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INTERPRETATION OF STATUTES IN DEROGATION OF THE COMMON LAW

JEFFERSON B. FORDHAM* and J. RUSSELL LEACH†

The tendency of the *lex scripta* to supplant the *lex non scripta* has carried far since Roscoe Pound published his provocative paper on "Common Law and Legislation" in 1908.¹ One can note at the same time indications that statute law is being received with much less hostility. The surprising thing, however, is that legislation in general is not at this day getting a far more sympathetic reception by lawyers and judges. Clearly they make up the professional group which has the largest share in the drafting and enactment of statutes. In actual practice, moreover, lawyers are given to committing private as well as public rules of the game to more or less carefully drawn instruments with a view to implementing broad ideas by detailed provisions calculated to indicate more clearly the desired line of human conduct. At the same time, they eschew common law procedures by resorting heavily to private methods of settlement such as arbitration.

When one considers the huge grab bag of rules of interpretation available to an American judge he is likely to indulge the very human wish that we could discard the whole lot and start afresh.² It would be bootless to dwell upon the thought. We cannot break abruptly with the past, even if we would. This is far from saying that we can do little in the way of a calculated effort to adapt existing institutions and ideas to the needs of a complex and rapidly changing society. We have no doubt that deliberate attacks can be made. And it is our purpose in this paper to consider the possibilities of positive action in relation to a particular canon of interpretation, the "ancient shibboleth," as Mr. Justice Stone called it,³ that a statute in derogation of the common law is to be strictly construed.

The immediate concern here is not with so-called intrinsic and extrinsic aids to interpretation. The canon under scrutiny falls in a third category; it is one of a body of rules which enable the interpreter to indulge certain presumptions.⁴ The question is—does the canon serve any useful function beyond

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1. 21 HARV. L. REV. 383 (1908). President Lowell of Harvard has recorded that Dean Thayer of the Harvard Law School told him he was so impressed by an article by Roscoe Pound that he wanted to invite him at once to join the Harvard Law Faculty. He did pursue the thought and brought Pound from the University of Chicago to Harvard in 1910. We wonder whether the article we have cited was the paper which so stimulated Thayer. See Lowell, *Roscoe Pound*, 50 HARV. L. REV. 169 (1936).

2. See Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 15 (1936).

3. *Id.* at 18.

4. See Horack, *The Disintegration of Statutory Construction*, 24 IND. L. J. 335, 337, 342 (1949).

providing a formulation or technique for explaining a decision already otherwise arrived at? ⁵ Is it a real factor in the process of deciding, in finding meaning in a statute in relation to a particular case? If the answers we should give were in the negative, one might well put the further query—why concern yourself beyond this since the rule under examination can do no particular harm if it does not control decision? It may be suggested here that there might well be gain in the brevity, clarity and consistency of judicial opinions if the techniques of rationalization were simplified by thinning out the overgrown thicket of interpretive aids. It hardly conduces either to the vitality of legal reasoning or to respect for the legal mind to perpetuate a welter of formal rules of interpretation from which can always be drawn a set of words calculated to buttress a desired conclusion.

The inquiry upon which this paper is based has led to the opinion that we should discard all rules of interpretation in the nature of presumptions. We would apply this with emphasis to the canon which calls for strict construction of a statute derogating from the common law.

It is to be observed that resort to presumptive rules is not always permissible. When a court declares that the plain-meaning rule applies with the effect of precluding interpretation because the statute is clear and unambiguous, or, put a little differently, admits of but one meaning, it is simply employing literal interpretation to the exclusion of other aids. While this does have the effect of preventing recourse to the rule-of-interpretation grab bag, it is open to serious criticism and we do not choose to stand behind it.⁶ As Mr. Crawford has effectively pointed out, the very process of determining that a statutory provision admits of but one meaning actually involves a choice of meaning.⁷

Extreme statements of the plain-meaning rule which are to be found in earlier writings, serve well to reveal its weakness. Endlich tells us that if the language has but one meaning effect must be given to it even if the words go beyond what was probably the intention and the result is absurd or mis-

5. It is a commonplace that "general rules do not decide concrete cases," that judges, like the rest of us, are likely to decide and then set about talking like a lawyer (or judge) in explanation or rationalization. The broader the so-called governing rules, whether of interpretation or otherwise, the more likely this procedure will be. The statement of one distinguished student of legislation that "the so-called rules of construction are not rules of law but rules of explanation" is questioned here because of its assumption that rules of law are not rules of explanation. Horack, *supra* note 4, at 337.

6. We would concur with Mr. Curtis in giving the rule limited effect. "Restrict this rule to names, singular terms, and words which contain only a definite number of objects, and the medieval theory which it keeps alive becomes intelligible. These words have meanings as immutable as their objects. They are compendious enumerations. They are taxonomical tags. They are dead words. I should scarcely call them words at all." Curtis, *A Better Theory of Legal Interpretation*, *supra* at 407, 434, also in 4 THE RECORD 321, 353 (Ass'n of Bar of City of New York 1949).

7. CRAWFORD, STATUTORY CONSTRUCTION § 174 (1940). The point is made with no less felicity by Professor Horack. Horack, *supra* note 4, at 338. It is of interest, in contrast, that the latest edition of Maxwell stoutly reasserts the ancient rule. MAXWELL, INTERPRETATION OF STATUTES 3 (9th ed., Jackson, 1946).

chievous.⁸ The courts, fortunately, have not been content to permit the "letter to kill." Consider the celebrated *Trinity Church* case,⁹ decided four years after the appearance of Endlich's book. Congress had in 1885 proscribed the encouragement of importation of aliens to perform "labor or services of any kind" in the United States by agreement made previous to importation. A proviso excluded professional artists, lecturers, singers and domestic servants but made no mention of ministers of the gospel. The church corporation made a contract with an English clergyman to come over and serve as rector and pastor of the church. He came and served. The Government sought, unsuccessfully, to recover the penalty prescribed by the act. The Court was not constrained to stand upon a literal interpretation of the words used; it looked to the language of the title (which referred only to "labor") to the evil or "mischief" which was intended to be remedied by the act, to the economic and social context as reflected in the appeal to Congress for legislation and to the reports of the cognizant Congressional committees and concluded that all pointed to a legislative intent simply to control the influx of cheap, unskilled labor from abroad.

The point, in short, is that a court is not compelled by what appears to be a clear, literal interpretation to forego taking into account the common law or statutory background, the social matrix, legislative history and the consequences of a literal interpretation viewed in relation to the policy of a measure, apprehended from consideration of the language of the measure and the other matters noted here.

HISTORICAL ORIGINS

Dean Pound would have us believe that the "derogation" canon was not of English origin but was, in fact, "an American product of the nineteenth century."¹⁰ In this he is supported by James M. Landis.¹¹ On the other hand, C. K. Allen and S. E. Thorne have referred us to English cases of the sixteenth century and even earlier which embraced a rule of strict construction of statutes abridging or restraining the common law.¹² Perhaps the first judicial enunciation of the canon in its modern form was that of Chief Justice Ellsworth in *Brown v. Barry*,¹³ in 1797. There is not much reason to doubt, however, that Ellsworth's pronouncement was made upon a background of veneration of the common law which went to the point of zealous guardianship

8. ENDLICH, INTERPRETATION OF STATUTES § 4 (1888).

9. *Church of the Holy Trinity v. United States*, 143 U.S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226 (1892).

10. Pound, *supra* note 1, at 402.

11. Landis, *Statutes and the Sources of Law*, in HARVARD LEGAL ESSAYS 213, 235 n.11 (1934).

12. ALLEN, LAW IN THE MAKING 379 (4th ed. 1946); Thorne, *The Equity of a Statute and Heydon's Case*, 31 ILL. L. REV. 202, 212 (1936).

13. 3 Dall. 365, 1 L. Ed. 638 (U.S. 1797).

against legislative encroachment. Coke's well-remembered dictum in *Bonham's Case*,¹⁴ to the effect that the common law would adjudge void an act of parliament which was against common right and reason, was the extreme expression of this spirit. While the establishment of parliamentary supremacy in 1688 was enough to put the quietus on Coke's declaration, there was yet room for a measure of common law, or, shall we say, judicial, control of statutes by refusing to extend their application at the expense of common law principles or rules to cases not considered to be within their plain language.

One does not find the "derogation" canon articulated in its American dress by the modern English textwriters. Thus, the latest edition of *Maxwell on Interpretation of Statutes* makes no mention of it. We do find expression of a presumption that the legislature "does not intend to make any substantial alteration in the law beyond what it expressly declares, either in express terms or by clear implication, or, in other words, beyond the immediate scope and object of the statute."¹⁵ Is this in substance the same as the American canon? Endlich declared that it was definitely not so. In his view the English presumption involves a certain strictness of construction but the canon is more restrictive by exacting that a case to be within a statute must fall within both its letter and spirit.¹⁶ This is a nice distinction, too nice, in fact, to use with assurance in relation to blunt instruments like rules of strict construction.¹⁷ The English formulation does appear to consist with the canon, employed both in England and America, that repeals by implication are not favored. And Endlich criticized the derogation canon insofar as it carried beyond this; he would simply apply the construction against changes beyond the immediate scope and object of a statute to existing common and statute law on an even footing. Of this more will be said later.

THEORIES ADVANCED IN DEFENSE OF THE CANON

Let us examine the major arguments which have been voiced in support of the derogation canon. There is the contention that the common law is the perfection of human reason and is definitely superior to statute law. Both Sedgwick and Dean Pound long since deflated this idea.¹⁸ In this day one would hardly make a serious contention that the common law was ever a fully-matured

14. 8 Co. Rep. 114, 118, 77 Eng. Rep. 646, 652 (K.B. 1610).

15. MAXWELL, INTERPRETATION OF STATUTES 85 (9th ed., Jackson, 1946).

16. ENDLICH, INTERPRETATION OF STATUTES § 127 (1888).

17. A decision like that in *Leach v. Rex*, [1912] A.C. 305, would have been as good an instance as any for parading the "derogation" canon. Section 4 of the Criminal Evidence Act of 1898 read as follows: "The wife or husband of a person charged with an offense under any enactment mentioned in the schedule of this Act may be called as a witness either for the prosecution or defence and without the consent of the person charged." It was determined that a wife was not compellable under the act to give evidence against her husband in a criminal case although she might do so voluntarily.

18. SEDGWICK, CONSTRUCTION OF STATUTES 270 (1st ed. 1857); Pound, *supra* note 1, at 404-06.

system. It has taken equity and legislation to try to make up for its deficiencies.¹⁹ Again, it was a spotty development; in some respects it was splendid, while in others it was much in need of correction and improvement. The very conception of the common law as customary law is, as Pound pointed out, highly imperfect.²⁰ The custom is more one of judicial decision than of popular action. This is nicely illustrated by recent decisions of certain lower federal courts, sitting in cases where jurisdiction was based on diversity of citizenship, recognizing that a minor child may have a cause of action for alienation of affections of a parent upon whom the child is dependent.²¹ We are not aware of any custom which these decisions can be said to articulate. A very intriguing aspect of the most recently reported federal case in this series is the invoking of the derogation canon in so interpreting the Michigan "heart-balm" statute as to render its ban on heart balm suits inapplicable to the common law cause of action of a minor created by the court after the statute was enacted.²²

A closely-related contention has been the thought that the common law is, in any event, a better quality of law than statute law, by and large. The common law, it is said, is distilled from experience and embodies broad principles which have a durable quality whereas statutes have more of a fiat character and are devised as rules deemed expedient to cope with this or that problem by positive command of the sovereign. In line with this type of reasoning we do not normally make any serious suggestion in our jurisprudence of treating statutes as sources of law from which we can reason by analogy as we do in the case of common law principles, but treat them as expressions of policy on the particular matters with which they are directly concerned. Notable exceptions are some old statutes like the statute of frauds and statutes of limitations.²³ If there were ever any basis for a broad assertion of common law superiority over statutes, improvements in the legislative process would assuredly make a generalization broadly favoring the common law unsafe at this time. It would appear to be much safer to confine any talk of superiority to particular principles, rules, standards or concepts and, if that is the case, we are not in a strong position in assuming common law superiority as a basis for a general rule of interpretation of statutes.

In rejecting Dean Pound's criticism of the canon Professor Allen has asserted that "in reality it is an essential guiding rule, for without it the con-

19. When Maine asserted that legal fictions, equity and legislation have been the three instrumentalities by which law has been brought into harmony with society he was referring broadly to any legal system but he obviously considered that his generalization was well illustrated by the English development. *MAINE, ANCIENT LAW*, c. 2 (2d Am. ed. 1874).

20. Pound, *supra* note 1, at 404-06.

21. The landmark case is *Dailey v. Parker*, 152 F.2d 174 (7th Cir. 1945). Intervening decisions are cited in *Russick v. Hicks*, 85 F. Supp. 281 (W.D. Mich. 1949).

22. *Russick v. Hicks*, 85 F. Supp. 281 (W.D. Mich. 1949). We do not feel put to it to wrestle with that venerable straw man, the notion that the court was merely declaring what had been the common law all the while.

23. Stone, *supra* note 2, at 13.

tinuity of legal development would be gravely imperiled; and it becomes the more necessary when we remember how few statutes are wholly innovations, and how many (of that comparatively small number which deal with 'lawyer's law') are extensions or modifications of existing Common Law rules."²⁴ This is a type of proposition the truth of which would be very difficult to demonstrate. One wonders why it is that the value of continuity could not be preserved by interpreting a statute in the light of its common law context without, at the same time, insisting upon some sort of predisposition against changes in the common law. A statute may be *in pari materia* with preexisting common law principles and rules just as it might occupy that relationship to earlier statutes. We would not suggest for a moment the rejection of the first rule of *Heydon's Case*, namely, that in construing a statute we should take into account the "common law before the making of the act."²⁵ Nor does Professor Allen appear to recognize the possibility that were a statute, as interpreted by the courts, to do violence to the symmetry of the law, the opportunity would still remain to repair the damage by a later statute.

This brings us to the next contention supporting the canon. It is the opinion of Mr. Crawford that "After all, there is perhaps as much reason for subjecting a statute which abrogates the common law to a strict construction, as it is to indulge in the presumption against the implied repeal of a statute."²⁶ In many states there are constitutional provisions which lend some support to this presumption. There is a common provision in state constitutions to the effect that no law may be revived or amended unless the new act contains the entire act revived or the section or sections amended.²⁷ Doubtless its specific object is to prevent the confusion and uncertainty which are likely to result where amendments can be made by the mere striking or insertion of words. Such a provision does, at the same time, involve a positive effort to make the amending process clear and coherent by having a section set out at length

24. ALLEN, *LAW IN THE MAKING* 379 (4th ed. 1946). The Minnesota court has expressed the thought in much milder form. "On occasion it [the canon] is a convenient and appropriate instrument in adjusting a new rule of statute so that it will work smoothly in reciprocal operation with the old machinery of the common law." *State ex rel. City of St. Paul v. Minneapolis, St. Paul & Sault St. Marie Ry.*, 190 Minn. 162, 165, 251 N.W. 275, 277 (1933). The court added the following significant comment: "But the rule is misused, inexcusably and dangerously so, when it disguises extraconstitutional obstacles to, or hindrances of, legislative purpose. Such misuse led, years ago, to this indictment of the 'whole science of interpretation' as practiced by English judges: 'Some of its rules cannot well be accounted for except on the theory that Parliament generally changes the law for the worse, and that the business of judges is to keep the mischief of its interference within the narrowest possible bounds.' Pollock, *Essays in Jurisprudence and Ethics*, 85." 251 N.W. at 277. Unlike the American judges, the English judiciary does not have recourse to written constitutions in exerting control over legislation. This renders the English employment of restrictive rules of interpretation the more understandable.

25. 3 Co. Rep. 72, 76 Eng. Rep. 637 (Exch. 1584).

26. CRAWFORD, *STATUTORY CONSTRUCTION* 491 (1940).

27. For references to constitutional provisions see 1 SUTHERLAND, *STATUTORY CONSTRUCTION* § 1916 (3d ed., Horack, 1943).

as amended,²⁸ and, even though it does not preclude amendments or repeals by implication,²⁹ it hardly could be said to give them any encouragement.

The short of the matter, however, is that we are not put to it to distinguish between the implied repeal and derogation canons. The reason is that we are not disposed to stand upon the implied repeal canon; instead, we would discourage employment of all presumptive rules of interpretation.

It can with reason be urged that any rule of interpretation in the nature of a presumption should have a logical core, that it should either be well grounded in actual experience or rested upon sufficiently compelling considerations of policy. Perhaps enough has been said concerning the policy basis. As for the experiential foundation, it is fairly apparent that every statute is either declaratory of the common law or changes it in the larger sense of modifying common law rules or occupying an area previously untouched by the common law. It is safe to add that little contemporary legislation is of a merely declaratory character. This appears to make the ultimate answer simple. The defender of the derogation canon would, however, have one more string to his bow. At this point he might be expected to declare that the presumption is not against changes in common law but simply frowns on those not ordained in express language or by clear implication. This narrows the question to the query whether experience weighs either way in resolving the doubt in a given case. The onerous burden of demonstration rests upon him who would assert that experience favors resolving the doubt against change in the common law. Meanwhile, we remain sceptical.

LIMITED USE AS AGAINST COMPLETE REJECTION OF THE CANON

The discussion thus far has been rather general. Even if the derogation canon is vulnerable as a rule of general application the question remains whether it is supportable with respect to any area of the common law domain. We suggest that the most likely subject for that distinction is so-called natural or common rights. While we find conventional expression, as a separate canon, of the rule that statutes in derogation of natural or common right are to be strictly construed, it is properly to be treated as a component of the derogation canon.³⁰ It is quite understandable that the English courts would lay store by this "sub-canon"; they do not have recourse to written constitutional limitations on governmental action.³¹ The courts certainly should be sensitive to encroachments upon personal liberty. In the United States, however, we

28. Effective carry-through on this policy entails adoption of a system under which the published session laws show both matter eliminated and that inserted or added. This can be done by resort to brackets and italics.

29. *Lehman v. McBride*, 15 Ohio St. 573 (1863); 1 SUTHERLAND, STATUTORY CONSTRUCTION § 1920 (3d ed., Horack, 1943).

30. 3 SUTHERLAND, STATUTORY CONSTRUCTION § 6206 (3d ed., Horack, 1943).

31. Pound, *supra* note 1, at 387.

depend upon our bills and declarations of rights to safeguard individual liberty. It is a commonplace, moreover, that our courts generally favor interpretation consistent with constitutionality.³² The answer here, in sum, is that there is no demonstrated need, in our system, for extraconstitutional judicial restraints on governmental action in the interest of individual freedom.

VAGARIES OF THE RULE

One serious objection to the presumptive rules rests upon the facility with which they may be drawn upon to support either side of a case hinging upon statutory interpretation. One hardly need point to the common situation where a statute may be said to be at once remedial and in derogation of the common law. Again, a statute may be penal in part and remedial in part. The canons, of course, bespeak liberal interpretation for remedial statutes and strict interpretation for penal acts. In the second type of situation the remedial provisions may be liberally construed and the penal sections and clauses dealt with strictly but no such reconciliation may be effected in cases of the first type. Sometimes the derogation canon triumphs and sometimes the remedial rule.

A leading Ohio case involving municipal responsibility in tort is illustrative. Ohio has long had a statute which requires municipalities to keep their streets in repair and free from nuisance.³³ This could have been treated as a governmental mandate, the violation of which would not involve civil consequences, but the courts have interpreted it to impose civil duties to people using the streets. It was decided in *City of Wooster v. Arbenz*,³⁴ however, that this did not apply to a situation where one was injured by a municipal truck hauling materials for street repairs. A person who fell into a hole in a street and then was bowled over by a street repair truck as he crawled back onto the pavement might recover for injuries due to the fall but not for the bones broken by the truck. The court recited the derogation canon as compelling strict construction of the statute but made no mention of its remedial character. This mechanical employment of the derogation canon occurred in a state in which the early cases supported a broad rule of municipal liability in tort³⁵ and in which the judicially-evolved theory of immunity from tort liability with respect to governmental functions had recently been shaken by a short-lived judicial repudiation of the whole immunity theory.³⁶ And this is

32. *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450, 65 Sup. Ct. 1384, 89 L. Ed. 1725 (1944); *United States v. Coombs*, 12 Pet. 72, 9 L. Ed. 1004 (U.S. 1838).

33. OHIO GEN. CODE § 3714 (1948).

34. 116 Ohio St. 281, 156 N.E. 210 (1927).

35. *Hunter and Boyer, Tort Liability of Local Government in Ohio*, 9 OHIO ST. L.J. 377, 379 (1948).

36. See *Fowler v. Cleveland*, 100 Ohio St. 158, 126 N.E. 72 (1919); and *Aldrich v. Youngstown*, 106 Ohio St. 342, 140 N.E. 164 (1922).

the case which gave the Utah court much comfort in reaching a like result notwithstanding an interpretation statute reversing the derogation canon!³⁷

On occasion the derogation canon has even been invoked against a person whose common law rights have been narrowed by statute. In *Klein v. United Theatres Co.*,³⁸ a modern corporation statute had taken away the common law right of a single dissenting shareholder to prevent a sale of the corporate assets and given him, instead, a right, on timely objection "in writing," to receive the fair cash value of his shares. The question was whether a written objection signed and filed by an authorized attorney who did not furnish any evidence of his authority was effective. The ruling was in the negative. While we are not suggesting that the derogation canon was controlling, it was, in fact, recited and the statute declared to be in derogation of the common law without recognition of the fact that the effect of a restrictive construction would be to derogate further from the common law as to stockholders' rights.

THE GENERAL AND UNCRITICAL JUDICIAL ACCEPTANCE AND USE OF THE CANON

If one is to judge by its reiteration, at least, there seems to be little doubt but that the derogation canon has gained a solid footing in American law. The rule has been invoked in the construction of innumerable federal and state statutes without evident discrimination as to subject matter. It has been employed in interpreting statutes on copyright, domestic relations, liens, municipal tort liability, duties of property owners respecting sidewalks, summary jurisdiction of courts, evidence, insurance, negotiable instruments, labor, agency, corporations, pleading, procedure, descent and distribution, trusts, insolvency proceedings, damages, administrative law and zoning, as well as legislative grants of authority to local governments, and even interpretation acts.³⁹ The emphasis upon "common law" does not appear to have excluded application of the rule to equitable principles.⁴⁰

If, as we are told in the *Erie* case,⁴¹ there is no common law of the United States, what basis could there be for applying the derogation canon in interpreting federal statutes? It is evident enough that common law ideas lie in the background of this or that provision of federal law and that it is appropriate to look to the past in interpreting such provisions, but this is hardly the same thing as taking a strict view of statutes of a political unit which derogate from

37. *Niblock v. Salt Lake City*, 100 Utah 573, 111 P.2d 800 (1941).

38. 148 Ohio St. 306, 74 N.E.2d 319 (1947).

39. For collections of cases see 3 SUTHERLAND, STATUTORY CONSTRUCTION § 6202 (3d ed., Horack, 1943); annotations to N.Y. CONS. LAW § 301 (McKinney, 1942 and Supp. 1949).

40. *In re Washburn*, 32 Minn. 336, 20 N.W. 324 (1884); *Blackman v. Wheaton*, 13 Minn. 299 (1868).

41. *Erie R.R. v. Tompkins*, 304 U.S. 64, 78, 58 Sup. Ct. 817, 82 L. Ed. 1188 (1938).

its own unwritten law. We have not encountered any federal case in which this thought was developed. On the other hand, there are cases in which the derogation canon has been invoked with respect to federal legislation without question.⁴² Several recent cases have, with respect to commercial transactions to which the Federal Government is a party, opened a field of what might be called federal "general law."⁴³ In that area the rule is, doubtless, as applicable to federal legislation as it is to state statutes generally.

The application of the derogation canon has not been confined to "lawyers law," that is, private law governing ordinary personal and business relations and civil procedure as well. The growing body of public regulatory law has not eluded the reach of the canon. While we applaud in principle the significant observation by Harlan F. Stone that the derogation canon has little scope in the interpretation of statutes establishing administrative agencies and defining their powers,⁴⁴ we must record that our examination of the cases does not disclose judicial support for the thesis. The cases do not concede the inappropriateness or vulnerability of the canon even in relation to this type of statute.

While the derogation canon has been freely criticized by text and periodical writers, there has been scant suggestion of judicial dissatisfaction with it. Many courts, on particular occasions, have found the rule inapplicable or overcome, but seldom has a court attacked it as ill-conceived or undesirable. Notable exceptions to this statement do exist, however. Nearly a hundred years ago, Judge Platt Potter of New York, who later produced an American edition of *Dwarris on Statutes*, strongly decried strict construction.⁴⁵ Critics of the canon have drawn comfort from the opinion in a 1933 Minnesota case in which it was declared: "We do not consider ourselves at liberty to apply any rule of 'strict construction' to this or any other statute simply because it happens to be in derogation of the common law."⁴⁶ Positive as this rejection appeared, it was destined to be short-lived. Seven years later the same court applied the old rule, after quoting the opinion in the previous case and saying, "Nevertheless, we should also be mindful that 'Long-established and valuable remedies are abrogated by statute only by "specific enactment or necessary implication."'"⁴⁷ As long ago as 1888, the Court of Appeals of New York was prepared to assert that the canon was so firmly established that it would take legislation to break its hold. The court's language bears quoting. "How-

42. Cases applying the canon to federal statutes since the *Erie* case include: *Grimes Packing Co. v. Hynes*, 67 F. Supp. 43 (D.C. Alaska 1946), *rev'd*, 337 U.S. 86 (1949); *United States v. Hark*, 49 F. Supp. 95 (D. Mass. 1943), *rev'd*, 320 U.S. 531 (1944); *West Virginia Pulp & Paper Co. v. McElligott*, 40 F. Supp. 765 (S.D.N.Y. 1941).

43. *Priebe & Sons v. United States*, 332 U.S. 407, 68 Sup. Ct. 123, 92 L. Ed. 32 (1947); *Gorrell and Weed, Erie Railroad: Ten Years After*, 9 OHIO ST. L.J. 276 (1948).

44. Stone, *supra* note 2, at 18.

45. *Billings v. Baker*, 28 Barb. 343 (N.Y. 1859), *affirming* 15 How. Pr. 525 (1858).

46. *Teders v. Rothermel*, 205 Minn. 470, 286 N.W. 353, 354 (1939).

47. *Bloom v. American Express Co.*, 222 Minn. 249, 23 N.W.2d 570, 573 (1946).

ever much modern judges might sometimes be inclined to doubt the beneficial results to be derived from an always strict adherence to the rule, grounded upon some possible doubts of the highest order of excellence in all cases of the common law, or of its being without exception the perfection of human reasoning in any other than a very narrow, technical and one-sided way, yet the rule itself is too securely and firmly established and grounded in our jurisprudence to be altered other than by legislative interference."⁴⁸ In other words, only the legislatures could do away with a court-made rule fashioned as a tool for use in the judicial function of interpretation.

Is interpretation legislation the answer? What reception might one expect the courts to accord it?

INTERPRETATION STATUTES

"The experience of history . . . shows that the judicial function of interpretation is inevitable and will in the long run always assert itself."⁴⁹ Nowhere has this proposition greater vitality than in the United States. Nevertheless, the legislatures may resort to several devices designed to provide some guidance in determining the meaning of statutes. One of these is interpretation acts. It hardly need be stated that interpretive measures are, themselves, subject to interpretation. Equally obvious is the fact that while a fiction may be used to say that a later act was adopted with reference to an interpretive statute, subsequent legislatures are not bound to submit to that statute.

Any serious suggestion at this day that since interpretation is a judicial function a general interpretive act, applicable only to future statutes, would be unconstitutional, could hardly be taken seriously.⁵⁰ In both England⁵¹ and America we have long proceeded on the basis that, although ultimate interpretation is for the courts, it is within the legislative province to lay down rules of interpretation for the future.⁵² The National Conference of Commissioners on Uniform State Laws has even undertaken the preparation of a Uniform Statutory Construction Act.⁵³

While we do not perceive that general interpretive acts should be denied prospective application to existing statutes, there is adverse authority.⁵⁴ Actually, if the legislation does not dress a change in meaning in the form of

48. *Fitzgerald v. Quann*, 109 N.Y. 441, 445, 17 N.E. 354 (1888).

49. Freund, *Interpretation of Statutes*, 65 U. OF PA. L. REV. 207, 209 (1917).

50. While no cases have been found which expressly deny this statement, the opinions in two Pennsylvania cases which involved retrospective interpretive acts contain language broad enough to condemn all interpretive acts as violative of separation of powers. Commonwealth *ex rel. Roney v. Warwick*, 172 Pa. 140, 33 Atl. 373 (1895); *Titusville Iron-Works v. Keystone Oil Co.*, 122 Pa. 627, 15 Atl. 917 (1888). Examples of courts applying interpretive statutes to later acts are too numerous to mention.

51. Interpretation Act, 1889, 52 & 53 VICT. c. 63.

52. 2 SUTHERLAND, STATUTORY CONSTRUCTION § 3003 (3d ed., Horack, 1943).

53. NAT. CONF. OF COM'RS ON UNIFORM STATE LAWS, 1944 HANDBOOK 240.

54. Note, 86 U. OF PA. L. REV. 189, 196 (1938).

an interpretive provision but merely provides an aid in determining meaning there should be no more objection than in the case of its application to a future statute.

If it is thought to effect a change in meaning, is not the true question whether the process of amendment was regular?⁵⁵ If an interpretation act could not be made to apply to the future operation of existing statutes its usefulness would obviously be very greatly limited. At the same time, one must consider the impact upon the judicial mind of a general interpretation clause designed to cover a great body of existing law. In 1947, the Ohio General Assembly inserted a separability clause in its more than 13,000-section General Code.⁵⁶ The clause purports to make each section and part of a section separable. This is so unrealistic in terms of the actual situation as to interdependence of existing code sections that it is likely to carry little authority or weight.

A truly retrospective interpretation act involves some additional considerations. If it purports to control interpretation in a pending case or to give effect to an interpretation different from that employed in a case already decided and does that with respect to the very matter then in litigation it would surely meet with judicial disfavor as an effort to interfere with the independence or finality of judicial decision.⁵⁷ Even in the absence of that factor, an interpretive act would not, generally speaking, be given effect by the courts as to past transactions.⁵⁸

Forty-one states and three territories have statutes abrogating the rule of strict construction of statutes in derogation of the common law in regard to all or part of their legislation. The form and extent of these interpretive statutes vary. Two states, for example, have statutes providing that certain acts shall not be limited by any rules of strict construction but rather that they shall be liberally construed.⁵⁹ All of the other statutes hereafter mentioned state the common law rule of construction and expressly provide that it shall not be applicable to designated codes or acts. Many of these statutes further

55. Thus, in *Titusville Iron-Works v. Keystone Oil Co.*, 122 Pa. 627, 15 Atl. 917 (1888), the statute was held violative of the constitutional provision that no law should be amended by reference to its title only. It should be noted that in this case the statute, in substance, attempted to amend a particular statute but in so doing used words of construction. It should further be noted that such constitutional provisions as this do not prohibit amendments or repeals by implication. *Lehman v. McBride*, 15 Ohio St. 573 (1863); 1 SUTHERLAND, STATUTORY CONSTRUCTION § 1922 (3d ed., Horack, 1943).

56. OHIO GEN. CODE § 26-2 (1948).

57. *People ex rel. Mutual Life Ins. Co. of New York v. Board of Supervisors*, 16 N.Y. 424 (1857).

58. 3 SUTHERLAND, STATUTORY CONSTRUCTION § 6205 n.6 (3d ed., Horack, 1943). There is no evident reason why this must needs be so as to legislation which is in substance and effect curative and where the transaction validated is something the legislature could at the time still authorize. That, however, is a matter beyond our purview.

59. IND. STAT. ANN. § 2-4703 (Burns, 1933); WASH. REV. STAT. ANN. § 144 (1932).

provide that the acts should be "liberally construed with a view to effect their objects and to promote justice."⁶⁰

The abrogating provision has been used with reference to single acts, certain subdivisions of the state statutes or even to the entire statute law of the state. Examples of its application to single acts are found in the Uniform Partnership Act⁶¹ and the Uniform Limited Partnership Act.⁶² It has likewise been applied to an article on workmen's compensation⁶³ and a chapter dealing with the relationship of husband and wife.⁶⁴ Such a provision has been widely employed in civil practice acts.⁶⁵ Ohio has a clause of this character applicable to Part III of its General Code.⁶⁶ While Part III is entitled "Remedial," it appears to be largely procedural. In other states we find the device applied to civil codes,⁶⁷ all civil statutes,⁶⁸ a political code⁶⁹ and a probate act.⁷⁰ Twelve states have substantially abrogated the old canon with respect to all of their legislation.⁷¹ Of these Pennsylvania alone has ordained expressly that the old canon should remain in force as to statutes enacted prior to the interpretation act.⁷²

The effectiveness of the statutes is very difficult to determine. Presumably, if followed in good spirit they would bring about wider applications of primary statutes but this can hardly be demonstrated in fact. One cannot be sure that, absent the interpretive provision, the result would have been different in a particular case. We can say that they, by and large, have served to take away one formulation otherwise available to explain a restrictive interpretation.⁷³

60. See, *e.g.*, IDAHO LAWS ANN. § 73-102 (1949).

61. UNIFORM PARTNERSHIP ACT § 4(1). See, *e.g.*, N.Y. PARTNERSHIP LAW § 4; OHIO GEN. CODE ANN. § 8105-4 (Supp. 1949); TENN. CODE ANN. § 7843 (Williams, 1934). Only Utah of the 29 states which have enacted the Uniform Partnership Act has omitted this section.

62. UNIFORM LIMITED PARTNERSHIP ACT § 28(1). See, *e.g.*, N.Y. PARTNERSHIP LAW § 117; TENN. CODE ANN. § 7909 (Williams, 1934). Iowa, Missouri and Utah of the 29 states enacting the Act have omitted this section.

63. MD. ANN. CODE GEN. LAWS, art. 101, § 78 (1939).

64. WASH. REV. STAT. ANN. § 6898 (1932). This provision was aimed at chapter 183 of the Washington Code of 1881. The provisions of that chapter are now embodied in Title 42 of the Revised Statutes.

65. See, ARK. STAT. ANN. § 27-131 (1947); CAL. CODE CIV. PROC. ANN. § 4 (1949); ILL. ANN. STAT., c. 110, § 128 (1948); KY. CODE CIV. PRAC. § 733 (1948); NEB. REV. STAT. § 25-2218 (1943); N.J. STAT. ANN. § 2:27-2 (1939); N.Y. CIV. PRAC. ACT § 3; S.C. CODE ANN. § 902 (1942); WYO. COMP. STAT. ANN. § 3-102 (1945).

66. OHIO GEN. CODE ANN. § 10214 (1948).

67. CAL. CIV. CODE § 4 (1949); CANAL ZONE CODE, tit. 3, § 4 (1934).

68. TEX. REV. CIV. STAT. ANN., art. 10(8) (1947).

69. CAL. POLIT. CODE § 4 (1944).

70. ILL. ANN. STAT., c. 3, § 159 (1941).

71. IDAHO LAWS ANN. § 73-102 (1949); IOWA CODE § 4.2 (1946); KAN. GEN. STAT. ANN. § 77-109 (1935); KY. REV. STAT. ANN. § 446.080 (1943); MO. REV. STAT. ANN. § 645 (1939); MONT. REV. CODE ANN. § 12-202 (1947); N.D. REV. CODE § 1-0201 (1943); OKLA. STAT., tit. 12, § 2, tit. 25, § 29 (1941); and PA. STAT. ANN., tit. 46, § 538 (1941); S.D. CODE § 65.0202(1) (1939); UTAH CODE ANN. § 88-2-2 (1943). It is of interest that the Supreme Court of Pennsylvania borrowed from the statutory construction act to declare that the derogation canon shall not be applicable to the rules of the court. Rule 130 of the Pennsylvania Supreme Court Rules of Procedure, 332 Pa. lxix (1939).

72. PA. STAT. ANN., tit. 46, § 558(8) (1941).

73. *In re Lund's Estate*, 26 Cal. 2d 472, 474, 159 P.2d 643, 644 (1945); *Baugh v.*

The statutes have not universally achieved even this much. There have been cases where they were ignored and the old canon applied.⁷⁴ As has already been noted, moreover, interpretive statutes have generally been restricted in application to later legislation.⁷⁵ The effectiveness of these interpretive provisions has been limited in other ways.

Rogers, 24 Cal. 2d 200, 211, 148 P.2d 633, 639 (1944); Sharon v. Sharon, 75 Cal. 1, 56, 16 Pac. 345, 370 (1888); Bayless v. Mull, 50 Cal. App. 2d 66, 74, 122 P.2d 608, 609 (1942); *In re Paterson's Estate*, 34 Cal. App. 2d 305, 93 P.2d 825 (1939); *In re Grant's Estate*, 34 P.2d 495, 499 (Cal. App. 1934); *In re Crutcher*, 61 Cal. App. 481, 215 Pac. 101 (1923); Glidden v. Whittier, 46 Fed. 437, 439 (C.C.D. Idaho 1891) (Idaho statute); Abernethy v. Peterson, 38 Idaho 731, 225 Pac. 132 (1924); State v. Altwatter, 29 Idaho 107, 110, 157 Pac. 256, 257 (1916); Flood v. McClure, 3 Idaho 587, 592, 32 Pac. 254, 255 (1893); Darby v. Heagerty, 2 Idaho 282, 13 Pac. 85 (1887); Aetna Ins. Co. v. Illinois Cent. R. Co., 283 Ill. App. 527, 532 (1936); Blakely v. Shortal's Estate, 236 Iowa 787, 20 N.W.2d 28 (1945); Adoption of Alley, 234 Iowa 931, 14 N.W.2d 742 (1944); Jermaine v. Graf, 225 Iowa 1063, 1066, 283 N.W. 428, 430 (1939); Sullivan v. Harris, 224 Iowa 345, 357, 276 N.W. 88, 92 (1937); *In re Van Vechten's Estate*, 218 Iowa 229, 251 N.W. 729 (1933); The Peterson Co. v. Freeburn, 204 Iowa 646, 215 N.W. 746 (1927); Chiesa & Co. v. Des Moines, 158 Iowa 346, 138 N.W. 922 (1912); Sires v. Melvin, 135 Iowa 460, 470, 113 N.W. 106, 107 (1907); Hopkins v. Antrobus, 120 Iowa 24, 94 N.W. 251 (1903); Van Horn v. Van Horn, 107 Iowa 247, 77 N.W. 846 (1899); Harris v. Brown, 187 Fed. 6, 10 (8th Cir. 1911) (Kansas statute); Produce Exchange Bank v. School District No. 86, 138 Kan. 834, 28 P.2d 742 (1934); Hill v. Halmhuber, 225 Ky. 394, 9 S.W.2d 55 (1928); Lawson v. Commonwealth, 160 Ky. 180, 183, 169 S.W. 587, 589 (1914); Myer v. Gaertner, 106 Ky. 481, 50 S.W. 971 (1899); Sutton v. Sutton, 87 Ky. 216, 8 S.W. 337 (1888); Dillehay v. Hickey, 71 S.W. 1 (Ky. 1902); Cooper v. Kansas City Public Service Co., 356 Mo. 482, 488, 202 S.W.2d 42, 45 (1947); *In re Duren*, 355 Mo. 1222, 1235, 200 S.W. 2d 343, 344 (1947); Women's Christian Ass'n v. Brown, 354 Mo. 700, 707, 190 S.W.2d 900, 901 (1945); Betz v. Kansas City Southern Ry., 253 S.W. 1089 (Mo. App. 1923); Northwestern Yeast Co. v. Broutin, 133 F.2d 628, 630 (6th Cir. 1943) (Ohio statute); Flynn v. Bredbeck, 147 Ohio St. 49, 56, 68 N.E.2d 75, 79 (1946); Smith v. Buck, 119 Ohio St. 101, 109, 162 N.E. 382, 384 (1928); *In re Estate of McCombs*, 52 Ohio L. Abs. 353, 366 (1948); Frame v. Shaffer, 39 Ohio L. Abs. 617, 619, 27 Ohio Op. 346, 347 (1943); Brenneman v. Brenneman, 1 Ohio N.P. 332, 3 Ohio Dec. (N.P.) 392 (1895); Englebrecht v. Day, 208 P.2d 538, 542 (Okla. 1949); Emery v. Goff, 198 Okla. 534, 542, 180 P.2d 175, 184 (1947); *In re Captain's Estate*, 191 Okla. 463, 464, 130 P.2d 1002 (1942); *Ex parte Reniff*, 65 Okla. Cr. 400, 88 P.2d 382 (1939); Bonsall Estate, 65 Pa. D. & C. 251 (1948); Smith v. Pennsylvania Power & Light Co., 50 Pa. D. & C. 581 (1944); Casey v. Edwards, 46 Pa. D. & C. 520 (1942); Farmers' & Mechanics' Nat. Bank v. Hanks, 104 Tex. 320, 137 S.W. 1120 (1911); Niblock v. Salt Lake City, 100 Utah 573, 111 P.2d 800 (1941); Moore v. Keesey, 26 Wash. 2d 31, 173 P.2d 130 (1946); State *ex rel.* Rothwell & Co., Inc., v. Superior Court for King County, 111 Wash. 71, 189 Pac. 556 (1920); Allen v. Houn, 30 Wyo. 186, 219 Pac. 573 (1923).

74. Armas v. Oakland, 135 Cal. App. 411, 27 P.2d 666 (1933); Bostic v. Workman, 224 Mo. App. 645, 31 S.W.2d 218 (1930); Crowley v. Polleys Lumber Co., 92 Mont. 27, 9 P.2d 1068 (1932); City of Waco v. Roberts, 121 Tex. 217, 48 S.W.2d 577 (1932); Lone Star Finance Co. v. Universal Automobile Ins. Co., 28 S.W.2d 573 (Tex. Civ. App. 1930); Silurian Oil Co. v. White, 252 S.W. 569 (Tex. Civ. App. 1923); Travelers' Ins. Co. v. Scott, 218 S.W. 53 (Tex. Civ. App. 1920); Moormeister v. Golding, 84 Utah 324, 27 P.2d 447 (1933). Of interest in this regard is Chiesa & Co. v. Des Moines, 158 Iowa 343, 346, 138 N.W. 922, 923 (1912), wherein the court stated, "The old rule has at times been quoted by our courts with apparent forgetfulness of this wholesome provision, and a statute so clearly in accord with essential justice and fairness ought not be ignored or allowed to fall into disuse."

75. Taff v. Tallman, 277 Mo. 157, 209 S.W. 868 (1919); Houston Chronicle Publishing Co. v. Bergman, 128 S.W.2d 114 (Tex. Civ. App. 1939). A series of Pennsylvania cases is to the same effect, but relies upon the exemption for prior statutes written into the statutory construction act. 46 PA. STAT. ANN. § 558(8) (1941); Beck v. Beiter, 146 Pa. Super. 114, 22 A.2d 90 (1941); Commonwealth v. Hubbs, 137 Pa. Super. 229, 8 A.2d 611 (1939); Dlugas v. United Air Lines, 53 Pa. D. & C. 402 (1944); Welch Grape Juice Co. v. Frankford Grocery Co., 36 Pa. D. & C. 653, 660 (1939). See also, *In re Jessup's Estate*, 22 Pac. 742 on rehearing of 81 Cal. 408, 21 Pac. 976 (1889), where the court says that such an interpretive statute is inapplicable in construing a statute with regard to an act done prior to the enactment of the interpretive statute.

The Supreme Court of Montana has concluded that the construction statute does not overcome the proposition that the rules of the common law are not to be overturned except by clear and unambiguous language.⁷⁶ By a strict construction of a liberal interpretation statute the court was able to declare, in effect, that once a statute has been found to be in derogation of the common law, it will be liberally construed, but the legislative intent to derogate must first appear from clear and unambiguous language. We suggest that the court was making a false distinction; the determination whether there is a change in the common law is the very stuff of the matter.

Another method of avoiding the statute is to give it lip service and then proceed to use the old rule anyway. It would not be fair to say that there had been many instances of this approach. In an Iowa case a broad statutory rule of liberal interpretation did not deter the court from holding that a statute which enabled a married woman to prosecute in her own name actions in tort or for the enforcement of any legal or equitable right did not permit her to sue her husband. Nor did the statute deter the court from asserting: "The relations of husband and wife to each other are essentially different from those of all other persons, and statutes dealing therewith should be clear and explicit in meaning, particularly when abrogation of a rule of the common law is involved."⁷⁷

A third, and closely allied, method of restricting the application of the primary statute is to give a strict construction in determining the persons or classes of persons entitled to its benefits and a liberal construction in applying the statutes in their favor.⁷⁸ This looks like a hybrid combination of the old restrictive canon and the equally familiar rule that statutes which are procedural or remedial, in the strict sense, should be liberally construed.

In his edition of Sutherland's treatise on *Statutory Interpretation* Professor Horack says, "These general interpretive provisions have generally effected their purpose . . ." ⁷⁹ This we are constrained to doubt. The demonstration that they carried decisive weight in any of the cases he cited would be no mean performance.

It is our belief that criticisms of the derogation canon and the enactment of legislation to discard or modify it have been directed more at the attitude of hostility to legislation reflected in the canon than its weakness as a tool of interpretation. Many of the pertinent statutes call for liberal construction to effect the objects of the laws construed and to promote justice. It is not a serious reflection upon the bar and the judges to say that a statutory exhorta-

76. *Conley v. Conley*, 92 Mont. 425, 15 P.2d 922 (1932).

77. *In re Dolmage's Estate*, 203 Iowa 231, 212 N.W. 553, 555 (1927). See also *Schwartz v. Inspiration Gold Mining Co.*, 15 F. Supp. 1030 (D. Mont. 1936) (Mont. statute); *Hill v. Halmhuber*, 225 Ky. 394, 9 S.W.2d 55 (1928).

78. *Whittlesey v. Seattle*, 94 Wash. 653, 163 Pac. 193 (1917). See also *Estate of De Laveaga*, 4 Coffey's Prob. Dec. 423, 429 (Cal. 1899).

79. 3 SUTHERLAND, STATUTORY CONSTRUCTION § 6205 (3d ed., Horack, 1943).

tion in favor of liberal construction is not calculated to extirpate deep-seated attitudes. The most hopeful possibilities here lie, we believe, in the realm of legal education and of this more will be said later.

As for techniques of interpretation, we reiterate that should a court wish to construe a statute strictly, it would find an abundance of tools remaining to replace the one withdrawn. We have already referred to three methods of avoiding the interpretive statute. In addition various "sets of words (more or less) well-played" are at hand. It may simply be said that the court cannot extend the meaning of a section further than the "clear intendment" of the statute,⁸⁰ or that the words of a section may not be extended beyond their "plain import."⁸¹ Again we may be told that a liberal construction does not permit "supplying words omitted,"⁸² or that the right must be found in the statute itself "fairly construed."⁸³ Oft-repeated is the observation that it is the duty of a court to administer the law as it is written, and not to make the law.⁸⁴ Nor does the interpretive statute abrogate the rule that "one claiming to be within the protection of the act must so show."⁸⁵ Liberal construction may not, it is said, extend a statute so as to require the performance of duties impossible of performance.⁸⁶

As we have already seen, some of the interpretive statutes attempt to reverse the situation by substituting liberal for restrictive interpretation. In other words, they adopt a new presumptive rule with a different emphasis. As a general canon applicable to a great variety of statutes it is vulnerable to two of the major objections to the derogation canon: (1) it assumes too much when applied generally without discrimination and (2) it is, at best, little more than a formulation for use by way of apology instead of a guide to decision. Why, as a general proposition, put a statute at the plate with one strike already called, or, conversely, allow four strikes instead of three?

CONCLUSION

The law schools must accept a large share of the responsibility for the inadequate development of sympathetic insight into the legislative process by lawyer and judge. By and large, the emphasis in law teaching upon judicial methods and processes has been so great that the law student almost inevitably has become pre-occupied with case law and adjudication. The student editor of a law review who insisted that he could not prepare a worthwhile comment

80. *Niblock v. Salt Lake City*, 100 Utah 573, 111 P.2d 800, 804 (1941).

81. *Young v. Kipe*, 38 Pa. D. & C. 434, 437 (1940).

82. *The Peterson Co. v. Freeburn*, 204 Iowa 644, 646, 215 N.W. 746, 748 (1927).

83. *Farmers' & Mechanics' Nat. Bank v. Hanks*, 104 Tex. 320, 137 S.W. 1120, 1123 (1911).

84. *Ibid.*

85. *Stringer v. Calmes*, 167 Kan. 278, 205 P.2d 921, 925 (1949).

86. *Gorges v. State Highway Commission*, 137 Kan. 340, 343, 20 P.2d 486, 487 (1933).

relating to a problem of state constitutional law for want of case authorities was pointedly footnoting this unbalance in perspective.

The legislative process is no whit less important in our legal system than is the adjudicative. It is high time, therefore, that the law schools undertake seriously to deal with legislative method and procedure as well as interpretation. There is strong reason, moreover, to launch the program in the first year of law study. Else, the unbalance in student perspective, which we have mentioned, may have become set before the student is really introduced to legislation.

Fortunately, there are able, articulate and vigorous law teachers who are both practicing and spreading this "gospel."⁸⁷ Legislation is gaining greater recognition in law school curricula. We make bold to cite an innovation in the curriculum of the College of Law of The Ohio State University. In the revised curriculum of the College a required course on Legislation runs throughout the first year. It covers legislative method, legislative organization and procedure and statutory interpretation.

When it comes to putting forward positive suggestions for improving the techniques of statutory interpretation we gladly defer to others who are participating in this symposium. Only one or two observations will be ventured here.

There is room for great improvement in legislative drafting. Once again it is well to emphasize that a constructive initial attack can be made at the law school level. An adequate program of instruction in a modern law school stresses skills training as well as transmission of information and development of insights. In the field of legislation a student can be given insights into the formulation of legislative policy as well as training in the articulation of policy in statutes.

At the state level we have lagged far behind Congress in both projecting and implementing the legislative function as a vital continuing process of government. It is still the dominant state theory that a legislature is a part-time branch of government which can do its job by meeting two or three months every other year. It is true that this is offset in part by the development of legislative councils and other fact-finding agencies, legislative reference services and drafting agencies. Most state legislatures have a long way to go, however, before they could be said to be doing a thorough job of investigation, deliberation and drafting. There is such a thing, moreover, as "simpler statute-writing."⁸⁸ A more determined effort can be made to spell out in the language of a measure the larger considerations of policy behind it. Old-fashioned

87. Jones, *A Case Study in Neglected Opportunity: Law Schools and the Legislative Development of the Law*, 2 J. LEGAL EDUC. 137 (1949).

88. Conard, *New Ways to Write Laws*, 56 YALE L.J. 458 (1947).

preambles are deadly but policy statements can be made at whatever length may be appropriate in forceful prose style in the purview of an act.

While there has been not a little criticism of late directed to the use of extrinsic aids, particularly legislative history, in statutory interpretation, we are not persuaded that the practice should be discouraged.⁸⁹ Abuses in the form of manufactured legislative history would be disturbing if beyond control. But are they? Where the facts as to the ersatz character of legislative history can be ferreted out by opposing counsel that material can, of course, be discredited. We favor enlargement of the sources of legislative interpretation at the same time that we would eliminate formal rules in the nature of presumptions. Instead of indulging assumptions we would weigh all relevant data.

A concomitant of a thorough legislative process at the state level would be the development of committee reports, hearings and other documents which constitute "legislative history." It, thus, would enrich the sources of interpretation of state statutes.

Finally, administrative experience with legislation offers its lessons. Administrative agencies are engaged in drafting and promulgating both interpretive regulations and true subordinate legislation. Often an agency will have had a hand in the drafting of the governing statute. Here we have a tremendous amount of practice in law-making and interpretation which should tell us some "do's" as well as "don'ts."

⁸⁹. Jackson, *The Meaning of Statutes: What Congress Says or What the Court Says*, 34 A.B.A.J. 535 (1948); Curtis, *A Better Theory of Legal Interpretation*, *supra* at 407.