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THE DISINTEGRATION OF STATUTORY CONSTRUCTION

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The problem of giving meaning to and finding meaning in symbols is universal. Communication and interpretation are the first requisites of a society. The rules of statutory interpretation purport to express the judicial custom in this general social phenomenon. When a judicial decision is pegged on one rule of interpretation and in a succeeding case the contrary result is dictated by a conflicting but equally authoritarian rule, it is time to recognize that we are dealing neither with "rules" nor with "interpretation," but with "explanations" of decisions independently determined.

Although concern over rules of interpretation is as old as our legal system, the great impetus to the use of rules occurred in the nineteenth century. During that century the desire for certainty was great. The inherent meaning of words and of word-position was an easy deduction. Certainty was created where it did not exist. It found political expression in the resurgence of the theory of a "government of laws and not of men." Man was the humble servant of the word.

The doctrine of the separation of powers further built the chasm between judge and legislator. Decent respect for the co-ordinate branch of government produced pages of judicial assertion that "if a law is plain and within the legislative power it declares itself and nothing is left for interpretation. It is as binding upon the court as upon every citizen."[1]

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1. State v. Duggan, 15 R. I. 403, 6 Atl. 787 (1886).

The increase in the work load of all government officers as well as the division of labor policy of the courts, made it increasingly difficult for the judge to know in any intimate way what the legislature was doing. He could not tell counsel, as did Justice Hengham, "Do not gloss the statute, for we know better than you, we made it."[2] Nevertheless, the judge was not only obligated to use the statutes, but to use them to an ever-increasing degree in the determination of litigation. The formal result of the legislative action was before him. A decision was necessary. He was responsible for the result and the explanation; he must respect the legislature and decide "under the law." To decide under the law was easy, if he knew what the words of the statute meant.[3]

Two views of "what the law is" have been advanced. One is that the law of the legislature reposes only in the words of the statute.[4] The other considers the statute only as the culmination of the legislative process and finds the law of the legislature in the totality of the legislative function.[5] This disparity of view is not dissimilar to the controversy over the so-called "law of the case."[6] In both situations, the test of theory should be its capacity for satisfactory prediction of future decisions.

Although logically the determination of what constitutes the law should control the manner of its interpretation, the rules as used indicate the process is teleological rather than logical.[7] Thus, a formalistic treatment of the rules of in-

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2. Aumeye v. Anon., Y. B. 33 & 35 Edw. I, 82; or as in Anon. v. Thomas, Y. B. 32 & 33 Edw. I, 429, "We agreed in Parliament. . . ."

3. Similarly, Holdsworth is supposed to have said, "It is easy to read the Year Books if you know what the words mean."

4. MAXWELL, INTERPRETATION OF STATUTES 25 (8th ed. 1937), Edrich's Case, 5 Co. Rep. 118a (1603); Woodward v. Watts, 2 E. & B. 452 (1853). But it would be misleading to suggest that the English courts have not considered extrinsic material. See PLUCKNETT, STATUTES AND THIER INTERPRETATION IN THE FIRST HALF OF THE FOURTEENTH CENTURY 49-54 (1922).

5. Jamison v. Encarnacion, 281 U. S. 635 (1930); International Stevedoring Co. v. Haverty, 272 U. S. 50 (1926) and indeed the thousands of cases that reject the doctrine of literal interpretation.

6. Oliphant, *A Return to Stare Decisis*, 14 A. B. A. J. 71 (1928); Goodhart, *Precedent in English and Continental Law*, 50 L. Q. REV. 40 (1934); Radin, *Case Law and Stare Decisis*, 33 COL. L. REV. 199 (1933).

7. "I am confirmed in my conviction that the ordinary 'interpretative process' is rather a technical language to set forth a conclusion than an organon for reaching one." Radin, *A Case Study in Statutory Interpretation*, 33 CALIF. L. REV. 219 (1945).

terpretation would scarcely reflect the realism of the judicial process—that the so-called rules of construction are not rules of law but rules of explanation.

Excluding decisions which deny the necessity of interpretation[8] and those which involve constitutional issues[9] the rules fall into three general classes:

(1) Rules which purport to derive meaning from the words of the statute itself.

(2) Rules which purport to gain meaning from extrinsic sources.

(3) Rules in the nature of presumptions.

Literal Interpretation. Rules of the first class are generally known as rules of literal interpretation. They postulate that the meaning of the statute can be determined from the words of the statute and from nothing more. Unless there is intrinsic meaning in symbols, this class of rules is clearly founded upon a false postulate. Or alternatively it uses the word "literal" as a symbol to mean words will be given their common meaning and one who uses them differently must disclose the difference or be bound by the common parlance of the society in which the words are used.[10] This latter explanation though denying the postulate upon which the rules are usually justified seems to place a sensible obligation upon the legislative draftsman. Even though words have no intrinsic meaning it is fair to impose reasonable uniformity in the use of symbols or otherwise the art of communication must surely fail. Thus, unless there is disclosure of special usage, the receiver of a symbol may use it in its "generally accepted" sense, with confidence that it had been so understood by the giver.[11] If this were not true we would all live in the anarchy of Babel.

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8. Obviously the denial of the necessity of interpretation is itself interpretation—that the statute means what the judge believes it to mean when he applies or refuses to apply it to the case before him.

9. The void-for-vagueness rule is clearly interpretation carried to the level of extraconstitutional bases for unconstitutionality. *See* Winters v. New York, 333 U. S. 507 (1948); United States v. Cohen Grocery Co., 255 U. S. 81 (1920); Connally v. General Construction Co., 269 U. S. 385 (1926).

10. Even this of course does not provide an absolute standard, and should not. The language level of a corporation act or a medical regulation act should be directed to those from whom compliance is expected, in the case of statutes of general application to the "simple understanding of the *pater familias*."

11. "The use of common experience as a glossary is necessary to meet the practical demands of legislation." Cardozo, J., in Sproles v. Binford, 286 U. S. 374, 393 (1932).

Thus, in most communication, interpretation is automatic, and giver and receiver achieve "understanding" immediately. Litigation, however, presents additional problems and as Gray soundly cautioned, the obligation of the statutory draftsman is not to write so that he can be understood, but to draft so that he cannot be misunderstood. Courts should recognize the disputatious tendencies of counsel and ignore the temptation to phrase opinions in terms of literal interpretation; for, when the challenge to meaning is serious and it is "reasonably apparent" that the meaning differs from that normally ascribed to the symbol, it should be equally certain that the decision cannot rest upon the words of the statute alone.

Literal interpretation is delusive and meaningless. Statements that the statute is clear and unambiguous in no way disclose the source from which or manner in which meaning is derived. Such statements are merely complicated explanations of the court's satisfaction with the result it reaches reading the statute as it reads it. Only the holding of the court makes the statute more determinate. This, of course, gives practical meaning to the symbols involved; but the meaning comes from the judgment and not from the assertion that the statute is clear.

The insufficiency of literal interpretation is frequently emphasized by courts cautioning that "It is always an unsafe way of construing a statute or contract to divide it, by a process of etymological dissection, into separate words, and then apply to each, thus separated from its context, some particular definition."[12] It is not only unsafe, it is not sensible. None of us speak in single words; our symbolizing involves collective word use and we intend to convey meaning by the aggregate of our symbols interpreted in the surroundings of their use. Interpretation based upon individual words leads inevitably to the perversion of meaning.

Such rules of literal interpretation, however, exist. The much-used *expressio unius* and *ejusdem generis* rules assume that particularity is inconsistent with generality, and thus, statutory enumeration restricts judicial application. This is inconsistent with human experience. Normally when a person particularizes and then generalizes his intent is to

12. International Trust Co. v. American Loan & Trust Co., 62 Minn. 501, 65 N. W. 78, 79 (1895).

include something more than his particulars; otherwise, he would be making a meaningless addition to an already understandable term.

The need for both particularization and generalization in statutes is even more compelling than in non-legal communication. Most people are aroused by particular evils and then seek to associate other ills of equal kind and degree. This habit probably accounts for the form of much statutory drafting and was clearly recognized as a basis for equitable interpretation.[13] But it is more than a habit of speech. Statutes are drafted to produce results. The draftsman knows that his statute is no better than the enforcement that it gets; thus, he must inform the enforcing personnel in terms that will produce action. What better way is there than to particularize and then say "in all other similar cases" act the same way. Yet, if this is what he says, he incurs the risk that in its judicial administration the statute will be limited in its application to the particulars.

Admittedly it is impossible to determine exactly how another expresses his thoughts in words. It is reasonable to assume, however, that expression may be tested by objective standards not unlike those used to determine the intention of the parties in contract,[14] but it is certain that word position alone is not a sufficient test, particularly when the formulated rule is contrary to the normal custom of word usage. Typically *ejusdem generis* discloses the impossibility of literal interpretation. The meaning of word position comes not from the words or the position but from the custom of the society and to determine this the interpretation must become extrinsic. Fortunately, the maxim of *ejusdem generis* is not a compelling rule and as frequently as it is applied it is ignored or rejected.[15] Thus, most statutes escape the fate that threatens them all; but unfortunate is the draftsman who must always face that fate or pay the cost of unguided enforcement.

The "and/or" rule, *noscitur a sociis*, and *reddendo singula singulis* are but a few of the many other applica-

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

14. Admitting of course that the "objective test" must nevertheless be something less than "objective."

15. 2 SUTHERLAND, STATUTORY CONSTRUCTION, §§ 4909-4914 (Horack's ed. 1943).

tions of the rule of literalness. All assume judgment limited to the four corners of the statute. Yet the very process of judging implies the application of what the judge considers the common usage of meaning and grammar. This does not mean that the judge seeks to decide issues of policy; it means only that he must apply words as he understands them. But this is something besides intrinsic-literal interpretation. It would be more accurate to describe the process as extrinsic interpretation measured by common usage or as presumptions restricting the area of effective legal expression. To say that the meaning comes from the statute alone, always has and always will be contrary to the fact.

Extrinsic Interpretation. Once it is admitted that words have no inherent meaning, then any system of literal or contextual interpretation imposes a judicial standard of objective expression upon the legislature. In this sense Radin is correct in postulating that there is no "discovery of legislative intention" but merely a judicial declaration of applicability of the statute.[16] But "legislative intention" is also a symbol capable of carrying an infinite variety of meanings. One Supreme Court Justice says, for example, that he never uses the word "intention" and, of course, never considers "motive."[17] But he uses "purpose" and "policy." This means only that he believes that "intention" and "motive" are bad words and that "purpose" and "policy" are good ones.

Radin pointed out effectively the fictional character of "legislative intention" but recognized the necessity of considering something more than the statute itself in determining its applicability to particular cases.[18] This, too, may be little more than expressing preference for particular symbols.

"Legislative intention" is useful as a symbol to express the gloss which surrounds the enacting process—the prelegislative history, the circumstances and motivations which induced enactment.[19] Legislative intention thus described becomes a rule of relevancy. Time and the necessity for decision limit the capacity of inquiry into all the possible

16. Radin, *Statutory Construction*, 43 HARV. L. REV. 863, 870 (1930).

17. Frankfurter, *Some Reflections on Reading the Statutes*, 47 COL. L. REV. 527, 538 (1947).

18. Radin, *supra* note 16, at 872.

19. See Horack, *The Common Law of Legislation*, 23 IOWA L. REV. 41 (1937).

data relevant to any given social phenomenon. Termination of inquiry is inevitable in all investigation, and the concept of legislative intention is merely a guide to the kind of source material which seems relevant to the meaning of the statute.[20] It is an objective standard similar to that discussed under literal interpretation—it merely recoguizes a wider scope of inquiry. Society cannot act effectively on subjectivity of intent; and, therefore, legislative intention becomes not what the legislature in fact intended but rather what reliable evidences there are to satisfy the need for further understanding of the legislative action.

The use of extrinsic materials in the interpretation of statutes by the Supreme Court of the United States has been a standard practice. Fortunately it has seldom felt the necessity of defending their use by the repetition of formalistic rules of interpretation.[21] Its opinions show that the meaning of the statute cannot come from the statutory words alone. Unfortunately, its lead has not found ready acceptance among the state courts. This is at least in part attributable to the failure of state legislatures to make available reliable records of committee hearings and reports, legislative memoranda, and the like.[22] Further, the federal docket, except for the constitutional cases, is so exclusively statutory that the only source of authority is the statutory material itself. This is also true in ever-increasing areas of state litigation where many contemporary statutes deal with areas alien to common law experience, but this is not well recognized by either bench or bar in the states.

Extrinsic materials, however, are not goals in themselves any more than the statutes. They, too, consist merely of symbols and as such are subject to interpretation and difference.[23] Their value lies exclusively in the increase of information which they provide on the question in issue.

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20. Obviously the inquiry must extend to non-legislative sources. See Radin, *supra* note 16; United States v. Sheridan, 329 U. S. 379, 389 (1946).

21. Although problems of interpretation involve a larger portion of the Supreme Court's time than they do of state courts the paucity of Supreme Court citations in the standard search books in comparison with state cases is a demonstration of the general abandonment of these rules.

22. The Massachusetts Document Series, is a notable exception. For other improved state document series see Finley, Book Review, 24 IND. L. J. 328, 330 (1949).

23. Caminetti v. United States, 242 U. S. 470 (1916).

The use of the extrinsic aid does not provide certainty but rather admits of the postulate that meaning is a devious thing and that all reliable sources from which meaning can be abstracted are appropriate for interpretation. If this is true, then there is no need for the citation of common rules purporting to justify the use of extrinsic materials. Judicial opinions can direct themselves to the reliability, the implications, the arguments contained in these materials, and the materials will fit into the judicial process in a way not unlike the use of case authority.

Modern opinions direct little if any attention to rules governing "precedent" and the acceptability of a case for judicial consideration. The argument centers on the propriety of the particular decision as relevant to the case at issue. Similar treatment of legislative material seems justified. In other words propriety should be framed in terms of relevancy and reliability, not in terms of formal rules of literal versus extrinsic interpretation.

In those areas where statutory materials have become deeply ingrained in judicial consciousness this same result has occurred. For example, courts in cases under the Bankruptcy Act, the Income Tax Act, the Interstate Commerce Act, and (in the states) cases involving the Criminal Code, the Statute of Wills,[24] and the Statute of Frauds find little need for rules of interpretation because the judges have confidence gained from a familiarity with the legislation, and the statute law takes its proper place in the judicial process.

When this result has been achieved statutory interpretation will not be dead, it will merely have advanced beyond the structural formalities of explaining by meaningless rules a court's conclusions as to statutory meaning, and will deal with the value of the materials from which the meaning is derived. The decisions of the Supreme Court of the United States have demonstrated in recent years that a court can operate satisfactorily without these structural crutches.

Fictitious Interpretation. Rules of interpretation in the nature of presumptions are the hardest with which to deal. They are fictional rules of interpretation and frequently lead to results exactly opposite those which legislatures intend. At best they are judicial standards requiring a particular form of legislative expression. As such, they are within

24. Bordwell, *The Statute of Wills*, 14 IOWA L. REV. 1 (1928).

limits defensible. Every system of government depends upon the ability of society to require of its people certain formalities as prerequisite to legal consequence. It is not too much to require this of the agencies of government as well. Formalities, however, become intolerable when they no longer reflect the normal expectations of the society for which they were constructed. To test thus the rules of presumed intention discloses that they are altogether unsatisfactory. The rule of strict construction of penal statutes is a case in point. The origin of the rule was clearly a policy attempt of the British courts to adjust the criminal laws to the society when Parliament still insisted on "making the punishment fit the crime." This rule also reflects our basic suspicion of governmental action. The prosecutor must prove his case beyond a reasonable doubt, not only on the facts, but also on the statute. If men are presumed to know the law, they are apparently only supposed to know the law which men of ordinary capacity find knowable.[25] Fiction is

25. In Winters v. New York, 333 U. S. 507 (1948), the Court held that a New York statute regulating the sale of publications "principally made up of criminal news . . . or stories of deeds of bloodshed, lust, or crime," was invalid as being too indefinite to inform booksellers when their conduct came within the statute. Under this view the Fourteenth Amendment might be invoked to invalidate a number of criminal statutes the standards of which are equally uncertain. *E.g.*, N. Y. PENAL LAW, § 1290: ". . . Hereafter it shall be immaterial in, and no defense to, a prosecution for larceny that: . . . the purpose for which the owner was induced to part with . . . such property was *immoral or unworthy*"; N. Y. PENAL LAW, § 1030: "It shall be unlawful for any person to engage in or aid or abet *what is commonly called hazing*, in or while attending any of the colleges, public schools or other institutions of learning in this state. . . "; N. Y. PENAL LAW, § 700: "All persons within the jurisdiction of this state shall be entitled to the *equal protection* of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any *discrimination* in his *civil rights* by any other person . . . or by the state. . ."; N. Y. PENAL LAW, § 421: "Any person . . . who, with intent to sell or in any way dispose of merchandise . . . to the public . . . with intent to increase the consumption thereof . . . publishes . . . in a newspaper . . . an advertisement . . . or statement of any sort regarding merchandise . . . which advertisement contains any assertion, representation or statement of fact which is untrue, *deceptive or misleading*, shall be guilty of a misdemeanor."; N. Y. PENAL LAW, § 1342: ". . . [Defense to libel] The publication is justified when the matter charged as libelous is true, and was published with *good motives* and for *justifiable ends*." [Italics supplied.]

Statutes similar to that in the *Winters* case which may be invalidated by that decision are collated by Frankfurter, J., in his dissent. Winters v. New York, 333 U. S. 507, 522 (1948). Among those statutes which are "somewhat similar, but may not necessarily be rendered unconstitutional" he lists IND. STAT. ANN. (Burns 1933) § 10-2805: "It shall be unlawful for any person to sell or offer for sale, or to print or publish, or to bring into this state for the purpose of selling,

compounded upon fiction. The legislative purpose or object or intent is lost sight of completely. Strict construction drives regulation and sanction from the judicial to the administrative level, if results are to be obtained, and then casts doubt upon the validity of the administrative sanction.

Certainly the rule of strict construction cannot support the decision in *United States v. Sheridan*[26] yet one can hardly doubt the practicality of the result or conjure up bases of unfairness to the accused. Further, "strict construction" would not have been consonant with the intent of Congress.[27] Nor is there apparent reason why the search for meaning should be different in a case like *Sheridan* than in *United States v. Ruizicka*[28] where the Court appropriately observed that "meaning, though not explicitly stated in words, may be imbedded in a coherent scheme."[29]

Originally, strict construction found no place in the law of interpretation. Lord Coke correctly pointed out that the search for meaning should apply to all statutes "be they penal or beneficial, restrictive or enlarging of the common law."[30] This properly emphasizes that policy should not be confused with the determination of meaning. The policy of extending protection to some defendants may be sound but it should not be justified as a matter of legislative meaning.

Even where an act cannot be described as penal, the

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giving away or otherwise disposing of, or to circulate in any way, any paper, book, or periodical the *chief feature* or characteristic of which is the record of commission of crime or the display by cut or illustration of crimes committed or of the acts or pictures of criminals, desperadoes, or of men or women in *lewd* and *unbecoming* positions or *improper* dress. . . ." [Italics supplied.]

26. 329 U. S. 379 (1946). Sheridan negotiated forged checks in Michigan, which were then forwarded to the drawee bank in Missouri. The defendant maintained, among other defenses, that he had not "caused" the transportation of the checks in interstate commerce within the meaning of the National Stolen Property Act, which provides ". . . whoever shall transport or cause to be transported in interstate . . . commerce any falsely made, forged, altered, or counterfeited securities, knowing the same to have been falsely made . . . shall be punished . . . ." The Court found the defendant's act to be within the terms of the statute.

27. See note 20 *supra*.

28. 329 U. S. 287 (1946). The Court held that the statutory design of the Agricultural Marketing Agreement Act compelled milk handlers to pursue an appeal to the Secretary of Agriculture from administrative orders. Where this procedure had not been followed, the validity of the order could not be tested in a judicial proceeding brought by the Government to enforce the contribution.

29. *Id.* at 292.

30. 3 Co. 7a, 76 Eng. Rep. 637 (1584).

risk of restrictive presumption is present. In a sense every statute, with the exception of declaratory statutes, alters the common law—either directly or by entering fields previously free of common law regulation. Thus, all statutes potentially may be strictly construed because they are in derogation of the common law. But to presume that the legislature did not intend to change the common law usually is directly contrary to the fact and often is in contradiction to specific legislative rejection of the rule.[31] Realistic acceptance of the situation induced the Minnesota Supreme Court very properly to declare: "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 common law. . . . Too much judicial indulgence in 'strict construction' of statutes has heretofore disguised 'extraconstitutional obstacles to, or hindrances of, legislative purpose. . . .' "[32]

"Extraconstitutional obstacles" is an excellent euphemism for judicial usurpation of legislative policy making—a usurpation unjustified under our constitutional system even though judges may think that they know better than legislators what the people desire or what is good for them.

Numerous other rules of presumption serve the function of shifting policy determination from the legislature to the court. For example, after what appeared to have been a decent burial,[33] the rule of derogation of sovereignty has appeared again in all its unfortunate vigor in the *Lewis* case.[34] The weak strands of the majority's legislative history are not strengthened by the assertion that "There is an old and well-known rule that statutes which in general terms divest pre-existing rights or privileges will not be applied to the sovereign without express words to that effect."[35] For as Mr. Justice Rutledge pointed out "The issue is not

31. Approximately one-third of the states have adopted general statutes concerning construction in which this rule is expressly rejected. 3 SUTHERLAND, STATUTORY CONSTRUCTION § 6205 (Horack's ed. 1943).

32. Teders v. Rothermel, 205 Minn. 470, 472, 286 N. W. 353, 354 (1939).

33. United States v. California, 297 U. S. 175 (1936); Nardone v. United States, 302 U. S. 379 (1937); and in the case of government agencies, Keifer & Keifer v. Reconstruction Finance Corp., 306 U. S. 381 (1939); Federal Housing Adm'r. v. Burr, 309 U. S. 242 (1940).

34. United States v. United Mine Workers, 330 U. S. 258 (1947).

35. *Id.* at 272.

avoided, nor is the effect of final legislative rejection nullified, by the easy device of resting the power . . . upon common law rules of statutory construction"[36]—rules "vague, conveniently selective and often, as here, contradictory. . . ."[37]

Legislatures seldom give helpful information concerning the applicability to the sovereign of a specific statute or of the whole body of statutes and common law.[38] To say that because the legislature has not considered the question, it has decided it, is both fictitious and illogical. To say when the legislature has determined the question, as it did in the *Lewis* case, that because the language of the statute was not explicit the legislature had not decided the question discloses the rule for what it is—a limitation on legislative power—an "extraconstitutional obstacle."

Although presumptions limiting statutory operation are the more common, some presumptions extend statutory application. These rules announce that "liberal construction" is to be given to remedial and beneficial legislation, grants for public purposes, public welfare statutes, and emergency legislation.[39] But why "liberal construction"? No greater reason justifies artificial determination of meaning in favor of the statute than against it.

The function of the court is to determine from relevant sources how the statute was intended to operate and to apply it in that manner. The beneficial statutes restrict rights and increase duties upon those against whom the statute is directed. For those persons the statute is not beneficial. They are entitled to have the statute applied as the legislature intended—neither restricted nor expanded.

After this hasty survey of some of the rules of construction it is easy to conclude that there is little that is defensible in either literal interpretation or in the rules of presumption. There is little left of "rule" in the maxims of extrinsic interpretation. They merely announce the fact that courts on occasion go beyond the statute to determine its meaning. As rules they do not give reliable guidance as to where, when,

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36. *Id.* at 344 n.4.

37. *Id.* at 349 n.11.

38. The question which majority and minority assumed in Federal Crop Insurance Corp. v. Merrill, 332 U. S. 380 (1947), Note, *Legal Responsibility of Federal Agencies*, 24 IND. L. J. 427 (1949).

39. 3 SUTHERLAND, STATUTORY CONSTRUCTION §§ 5701, 6406, 7201-7216 (Horack's ed. 1943).

or how far beyond the statute the inquiry may go. They are not exclusionary rules of evidence, and, thus, as maxims are useless.

Where does all this leave us? Judges Frank[40] and Frankfurter[41] have said that statutory interpretation cannot be reduced to rule, that it is an *Art.* This is unsatisfactory. Granted that psychology has been unable to analyze and describe the act of judgment and that the interpretation of a statute is, as is every other judicial determination, an act of judgment, still we are entitled to a more concrete answer than "It is an Art."

Statutory construction has more than judicial consequences. Obviously, every judicial decision has effect beyond the immediate litigants involved. Lawyers advise clients on the basis of court decisions. Transactions are entered into on the assumption that former decisions in the same field will have future application. Decisions founded on statutory interpretation have wide import. Not only do they serve as a guide for future litigation and counseling, but they become guides for future statutory drafting, both in the area of the decision, and in many other fields as well.

If courts believe, as they say, that legislatures are presumed to know of past judicial decisions and that statutes are drafted with a knowledge of them, they must recoguize that they have given legislative draftsmen poor guides for future action. To be sure, the draftsman knows that if his statute is held to be penal it will be strictly construed, while if it is considered to be remedial the interpretation will be "liberal"; that if he uses enumeration he must face the rule of *ejusdem generis;* while if he uses words of general import the statute may be "void for vagueness." But he does not know when the court will determine that one set of rules is applicable and when the other. For him the rules of statutory construction are at best, meaningless; at worst, they are unseen and "extraconstitutional obstacles" that he must avoid if possible.

Critical as we may be of the courts, it must also be

40. Frank, *Words and Music: Some Reflections on Statutory Interpretation,* 47 COL. L. REV. 1258 (1947).

41. Frankfurter, *Some Reflections on the Reading of Statutes,* 47 COL. L. REV. 527 (1947). For Justice Frankfurter's view of the interpretative process see Wolfson, Book Review, 23 IND. L. J. 381 (1948).

42. See note 9 *supra.*

recognized that legislative draftsmen have obligations to provide statutes capable of judicial administration. It is obvious that draftsmen have not always discharged this responsibility. Legislatures like courts have tended to accept the validity of word symbols and to provide courts with nothing but the "literal words" of the statute. Only Congress and three or four state legislatures publish permanent records of their committee hearings, reports, and legislative memoranda. Not until all state legislatures make data of this character regularly available and published in usable form can bench and bar be expected to give adequate treatment to the interpretative process.

Assuming that these materials become generally available what should be the general character of "rules of interpretation"? Rules of literal interpretation should be abandoned and the court should consider the statute with all relevant material for the understanding of the statute. To do otherwise gives undue significance to the accidental use and understanding of words.

Assume the abandonment of rules of literal interpretation. Where then would the court turn? To extrinsic materials? Yes, but without all the structural rules which purport to justify the use of committee reports, statements of the floor manager, and the like. These rules have served for statutory construction the function that the maxims of equity served for the Chancellor. But just as courts of equity found that the substitution of the maxims hid but did not prevent uncontrolled discretion, so for statutory interpretation. Few lawyers believe, today, that the citation of a maxim of equity will decide a case and few courts suppose that their citation is sufficient explanation of result. This does not mean that the decision of a case in equity is an art or that it is the uncontrolled or arbitrary result of the judges' preferences. Room for judicial choice there is, and always will be; the finding of new relevance in old symbols merely emphasizes that judicial choice will be made by factors more complex and more subtle than can ever be expressed in a single maxim. The result has been that both court and counsel have inquired more thoroughly into the merits of each case and the consequence of the decision. They have thus abandoned reliance on formal logic and the intra-consistencies of the opinion.

If the development of statutory construction can follow a similar pattern, and there is no reason why it cannot, then the role of the court in the legislative process can more easily be analyzed and understood. It is the tradition of the judiciary to express their judgments wherever possible in terms of prior authority. When they engage in this process they indulge in no formal talk about interpreting the prior case; they do not say that it is *ejusdem generis* or *in pari materia*. The court merely declares what it meant in its prior decision. Because the decision was the court's own child it does not hesitate to speak for it; only because it is aware that a statute was the offspring of others does it feel the necessity for explanation.

In the twenty-odd years since Cardozo wrote *The Nature of the Judicial Process* much false mysticism has been abandoned. It is recognized today that precedent has its place and that likewise society is entitled to progress. Where the two claims collide the court or the legislature each in its own way must accept the responsibility for decision.[43]

In the area of statutory construction, courts have been hesitant to acknowledge a similar flexibility in the judicial process. Faith still is put in the old rules in the belief that they will strain out the human side of the judge and bar considerations of policy which must forever motivate to greater or lesser degree what appears to be the "fitness" of an answer. Nevertheless, everyone is fully aware that the rules of interpretation are not rules of law, or of grammar, or of semantics, or even of policy. They are explanations and apologies which, historically, we have accepted as the proper verbalizings to accompany a result where, though the judge speaks last, court, administrator, and legislature must cooperate if intelligent social standards are to be maintained.

If this is the goal, then surely all relevant material regardless of origin is appropriate authority for decision. Just as in the selection of case authority, we must place confidence in the courts to select authority which a majority will consider convincing. The fact that the material is legislative, administrative, or even non-governmental should need no explanation so long as by tests of relevance it illuminates the

43. But neither their ways nor their methods are as diverse as might be expected. Cohen, *On the Teaching of 'Legislation'*, 47 COL. L. REV. 1301 (1947).

problem which the legislature was considering and contributes to the substance of the ultimate legislative decision.[44] If such a test can be accepted, then there is no need for a different approach to statutory questions than to others; the raw materials of decision will be the same, altered only by the issue in litigation.[45]

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44. Lawson v. Suwanee Fruit & Steamship Co., 69 Sup. Ct. 503 (1949), illustrates the kind of material which may be resorted to in a difficult case. In an action brought by an employee under the Longshoremen's and Harbor Workers' Compensation Act, the Court was confronted with delimiting the "disability" incurred by an employee who, having lost the sight of one eye through a non-industrial cause, loses his other eye in an industrial accident. The Court, rejecting the suggestion that the word "disability" had been used as a term of art, refused to apply the statutory definition in a mechanical fashion. It employed Subcommittee Hearings, Bureau of Labor Statistics Bulletins, and particularly administrative practice under the New York statute (on which the federal act was said to be based) in the construction of the statute. *Cf.* Jamison v. Encarnacion, 281 U. S. 635 (1930); 3 SUTHERLAND, STATUTORY CONSTRUCTION § 7206 (Horack's ed. 1943); Landis, *Statutes and the Sources of Law* in HARVARD LEGAL ESSAYS 213 (1934).

The Court feels free on other occasions to reject materials equally persuasive. Thus, in Vermilya-Brown Co. v. Connell, 69 Sup. Ct. 140 (1948), the Court found, in a suit brought by an employee under the Fair Labor Standards Act, that the Act applied to a Bermuda naval base. This holding was in the face of the strongest possible urging by the executive branch that such a decision would have dire consequences for our foreign relations and would be contrary to administrative interpretation. "While the general purpose of the Congress in the enactment of the Fair Labor Standards Act is clear no such definite indication of the purpose to include leased areas, such as the Bermuda base in the word "possession" appears. We cannot even say, 'we see what you are driving at, but you have not said it, and therefore we shall go on as before.' Under such circumstances, our duty as a Court is to construe the word 'possession' as our judgment instructs us the lawmakers, within constitutional limits, would have done had they acted at the time of the legislation with the present situation in mind." Reed, J., Vermilya-Brown Co. v. Connell, 69 Sup. Ct. at 146. See Fuchs, *Administrative Determinations and Personal Rights in the Present Supreme Court*, 24 IND. L. J. 163-166 (1949).

But surprisingly, in an opinion also written by Mr. Justice Reed in the current Term the Court held that the Eight Hour Law does not apply to a contract between the United States and a private contractor for construction work in a foreign country. Foley Bros. v. Filardo, 69 Sup. Ct. 575 (1949). "The canon of construction which teaches that legislation of Congress, unless a contrary intent appears, is meant to apply only within the teritorial jurisdiction of the United States . . . is a valid approach whereby unexpressed congressional intent may be ascertained. It is based on the assumption that Congress is primarly concerned with domestic conditions. We find nothing in the Act itself, as amended, nor in the legislative history, which would lead to the belief that Congress entertained any intention other than the normal one in this case. The situation here is different from that in Vermilya-Brown Co. v. Connell. . . ." 69 Sup. Ct. at 577.

45. Herein, of the distinction between powers of the court rather than the interpretative method when the issue is one of constitutionality instead of statutory interpretation. See Horack, *Congressional Silence: A Tool of Judicial Supremacy*, 25 TEX. L. REV. 247 (1947).

If rules of interpretation are of intense concern to the draftsman as well as to litigants then there is still to be disposed of the desirability of rules of presumption—in other words, norms of expression that courts may reasonably require of legislatures. Although it would appear that the search for meaning and truth should rise above mere form alone, the merit of certainty bulks large in favor of a system of presumptions. Unfortunately, however, when presumptions have been tried they have failed.

After numerous statutes had been declared unenforcible because some section was unconstitutional and after Justice Brandeis had suggested that if the statute had expressed such an intention the provisions were severable, the rule became general that the judicial respect for another branch of government required that so much of the act as was valid be enforced. The severability clause operated to rebut the presumption that the legislature intended the act to operate as a whole.[46] Consequently, it became customary to append severability clauses, indeed, so customary that almost every statute, even those with but a single section, contained such a clause. In the end the presumption failed for courts said the mere inclusion of the clause was not indicative of a legislative intent that the statute be severable.[47] As a result, the draftsman is in a worse position than before: If he leaves the section out he implies non-severability; if he puts it in the court can disregard it as insufficient evidence of legislative intent. The best the draftsman can do is to draft the section in some unusual form in the hope that a court will consider (inappropriately) that the unusual wording is indicative of special legislative consideration.

The suggestion that statutes be literally construed and that nothing be taken by intendment appears attractive until it is recognized that the rules of presumption are multiple and provide no greater certainty than the usual maxims of interpretation. What is needed in statutory construction is not more rules but fewer. Until the

46. Dorchy v. State of Kansas, 264 U. S. 286 (1924) (but the court warned that the clause "is an aid merely; not an inexorable command."); Williams v. Standard Oil Co. of Louisiana, 278 U. S. 235 (1929).

47. Utah Power & Light Co. v. Pfost, 286 U. S. 165 (1932); Railroad Retirement Board v. Alton R. Co., 295 U. S. 330 (1935); Carter v. Carter Coal Co., 298 U. S. 238 (1936).

propriety and necessity of extrinsic material is truly recognized, the law of statutory construction will continue to fill the opinions with meaningless apologies for decisions the rules never dictated. The rules will multiply as each new problem requires a new answer and another escape from an old rule.

When once it is accepted that the process of interpretation is normal and inescapable and that the court must decide from such sources as are relevant, it can be hoped that legislatures will provide adequate sources of interpretation and that the courts will use them without explanation or apology. The test of the decisions will not change: the profession will judge the judicial skills; the public will judge the social results.