He sat on the bank and fished for bass."
> "He walked into the bank and withdrew $100."

In these two sentences, the word "bank" has different meanings—the verge of a river, or a depository for currency. In each of these examples, the word "bank" occurs in a sentence, and we interpret the word in the context of the sentence; we assign meanings that are appropriate to the sentence as a whole. All of this is straightforward enough, and I trust it is noncontroversial. The only subtlety is that it all happens so quickly that we do not notice what is happening. We attend to the context by reading the entire sentence in which the word "bank" appears, and since we were reading the sentence anyway, we automatically attend to the context. However, with statutes, this process is more complicated and more difficult. The equivocations, ambiguities, and indeterminacies of statutory language are sometimes more radical. We are not often worried about single words such as "bank"; instead, we are puzzled by entire sentences, or even paragraphs. The simple procedure of looking at the immediate linguistic context will not always help.

When we need to go beyond the immediate linguistic context to interpret the language in a statute, we might turn to the context of daily practice and custom. This is the second type of context that I wish to discuss. In interpreting statutes, the reference to custom is often quite helpful in ascertaining the meaning of statutory language. For example, a good samaritan statute may immunize a doctor who gives aid at the scene of an accident so long as the doctor follows "good medical practice."[2] Neither judges nor legislators know what good medical practice is; presumably, doctors know. Furthermore, good medical practice is something that changes, and the changes are

2. For a list of representative statutes, see Comment, *First Aid to Passengers: Good Samaritan Statutes and Contractual Releases from Liability*, 31 Sw. L.J. 695, 704 nn.86-87 (1977).

brought about by the actions of doctors, not judges or legislators. Consequently, the conversations that supply the context for the phrase, "good medical practice," are conversations as to which judges, legislators, and lawyers are merely eavesdroppers. Similarly, a statute may prohibit assault "with a dangerous weapon." Unfortunately, the destructive capacity of the human species evolves, and so the statute must be given meaning by inserting it into the practice of destructiveness.[3] The Uniform Commercial Code refers to that which is "commercially reasonable."[4] Here too, the context that gives meaning to this phrase is a context that is external to courthouses and capitols. In each of these examples, the relevant context is the context of community custom. At one time, custom was a major source of creativity in the common law.[5] Unfortunately, we are now less adept at pleading and proving custom, but it remains a potential.

A third possibility for interpreting statutory language is to put it into the context of the pre-existing common law. Under this approach, judges assume that legislators are taking part in a conversation that includes the valued precedents of the common law and are speaking appropriately within that community of discourse. If the judges discern an ambiguity in the statutory language, and of course they generally can, then the ambiguity can be resolved so as to make the statute consistent with the common law.

One can find in the cases numerous examples of this approach. Consider, for example, the following well known maxims: "criminal statutes should be strictly construed"; "statutes should be construed so as to avoid constitutional problems"; and "statutes should be construed so as to prevent frauds"; and so forth. There are justifications for the presumptions that such maxims establish. The general principles of criminal law, the Constitution, common law and equity are valuable resources for our social life. Furthermore, we know that legislators must often act under powerful short-term pressures, and so judges are often reluctant to interpret their words in a way that jeop-

3. *See* Thomas v. State, 524 P.2d 664 (Alaska 1974) (a telephone can be a dangerous weapon, given certain ways of using it). Two cases that are almost sixty years apart, People v. Benson, 321 Ill. 605, 152 N.E. 514 (1926), and State v. Hill, 298 Or. 270, 692 P.2d 100 (1984), agree that an automobile can be a dangerous weapon.

4. Almost any page of Article Two, the Sales provision of the Uniform Commercial Code, will present evidence of this phrase. *See, e.g.*, U.C.C. § 2-706 (1978).

5. The obvious citation here is to Lord Mansfield. *See* 12 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 524-42 (1938); P. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 115, 123, 190-91 (1979).

ardizes traditional values. When judges speak politely, they are inclined to say that the legislature should not be presumed to have intended a departure from these principles.[6] However, if one scratches the surface of such judicial performances, it often appears that the language about presumed intent is fictional and counterfactual. The judges know very well that the legislators intended to depart from tradition, and they are trying to resist that departure.

Finally, there is a fourth possibility. Instead of ascertaining the meaning of statutory language by using the immediate linguistic context, the context of community practice and custom, or the context of the pre-existing common law, judges can put the statute into its legislative context. There are numerous examples of using the legislative context. For example, there are the maxims that direct judges to ascertain the "intent" of the legislature, or that instruct a judge to execute the "purpose" or "policy" which lies behind the statute.

This fourth possibility, examining legislative context, also has its justifications. A statute is normally the product of a protracted legislative process in which the legislators consider alternative proposals, argue their merits, consider staff reports, vote on amendments, and so forth. One way to understand the meaning of the final product, the statute, is to put it into the context of all of the legislative conversations that produced it. Another justification for examining legislative context is that the maxims about executing the purpose of the statute appear to embody a means-end rationality. The paradigm of means-end rationality is powerful in our culture, and the advice to execute the purpose of the statute seems to be a subtle variant of this attractive paradigm, and to gain power by association. Finally, there is the argument from political legitimacy. The legislature has an unquestioned power to make law, and a judiciary that faithfully executes the purposes of legislative acts can claim that it is helping the legislature do what the legislature is constitutionally entitled to do.

My own judgment is that the fourth possibility, putting the statute in its legislative context, is sound; however, I am skeptical about the way in which judges go about the task. When I read opinions that discuss carrying out a statute's "intent" or "purpose" or "policy," I

6. See H. HART & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (tent. ed. 1958) for a survey of ways to make this presumption. For example, Hart and Sacks suggest that judges should ask the following question when they read legislative history: "Is there anything here which shows clearly that these men were doing something different from what seems to us to have been the reasonable thing to do?" *Id.* at 1278.

am not often persuaded that the opinions are sound. One criticism is that these three words—intent, purpose, and policy—are used interchangeably and carelessly, so that the meaning of these words is generally vague. This criticism might seem minor, but I think that a real problem is being ignored by those who use these vague words.

One attack upon this paradigm—carry out the purposes, execute the policy—is empirical. One can doubt, and have sound empirical grounds for doubting, the existence of this hypothetical entity, the purpose of the statute. The empirical doubt comes from opening one's eyes and looking at the legislative process. The legislative process is rather messy. The average statute is the product of compromise, in which various factions or special interests pull and tug. In order to pass a statute, the legislative sponsors normally must assemble a coalition, and the several factions of the coalition do not have identical interests and purposes. No single faction in the coalition constitutes a majority of the legislature as a whole, and so there normally fails to be a majority purpose.[7]

In addition to this empirical critique, there is also a philosophical critique of this paradigm of carrying out the purpose of the statute.[8] The philosophical critique has two parts: understanding why the concept of purpose is so attractive, and understanding why the concept of purpose is not very helpful. The temptation to chase after purposes arises from a truth. Statutes are produced by humans, and human action generally has its rationale, its purposes. Consider, for example, an ordinary sentence such as:

> "That was an intelligent statement."

A sentence such as this one can be said sincerely or sarcastically. (There are many other ways that it could be said, but these two will do for now.) When we interpret the sentence, we interpret it in light of such purposes. Someone who interpreted such a sentence as sincere, when the speaker's purpose was to have it be sarcastic, would misinterpret it. All of this is obviously true, and so it seems that un-

7. A recent article that summarizes the relevant research and discusses its implications for statutory interpretation is Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986).

8. While my philosophical critique is logically independent of the empirical critique, I confess that I was motivated to develop it because of the empirical critique. When I first began teaching Legislation as a law school course, I was very casual in my use of the concept "purpose." As I learned more about the recent literature in political science and economics, I was provoked into rethinking my use of this concept. The philosophical critique presented in this Article is the result of that rethinking.

derstanding purpose is the key to interpretation.[9]

However, the apparent usefulness of the concept of purpose is evanescent. Consider the following question: What is the evidence that we use to discover a speaker's purposes? In ordinary conversation, it is quite often the tone of voice, or an accompanying gesture, or an arched eyebrow, and so forth. In other words, we use the linguistic context.[10] Consequently, the technique of executing the purpose, which requires that we understand the purpose, appears to be a variant of the first possibility, using the linguistic context. If this conclusion is correct, then the fourth possibility collapses into the first, except for the distinction that one is expanding the linguistic context beyond the bounds of a single sentence. Let me expand on this point about the evidence that is used to discern "purpose."

A sentence such as, "That was an intelligent statement," normally occurs as part of a conversation. We might imagine that two members of a faculty were conversing about something that a colleague had said. In such a conversation, there would be a group of sentences that precede the quoted sentence, and a further group of sentences that would follow it. If we knew the entire conversation, we would know a great deal about the speakers' attitudes toward their colleague, their judgments about the cogency of his arguments, and so forth. Given this context (which is clearly a linguistic context), we would be able to determine whether the sentence in question was meant sarcastically or sincerely.

As I have stated it, the example is not yet realistic, for I have not specified how we would learn about the larger context of the conversation. One possibility, albeit bizarre, is that we have recorded it by electronic eavesdropping. However, we can make this example realistic if we make it analogous to the sort of problems that historians normally encounter. Suppose that we came across the sentence, "That was an intelligent statement," in a letter, or as a marginal annotation in a book. Using an historian's approach to interpret this sentence, we would seek more evidence—other letters, a diary, or published writings. Given that evidence, we may or may not be able

9. Note that, in this example, due to the equivocal nature of the sentence, determining whether its speaker is being sincere or sarcastic is an interpretation that goes to the sentence as a whole, not a mere word in it. Thus, this example has a structural similarity to the sorts of problems that we commonly encounter with statutes.

10. One might object that tone, gesture, and facial expression are not language. This seems obviously false to me, but I will not quibble. Despite the label attached to it, such as behavioral context, it still remains true that we infer meaning from context.

to say whether the sentence was sarcastic or sincere. We would have the sort of problem that historians regularly have. Assuming that the normal practice of the historian is sensible, albeit quite difficult, we can ask what sort of lessons we learn from their practice.

My thesis is simple enough. The use of the word "purpose" normally does not do anything more than rename the problem. Interpretation still proceeds by way of judgment in light of context. The renaming, furthermore, is not harmless; sometimes it produces confusion. The renaming can generate confusion by distracting our attention away from what is occurring. Because we start looking at the hypothesized fact that a "purpose" exists, we tend to lose sight of the evidence upon which judgments about the purposes of human action are normally based. When we ask ourselves about the evidence we are using, we see that judgments are made on the basis of context.

When examining statutory context, we often have a rather rich body of evidence that we can use. The Congress of the United States follows elaborate procedures in enacting statutes, and the recordkeeping for the process is voluminous. Committees hold hearings, and a verbatim transcript is often available. Furthermore, the witnesses often supplement their testimony with written statements, and in addition, statements are submitted by those who are not witnesses; these written statements are often published as part of the committee record. Of course, there is lobbying, both oral and written, that is "off the record," but lobbying is not generally done in secret; it is reported on in newspapers, trade journals, and specialty newsletters, and so anyone who is interested can find out about it. And finally, there are such well known sources as the formal committee reports and the recorded debates. As I see it, the practical problem is: how do we use this rich body of evidence? what questions do we pose to the records? My thesis is that Lord Coke has some good advice, which has been both misunderstood and neglected. In the next Section, Lord Coke's advice will be examined, so that we will learn to make better use of legislative history.

III. Lord Coke's Advice

Heydon's Case[11] is worth discussing because it has been misrepresented. The received wisdom is that the judges in *Heydon's Case* recommended that one interpret a statute so as to carry out its pur-

11. 76 Eng. Rep. 637 (Ex. 1584).

pose. It has been said that the case represents the "public interest" view of statutes, in contrast to the modern skeptical assertion that most statutes are private interest disguised as public interest.[12] This interpretation of *Heydon's Case* fits the case into the reigning orthodoxy, and thus in my judgment distorts it.

Our knowledge of the case comes from Coke's reports. These reports do not contain a verbatim transcript of what judges said; instead, they are Edward Coke's summary. The contemporary reputation of these reports was quite high, and so we may assume that they were substantially accurate. However, we have no reason to believe that they are accurate at the level of diction and wording. Consequently, in my subsequent discussion of this case, I shall refer to the text of *Heydon's Case*, as it appears in Coke's reports, as "Coke's opinion."

Although *Heydon's Case* is routinely cited by scholars who write about statutory interpretation, I think that it is fair to say that very few have actually read the original. Most of us were introduced to the case via the Hart and Sacks materials, *The Legal Process: Basic Problems in the Making and Application of Law*.[13] The case is presented on page 1144 of those materials, which is the first page of approximately 270 pages devoted to the problem of statutory interpretation. On that first page, *Heydon's Case* is the first case which is presented in the section on interpretation. In the context of those materials, *Heydon's Case* is presented as having given the gist, the nub, of a sound position, which needs only to be elaborated.[14]

Unfortunately, the case is poorly edited in the Hart and Sacks materials. As presented, all of the facts and the reasoning are omitted. The editors only present the famous "four resolutions" in the case. Hart and Sacks do not put the resolutions in their factual context, nor do they include the reasoning by which the resolutions were applied to the facts. Consequently, the "context" which would clarify our "interpretation" of the resolutions in *Heydon's Case* is omitted by

12. *See* Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263, 265 n.6 (1982). Judge Posner's reading of Heydon's Case is especially enlightening, because he draws out the contrast so clearly. The so-called "public interest" theory of statutes is a variation of the theme that emphasizes "purpose." If one assumes that a statute has a single purpose (and not multiple and inconsistent purposes), and that the purpose is benign (not selfish), then one can say that the purpose of a statute is to advance the "public interest."

13. H. HART & A. SACKS, *supra* note 6.

14. The materials end with a "Note on the Rudiments of Statutory Interpretation," *id.* at 1410-17, in which it is said that a court should do "just what Lord Coke said it should do." *Id.* at 1415.

these editors.[15] It seems apparent to me that our scholarly community has had only the vaguest of ideas of what the case stands for, and furthermore, this seems to me highly unfortunate. But let me proceed.

If we examine the facts of the case, there are several matters that make it implausible that the case involves what one might call a "public interest" statute. First, the statute that is being interpreted is one of Henry VIII's statutes for the dissolution of the monasteries.[16] Second, the action was filed during Queen Elizabeth's reign and it is an "information" filed in the Exchequer.[17] In other words, *Heydon's Case* is substantially a suit of the Crown against Heydon. Third, the statute in question had a retroactivity provision and it was being applied in the case to a transaction that occurred prior to the date of the statute's enactment.[18] Fourth, the question presented was whether a particular transaction was to be declared void because the transaction occurred within the time period of the statute's retroactivity.[19] Fifth, if the statute voided the transaction, the land involved would have reverted to the Queen; if not, the land would go to Heydon.[20] Finally, the result of the case is that the Queen wins.[21] With these facts in mind, one ought *not* to approach the case as though it involved straightforward statutory interpretation which was obviously and morally unproblematic.

However, any cheap cynicism would also be misplaced. One can grant that the judges were the Queen's judges and inclined to rule in favor of the royal fisc. However, they were also devoted to the security of property rights. Consequently, the case posed a sharp dilemma: the judges were torn between their loyalty to the Crown and their loyalty to the security of property. Indeed, their performance in the face of this divided loyalty is the reason the case is still relevant. Their problems are analogous to our problems. For us too, there are general principles of law and there are particularized special interest statutes. For us too, a judge will be torn between his loyalty to princi-

15. By this use of the word "context," I am trying to follow my own advice concerning the importance of supplemental materials. I shall interpret the "four resolutions" by putting them into the context of the case as a whole.

16. Heydon's Case, 76 Eng. Rep. 637, 638 (Ex. 1584).

17. *Id.* at 637.

18. *Id.* at 638.

19. *Id.* at 641.

20. *Id.* at 642-43.

21. *Id.* at 643.

ples laid down in precedent and his duty to execute duly-enacted statutes. Consequently, modern cases can be described as Lord Coke describes *Heydon's Case*, as one in which there is a "great doubt which was often debated at the Bar and Bench," and among us, it can be said that the judges "openly argued in court." Given their moral dilemmas, I think the judges in *Heydon's Case* performed well, and I also think that Coke's opinion gives sound advice. Because I think the case is relevant to us, I wish to attend carefully to its details.

First, one must understand the facts. As noted above, the case involved a dispute between the Crown and Heydon over the rights to a parcel of land.[22] Heydon had obtained a leasehold interest in the land as a result of a series of three transactions. Shortly thereafter, Henry VIII persuaded Parliament to enact a statute for the dissolution of monasteries, which also voided certain leases held by the monasteries. The issue in *Heydon's Case* was whether the statute should void Heydon's lease.

The relevant details are as follows: The land in question was normally held by copyhold and was part of "the manor of Ottery" of which "the warden and canons regular of the late college of Ottery were seized."[23] Those who are familiar with medieval property law will recognize immediately that the ancient distinction of freehold and copyhold forms the basis of this dispute. For our purposes, we can simplify the baroque complexity of that law and say that the warden and canons held fee simple title to the land and that the land was customarily put out for farming by way of a copyhold. The first transaction that gave rise to the lawsuit in *Heydon's Case* is described as occurring "22 H. 7.," but with no reference to month or day.[24] According to the table of regnal years, the twenty-second year of the reign of Henry VII ran from the 22nd of August 1507 to the 22nd of August 1508. We are told that the following occurred in that year: "The warden and canons of the said college, 22 H. 7. at a court of the said manor, granted the same parcel by copy, to Ware the father and Ware the son, for their lives, at the will of the lord, according to the custom of the said manor."[25] There is a good deal of information in this compact sentence, which may take some decoding. First, the grant occurred "at a court." This does not mean that there was a

22. *See supra* text accompanying notes 16-21.

23. Heydon's Case, 76 Eng. Rep. at 637.

24. *Id.*

25. *Id.*

lawsuit. The proceeding was entirely nonjudicial; a proceeding in the manorial court was the customary formality for conveying a copyhold. Second, the wardens and canons of the college "granted the . . . parcel by copy." This means that the two grantees were given a copy of the court "judgment" or "decree" by which the property interest of a copyhold was established.[26] Finally, the term of this grant was "for . . . lives, at . . . will, according to . . . custom." To our eyes, this formula looks inconsistent, but it was the customary formula.[27] As a result of this transaction, Ware and Ware, father and son, took possession of their copyhold; the warden and canons held the fee, subject to the copyhold.

The next transaction is described by Lord Coke as follows: While Ware and Ware were holding under their copyhold, "the said warden and canons by their deed indented, dated 12 January anno 30 H. 8. did lease the same to Heydon the defendant for eighty years."[28] Using the table of regnal years, the 12th of January in the thirtieth year of the reign of Henry VIII is the 12th of January, 1539. In other words, in 1539, thirty-eight years into the copyhold, the warden and canons made an eighty year lease with Heydon, which would run until the 11th of January, 1619. After the second transaction, the fee was subject to two interests, so that we would say that the warden and canons hold the parcel in fee simple, subject to Ware and Ware's copyhold, and also subject to the Heydon lease.

Coke's opinion does not assign a precise date to the third transaction, but in context, it appears that it also took place in the year 1539. The report reads "that after the said lease they did surrender their college, and all the possessions thereof to King Hen. 8."[29] Knowing what we do about this period of English history, we may assume that this third transaction was not entirely voluntary. Nevertheless, by the positive law of England, circa 1539, the "surrender" effectively conveyed whatever title the warden and canons had to the king. At this point, the state of the title would be: fee simple in the king, subject to the copyhold and the lease. The lawsuit came on for argument in

26. In hindsight, we often call this device giving the copyholder a copy of the decree one of the first recording devices in English property law. In Heydon's Case, two documents establish the rights of Ware and Ware, the original decree of the manorial court, and the copy of that decree given to Ware and Ware. This was an intelligent development in the law.

27. Over time, a good deal of law developed around the meaning of this formula, and Lord Coke himself wrote a treatise on the topic. *See* E. COKE, THE COMPLEAT COPYHOLDER (1650).

28. Heydon's Case, 76 Eng. Rep. at 637.

29. *Id.* at 638.

"pasch. 26 Eliz.," which I understand to be the Easter term in 1583. Apparently, Ware and Ware, father and son, died prior to the lawsuit, and, as a result, Heydon held the property under his lease.[30] Lord Coke tells us that the statute under which the Crown sought the property was passed in the thirty-first year of the reign of Henry VIII, and the question before the judges was how to interpret this statute.

Omitting the extraneous words, the relevant language of the statute is as follows:

> [I]f any . . . religious and ecclesiastical house . . . within one year next before the first day of this present Parliament, hath made . . . any lease . . . in the which any estate or interest for life . . . at the time of the making of such grant or lease, then had his being or continuance . . . every such lease . . . shall be utterly void.[31]

The college of Ottery was a "religious house" and therefore fell within the included class of lessors under the statute. The lease was made within one year of the relevant parliamentary session, and therefore the statute's retroactivity provision covered the lease. The crucial issue for the judges in *Heydon's Case* was whether Ware and Ware's existing copyhold on the land constituted "any estate or interest for life" so as to void the subsequent lease given to Heydon on the property. As Lord Coke puts it:

> And the great doubt which was often debated at the Bar and Bench, on this verdict, was, whether the copyhold estate of Ware and Ware for their lives, at the will of the Lords, according to the custom of the said manor, should, in judgment of law be called an estate and interest for lives, within the said general words and meaning of the said Act.[32]

To a modern eye, the dilemma raised by this statute may not seem difficult, but to a 16th century judge or lawyer, there is a serious problem. On the one hand, an estate for life was one of the freehold estates; a copyhold is by definition not a freehold; and so as a technical matter, the copyhold could not be a life estate. On the other hand, the copyhold estate would terminate, as a practical matter, on the death of the two copyholders, although it could terminate earlier. The problem for the judges in *Heydon's Case* was which context to

30. The report reads that "the said several rents in Heydon's lease reserved, were the ancient and accustomed rents of the several parcels of the lands," *id.* at 637-38, and of course, the Crown would be entitled to receive the rents. However, due to inflation from 1539 to 1583, presumably these rents were less than the current market rate, and so it was in the interest of the Crown to file the information in question.

31. *Id.* at 638.

32. *Id.*

choose, the technical context of property law, or the more colloquial context of everyday practicality? The barons of the Exchequer chose to construe the statutory language colloquially and held that the copyhold was a life estate, thus voiding Heydon's lease. The case was so controversial, however, that they justified their position by offering a generalization about how statutes ought to be construed.

Their generalization is the famous "four resolutions" of *Heydon's Case*, which are quoted in the Hart and Sacks materials.

> And it was resolved by them, that for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law,) four things are to be discerned and considered:—
>
> 1st. What was the common law before the making of the Act.
>
> 2nd. What was the mischief and defect for which the common law did not provide.
>
> 3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth.
>
> And, 4th. The true reason of the remedy; and then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and *pro privato commodo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico*.[33]

As a preliminary matter, I would point out that the resolution falls into two parts, which must be distinguished to properly interpret the resolutions. The resolution says that there are "four things to be discerned and considered," and then it says that having "discerned and considered" these things, the judge is "to make such construction" as will do good. The resolution enjoins two very different types of intellectual acts, a distinction which commentators frequently overlook. My own interpretation is that when the judges "ascertain and discern" the four things, they engage in an historical inquiry. After they have ascertained these historical matters, they engage in analogical reasoning. While it is not obvious from the text of the resolutions that this dichotomy between historical inquiry and analogical reasoning is the correct interpretation, when one examines the rest of Lord Coke's opinion, in which he applies the resolutions to the facts, the dichotomy of historical inquiry and analogical reasoning becomes more plausible.[34]

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33. *Id.* (footnotes omitted). *See also* H. HART & A. SACKS, *supra* note 6, at 1144.

34. Hart and Sacks interpret Heydon's Case to say that a judge should ascertain the purpose underlying the statute and then should apply the statute so as to advance that purpose. For reasons

The four resolutions state the four "things . . . to be discerned." Consequently, the opinion turns to discerning these four things. The analysis proceeds as follows: "And it was said, that in this case the common law was, that religious and ecclesiastical persons might have made leases for as many years as they pleased . . . ."[35] This statement about the state of the common law is an historical statement. In this particular case, the historical statement is obvious, but its very obviousness can conceal its subtlety. Generally, statutes do not identify exactly which parts of the common law are being overturned. Consequently, this historical judgment requires the appropriate knowledge on the part of the judges.[36]

The second step is as follows: "the mischief was that when they perceived their houses would be dissolved, they made long and unreasonable leases."[37] The judgment here is not straightforwardly historical. We would *not* say that labeling certain leases as being "long and unreasonable" and thus a "mischief" is a factual judgment. However, I think that Lord Coke is saying that it is an historical fact that this value judgment was held by Parliament (or the Crown).[38]

The third of the four items to be discerned is presented in the following language:

> [N]ow the stat of 31 H. 8. doth provide the remedy, and principally for such religious and ecclesiastical houses which should be dissolved after the Act (as the said college in our case was) that all leases of any land, whereof any estate or interest for life or years was then in being, should be void.[39]

This statement identifying the "remedy" is merely a restatement of the statutory language, appropriately summarized. The actual text of

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that will be apparent from the text of this Article, I do not think that the case supports this proposition.

35. Heydon's Case, 76 Eng. Rep. at 638-39.

36. In England in the days when Heydon's Case was decided, the judges knew what the legislators were doing, and so their judgment about which common law precedent a statute was aimed was probably well grounded. The relevant elites were small and had regular contact with each other, and so the requisite knowledge came easily. Today, one must read "legislative history" (assuming it exists) in order to have any confidence about which parts of the prior law (either judge-made or statutory) are the target of a statute.

37. Heydon's Case, 76 Eng. Rep. at 639.

38. Lord Coke's opinion does not address this issue directly; he does not say whether the judgment that the leases were "long and unreasonable" and therefore a "mischief" is the judgment of the barons of the Exchequer or the Parliament of England. However, I believe he does not say this directly because, to him, it was perfectly obvious—he is identifying the value judgment that Parliament made.

39. Heydon's Case, 76 Eng. Rep. at 639 (footnote omitted).

the statutory language is an historical fact, and so this particular historical judgment was intellectually the least problematic of any of the several judgments.

The fourth item, "the true reason of the remedy," is the crucial step. Whether it constitutes an historical judgment is less clear. The relevant portions of Lord Coke's report is as follows:

> and their reason was, that it was not necessary for them to make a new lease so long as a former had continuance; and therefore the intent of the Act was to avoid doubling of estates, and to have but one single estate in being at a time: for doubling of estates implies in itself deceit, and private respect, to prevent the intention of the Parliament.[40]

This passage sets forth "the true reason" for the "remedy."[41]

In interpreting this passage, one must understand why the conclusion "it was not necessary for them to make a new lease so long as a former had continuance" is a crucial step in the logic of the opinion. The importance of the fourth step in the analysis stems from the gap between "the mischief" and "the remedy." The mischief is that long and unreasonable leases were being made, but the remedy is that leases of land in which there is a prior estate for life should be void. The remedy does not seem to have anything to do with the mischief, and thus there is a gap between the two.

Since the mischief was that long and unreasonable leases were being made, why did Parliament simply not outlaw and declare void all long and unreasonable leases? The answer is that the Parliament would not say that all "long and unreasonable" leases should be void because that particular description of a remedy would be unsatisfactorily vague. I wish to emphasize this point, because it seems both important and yet easy to miss. In nearly every case, statutes are drafted so that the "remedy" (which in Lord Coke's opinion is merely the language of the statute itself) is stated in language that differs from the language that we use to describe the events that provoked the statute. In other statutes, the language that describes the mischief

40. *Id.*

41. Once again, one can ask the question whether this is an historical judgment. Is the statement that "it was not necessary" the sort of judgment that is attributed to the barons of the Exchequer or to the Parliament of England? Lord Coke's opinion does not distinguish these two questions, but, as with the third item, I believe it is merely because he thought the answer was obvious. The judgment that these sorts of leases were not necessary is a judgment that he is attributing to Parliament. It is not that the barons have identified why they think the remedy is responsive to the mischief; rather, they have identified why Parliament thought the remedy was responsive to the mischief.

and the language of the remedy will differ for other reasons. The statutory language will be some generalization of the mischief, and the legislators could have various reasons for generalizing as they have. The legislators may have identified a mischief, but not wish to deal with all of it, and thus the remedy may be directed at a subset of the total problem. Conversely, the remedy may be drafted more broadly. The statute in *Heydon's Case* is typical, it seems to me, in that the mischief is described in ordinary language whereas the language that describes the remedy is more technical. Since the remedy is stated in technical language, one can use modern jargon and say that the statute enacts a "presumption": whenever there is doubling of estates, there is deceit, and whenever there is deceit, there is a long and unreasonable lease.

After answering the four questions, that is, having ascertained the "four things . . . to be discerned," the opinion turns to the next task, which is: "to make such construction as shall suppress the mischief, and advance the remedy, . . . and to add force and life to the cure and remedy, according to the true intent of the makers of the Act . . . ."[42] In executing this task, the opinion states: "And if the copyhold estate for two lives, and the lease for eighty years shall stand together, here will be doubling of estates *simul & semel*, which will be against the true meaning of Parliament."[43] What is the support for this judgment? What sort of reasoning lies behind it? I interpret this sentence as an example of reasoning by analogy. In the previous statement about the "true reason," we were told that doubling of estates is presumed to be deceitful because doubling of estates is not "necessary." It seems to me that the necessity in question is economic; it was not economically necessary to double estates because doing so created no economic advantage to the fee holder. Consequently, it is appropriate to reason by analogy and judge whether or not there are two estates by using economic categories, not technical property categories. The mere fact that a copyhold is not a freehold estate for life does not mean that it is not an economic estate for life. Therefore, by analogy, it should be covered by the statute.

In summary, *Heydon's Case* prescribes a two-step analysis. First, judges should try to understand statutes historically, which entails that they should ascertain: what was the state of the law prior to the statute? why did the legislators think that the prior law failed to solve

42. Heydon's Case, 76 Eng. Rep. at 638.
43. *Id.*

certain problems? what is the statutory remedy for the problem? and why did the legislators think that the remedy would solve the problem? Second, the judges should determine whether the problem before the court is analogous to the problem addressed by the statute.

IV. A Modern Analogy

What lessons should we draw from Lord Coke's opinion? Why have I made such a big point of it all? I do not wish to argue something that is obviously foolish, which is that my "true interpretation" of Lord Coke's opinion provides the key that will unlock all problems of statutory interpretation. If the legislatures instruct judges, as ours have done, that they are to penalize practices which constitute bad medical practice, or pollute the environment, or injure competition, then Lord Coke's approach is irrelevant. By hypothesis, these statutory injunctions direct judges to attend to scientific and economic matters. The "mischief" that is hypothesized by these statutory injunctions is not to be found in the prior state of the law, but in scientific and economic complexity.[44] Even so, Lord Coke's questions are good questions. They offer a disciplined way of approaching statutes that is superior to the vaguer talk about "purposes" and "policy." One can always ask what was happening that the legislators thought was bad; one can then make a precise identification of the statutory remedies for these legislatively presumed evils; and finally, one can attempt to understand why the legislators thought that these particular remedies were responsive to those particular evils. Having done these things, the judge is intellectually prepared to take the next step, construction.[45]

A relatively modern case that illustrates the contrast between talking about purposes and using history is *Fishgold v. Sullivan Drydock & Repair Corp.*[46] The statute in question in *Fishgold* was the

44. Legislators should not delegate to judges the burden of grappling with scientific and economic complexity. If I were a judge (which is a purely counterfactual hypothesis), I would be upset by this type of legislative behavior and would try to evade that responsibility. However, our judiciary does not share my crankiness, and judges do undertake these inquiries. With respect to them, Lord Coke is also of no aid.

45. This next step, construction, is crucial. If my argument that "construction" is "reasoning by analogy" is correct, then obviously there are additional problems. In addition, an accurate interpretation of a statute may yield uncertainty instead of certainty. As argued *infra* at note 58, an accurate interpretation may reveal more inconsistencies in a statute than an inaccurate interpretation would.

46. 154 F.2d 785 (2d Cir. 1946).

Selective Training and Service Act of 1940.[47] The statute created certain legal rights for veterans to regain their jobs after separation from service. We may assume that it had several social purposes: the legal rights extended to the veterans were a recognition and recompense for their service; these benefits would also make the armed forces more attractive and thus an aid in attracting sufficient numbers into the armed services.

The rights created by the Act were threefold. First, a veteran is entitled to be rehired by his former employer. The statutory language is "a position of like seniority, status, and pay," with the proviso that this duty does not exist if "the employer's circumstances have so changed as to make it impossible or unreasonable to do so."[48] Thus, in *Fishgold*, the plaintiff's employer had a duty to offer Fishgold a job comparable to the one he had held before he went into the service. In the absence of the Act, the employer would have had no such duty.

The legal rights created by the statute also include a restoration of seniority.[49] This, too, changes what would otherwise be the law. Without this statute, Fishgold's employer would not have been obligated to restore his seniority, even if he had voluntarily chosen to rehire Fishgold.

Finally, the Act prohibits certain discharges; the relevant language is: "[The veteran] shall not be discharged from such position without cause within one year after such restoration."[50] This provision created the issue in *Fishgold*. Fishgold was not fired, but he was laid off for several days within one year after returning to work. Fishgold was a welder, and his employer, the Sullivan Corporation, regularly laid off such workers for brief periods whenever there was not enough work to occupy the full staff. According to Sullivan's contract with the union, such temporary layoffs were to be made in accordance with seniority. Consequently, Sullivan laid off Fishgold rather than a non-veteran union member who had been employed about a month and a half before Fishgold had originally been hired

47. Selective Training and Service Act of 1940, ch. 720, 54 Stat. 885.

48. *Id.* § 8(b), 54 Stat. at 890. For reasons explained *infra* in note 49, Fishgold got his job back, so we need not worry about the details of the employer's duty to rehire.

49. Section 8(c) of the Act provides that the employee's prior position "shall be so restored without loss of seniority." *Id.* § 8(c), 54 Stat. at 890. In *Fishgold*, the employee was treated as though he were on an approved leave of absence, and as a result, under the Act he was to be reinstated to the same position on the seniority ladder that he held when he left. Seniority law has its technicalities, and so there are presumably interpretive problems with this provision also; however, there is no dispute in the case over the question of seniority.

50. *Id.*

before the war. The question before the court was whether a "layoff" is a "discharge" within the meaning of the statute. Judge Hand, in an opinion joined by Judge Frank, held that a layoff is not a discharge within the meaning of the statute.[51] Judge Chase dissented.

Neither Hand's opinion, nor Chase's, can be characterized as a straightforward execution of Lord Coke's instructions. However, Hand's opinion is closer to Coke than Chase's is, and their opinions are helpful in illuminating the modern relevance of *Heydon's Case*.

Judge Hand interpreted the prohibition against discharge without cause in the context of the pre-existing labor law. He noted that under the pre-existing labor law, "[t]he value of that assurance [against discharge without cause] would indeed vary."[52] Those who are protected by a union contract have a right not to be discharged without cause. For such employees, Hand reasoned, there is "the possibility that statutory protection may be an important supplement to union protection."[53] On the other hand, the Act granted those employees who were not unionized protection they would otherwise lack.

In his dissenting opinion, Judge Chase did not perceive the issue as a simple labor law issue. In his view, the congressional purpose behind the Act was to provide veterans with "an actual job with actual pay on which they could live at least for a year."[54] In other words, the contrast is that Hand sees Congress as changing a legal fact, whereas Chase sees Congress as changing an economic fact. Although this contrast between changing labor law and providing a job is not sufficient to decide the outcome in the case, it does help explain why Hand gives different rights to Fishgold than Chase. My purpose here, however, is not to address the question of which way the case should have been decided.[55] What is interesting about the case is that the contrast between Hand and Chase illuminates important facts about the character of the modern judiciary.

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51. *Fishgold*, 154 F.2d at 788-89.

52. *Id.* at 788.

53. *Id.*

54. *Id.* at 792 (Chase, J., dissenting).

55. My own judgment is that Hand is probably right on the facts of the case. It could well be that the members of Congress did intend to change an economic fact, as Chase suggests, although the argument is close. Had the Act been passed toward the end of World War II, the inference would be stronger that Chase would be right. However, as Hand points out, the Act was passed when the United States was still at peace, although preparing for war. *See id.* at 789. This makes Judge Hand's less sweeping interpretation more plausible.

My own judgment is that Judge Chase represents the majority position among contemporary judges. Most judges, whether conservative or liberal in their general political views, are likely to be pragmatists in their judicial philosophy. The explanation for this pragmatic judicial philosophy is to be found in the patterns of recruitment to the bench, in the process of selection. We do not select judges by a process of examination and training in the task, nor do we promote up the hierarchy from within. Furthermore, we do not select judges from an elite corps of trial lawyers who have served with distinction as advocates. Among us, judges are selected for distinguished service in political matters and public affairs.[56] For all of these reasons, our judges tend to come to the bench with a pragmatic judicial philosophy. Such judges will naturally tend to inquire into the social policy behind a statute rather than into the way the statute changes the prior law. Given these facts of "judicial anthropology," this Article is not likely to change the way judges interpret statutes. Nevertheless, I do have a duty to say where I stand.

V. CONCLUSION

At this point in a law review article, it is customary to conclude by stating which technique of analysis is "the true way." Should we choose the Coke-Hand approach or Chase's? I do not think that there is a right answer to this question. In particular, I do not believe that one way is better than another for carrying out "the legislative intent." There is no such thing as "the" intent; generally, a statute embodies many intents. Consequently, the proper question is: which of the many "intents" ought to be relevant? Does one start with the legislators' dissatisfaction with prior law, and thus with the legislators' intent to change law? Or does one start with the legislators' vision of social policy, and thus with the intent to advance a policy? Starting from these different premises may lead to different results, yet starting from either is rational. I prefer Coke-Hand, but I do not believe that my reasons are so cogent that everyone should agree.

My reasons for preferring Coke-Hand are connected with my comments on "context" set out in Part II above. I asserted in Part II

56. A cynic would say that the best route to the federal bench is being the finance chairman for a successful senatorial candidate. In this case, as in others, the cynic's view is only partially accurate. To complete the picture, one would have to explore the wide diversity of ways in which lawyers are active in public affairs. From that perspective, one could offer an historical explanation of why different routes have been significant at different times.

that meaning is derived from context, and I identified four possible contexts (linguistic units, customary practice, judicial precedents, and legislative process) within which we might embed a statute. I would like to suggest that we should find ways to use as many of these contexts as possible; I prefer Coke-Hand because their approach offers a way to do so. My Lord Coke's statement is especially helpful.

As I have interpreted *Heydon's Case*, Lord Coke instructed judges involved in the process of statutory interpretation to look at the problem from the point of view of the legislator. To repeat, the judge is to ask what was the law, why did the legislators think this law was defective, what remedial provisions were enacted, and why did the legislators think these remedial provisions were responsive to the mischief. In asking these questions, the judge honors his or her duty to the legislature by construing the statute in a manner that is sympathetic to the legislative task. However, this adoption of the legislative perspective is qualified. Lord Coke's ideal judge does not assume the political point of view of the legislator. Instead, a legal perspective is imposed upon the statute. The judge reads the statute assuming that the legislators were attempting to modify the corpus of existing law and seeks to ascertain what changes were intended. The legislators' political motivations, which likely were paramount, are ignored. Instead, the judge assumes that legislators are engaged in the task of modifying and refining the law, which is a task not unlike that the judge is engaged in. Consequently, the judge reads the statute in a "double" context. I use the word "double" because Lord Coke's technique does two things: (1) the judge reads the statute in the context of pre-existing law, but (2) the judge examines that pre-existing law from the point of view of the legislator and not from his own point of view.

This quality of "doubleness" appeals to me because it has the sort of complexity that seems intuitively plausible.[57] Statutes are complex objects, and statutory interpretation is a complex task. Consequently, I cannot imagine how a simple theory can be plausible. I am confident that a complex and uncertain procedure is likely to be superior to any purportedly simpler procedure that presents itself as more certain.[58]

57. I have lifted this metaphor of "doubleness" from conversations with Professors Peter Reid Teachout and James Boyd White, but neither of them can remember where they lifted it from.

58. The production of law, either legislatively or judicially, is as likely to produce inconsistency as consistency. *See* Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802 (1982); Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976). Easterbrook and Kennedy do not agree on much, but they seem to agree on this. Given inconsistency,

An alternative reason for preferring Lord Coke's technique, and thus preferring Hand to Chase, is that it fits better with the complexity of our scheme of separation of powers. Our constitutional scheme is maddening in its ambiguities. The several branches of government, executive, legislative, and judicial, are supposed to cooperate, but not too much. They are to be independent checks on each other, yet not hostile. We could abandon this scheme for one that is less ambiguous, but I doubt that we will. Assuming that we maintain the current scheme, we must consider whether it has any implications for statutory interpretation? Presumably, it ought to, because interpreting statutes is one of the day to day tasks in which judges declare their respect for, or disdain of, legislators and statutes.[59] How can we manage the complex ambiguities of this situation?

I would suggest that we can adapt Lord Coke's advice to our own system of separation of powers by using the metaphors of agency in the following way: we should understand our judges as being the legal agents, but not the political agents, of our legislators. This metaphorical contrast between legal agency and political agency may not be as evocative to others as it is to me. Let me explain.

Recall that in *Fishgold*, Judge Chase thought that the congressional purpose was to provide veterans with "an actual job with actual pay on which they could live for at least a year."[60] Regardless of whether Chase is right or wrong as to the details, he is surely right in stating the right *kind* of political purpose. My own hypothesis is that there are two different sorts of reasons that might have motivated the legislators. Their political motivation may have been to strengthen the armed forces; veterans' benefits are an incentive that can aid recruiting. Alternatively, they may have been motivated by a sense of fairness. The veterans' benefits created by the statute might be seen as a just recompense for the servicemen's sacrifice. Chase asserts a particularly strong version of the fairness hypothesis.

Chase may be right that the primary purpose of the statute at

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uncertainty will follow. *See* Altman, *Legal Realism, Critical Legal Studies, and Dworkin*, 15 PHIL. & PUB. AFF. 205 (1986). On this theory, the more accurately we interpret statutes, the more likely we are to find inconsistencies.

59. Some mixture of respect and disdain seems inevitable. Even the most ardent proponent of legislative power can sympathize with the reactionary Justice McReynolds when he wrote: "Logic and taxation are not always the best of friends." Sonneborn Bros. v. Cureton, 262 U.S. 506, 522 (1923) (McReynolds, J., concurring).

60. Fishgold v. Sullivan Drydock & Repair Corp., 154 F.2d 785, 792 (2d Cir. 1946) (Chase, J., dissenting). *See supra* text accompanying note 54.

issue in *Fishgold* was fairness to individuals. Although I am skeptical about this conclusion, I certainly agree with Chase in supposing that something like that must lie behind the statute. Strengthening the military and benefiting individuals are political goals which legislators, as elected officials, are interested in achieving. These are the political issues behind the statute; legislators are elected to office, and so these are the sorts of matters in which legislators, as politicians, are interested.

On the other hand, despite the merits of Hand's opinion, and they are many, he does not provide a plausible account of motivation. According to Hand's interpretation of the statute, the legislators have given statutory remedies in addition to contractual remedies to the union shop, and statutory remedies in lieu of contractual remedies to the non-union shop.[61] Hand may be right that this is what the legislators did, but his interpretation does not explain why they intended to do it.[62]

However, although I agree with Chase about what sorts of things might have been the political motivations for the statute, I would prefer that he not regard himself as a deputy legislator who advances the political and social policies that have motivated legislative action. My skepticism is not that Chase, by being a deputy legislator, is making law, and thus legislating, and thus usurping the legislature's sphere of power. Let a thousand flowers bloom, and may judges make many laws. My skepticism is that Chase is assuming a role of intimacy with respect to the legislator, whereas I would have him be more distant. I would like him to be a legal agent of the Congress, helping the legislators change the law, but I do not want him to be a political agent of the Congress, doing its political will. If we retain our scheme of separation of powers, do we not imagine that judges should be cautious in adopting the political agenda of the legislature? If not, where is their independence?

There are no easy answers, and there are no simple solutions. In particular, the reading of *Heydon's Case* will not save the constitutional scheme of separation of powers. At best, one can say that Lord

61. See *supra* text accompanying notes 52-53 for the relevant portions of Judge Hand's opinion in *Fishgold*.

62. Hand did give an historical argument, but it was largely negative. He argued against Chase by saying that it was historically implausible that the Congress in 1940 (before we entered World War II) would have intended such a sweeping result. *See Fishgold*, 154 F.2d at 789. However, Hand did not give an affirmative historical argument explaining the motivations behind the grant of the new legal rights afforded to veterans under the statute in question.

Coke has propounded some interesting ideas that can be adapted to our situations. The problem is that we want our judges to respect legislators, and cooperate with them, and yet we also want our judges to be independent. By looking at the statute from the legislator's point of view, a judge is cooperating. However, there is a subtle twist. By asking what the legislator is doing to change pre-existing law, which is probably judge-made law, the judge imposes a judicial agenda upon legislators, and thus asserts an independence. This does not offer a very clean solution to the problem, but it may be all we can get.