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Introduction (Judicial Law Making in Relation to Statutes Symposium)

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SYMPOSIUM ON JUDICIAL LAW MAKING IN RELATION TO STATUTES*

INTRODUCTION

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Why was the topic, *Judicial Law Making in Relation to Statutes*, selected for this brief symposium? Perhaps the reader will forgive an explanation suggested by personal experience.

The professional legislative draftsman is sooner or later struck by the fact that it is the rare drafting problem that requires him to consult the literature of "statutory interpretation." Treatises like Sutherland's and Crawford's tend to stay on the shelf. Although this may produce an occasional pang of conscience, he finds two rationalizations for not consulting them. First, many of the rules of interpretation, like the one that lets the reader read "may" as "shall" on some occasions, deal with sick laws, not the kind of healthy laws that the draftsman is presumably writing. Second, and more important, many of these rules do not relate to interpretation in the normal, general sense of ascertaining the meaning of a written document.

Some of them, such as the *in pari materia* rule, the whole document rule, and those that let the interpreter look at miscellaneous kinds of legislative history, merely tell him what materials he is permitted to look at. They do not tell him what the materials he is permitted to look at mean. More significant examples are found among the rules that relate to ways of getting cases decided that can be decided only by imputing a fictitious meaning to the statute or, to speak more directly, by applying a rule of law.

Thus, it becomes apparent that, although the courts tend to discuss their functions with respect to statutes in terms of the "meaning" they purport to find in the statute, they often impose their own meanings and

* The following articles are based upon papers presented at the Association of American Law Schools' Round Table on Legislation, Philadelphia, December, 1960.

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sometimes actively rewrite the statute. How else could we adequately describe, for example, what state courts have done with section 15(1) of the Uniform Sales Act in extending the words "particular purpose" to protect the buyer's general purpose when he buys from a dealer other than "by description"? The imputation of meaning, as distinct from the ascertainment of meaning, is by definition something generated by the court rather than by the legislature, and it does not necessarily carry an unwholesome taint of judicial usurpation or other indiscretion. In any event, its high incidence explains why most of the literature of "statutory interpretation" is of only secondary concern to the legislative draftsman, whose central mission is to communicate. Although this dichotomy is perhaps more obvious to the draftsman, it has far reaching significance for courts and legislatures as well.

Two elementary examples will illustrate the wide difference that can exist between the ascertainment of meaning that constitutes interpretation and the imputation of meaning that constitutes judicial law making.

First is an example of what is believed to be an authentic rule of interpretation. In the sentence, "Mary, John, and Ruth are 12, 14, and 16 years old," the rule *reddendo singula singulis* tells the reader to take the predicate distributively: "Mary is 12 years old. John is 14 years old. Ruth is 16 years old." This is an authentic rule of interpretation, because it describes how people actually use and understand this kind of configuration of words. And so, in this area of "statutory interpretation," the law shares a specific rule with non-legal disciplines.

Compare with this the rule of law that is sometimes used to impute meaning fictitiously where meaning in the first sense fails to resolve the controversy. Suppose, for example, there is a statute in which section 4 contradicts section 2 and there is nothing in the language, arrangement, substance of the idea, or context of other statutes and legislative history that indicates which section is to prevail in the area of conflict. Here, some courts apply the rule that section 4 must prevail because it represents the later, reconsidered views of the legislature, which inadvertently failed to withdraw the formal expression of its original views.

There seems no escape from the conclusion that in such a case the court, failing to find an answer in the statute and its context, simply takes matters into its own hands and imputes to the statute a court-generated meaning. So doing, it amends the statute so that it may discharge its main function of resolving the controversy before it. Adopting the converse rule, which would select section 2, would do the job just as well and be just as consistent with the meaning of the statute, which by hypothesis tells the reader only that the statute contradicts itself.

Courts inject their ideas into statutes, and thus create law, in several kinds of cases. They may create law (1) by putting sharp edges on vague legislative concepts or by resolving ambiguities, (2) by filling legislative gaps or by supplementing the legislature's general rules with specific ones, (3) by refusing to give full effect to the most plausible ascertained meaning of the statute, as where it construes a statute "strictly" for the purpose of avoiding injustice or socially harmful results, (4) by extending the force of a statute, beyond what the ascertained meaning conveys, in order to deal with what a dissenter would call a "*casus omissus*," or (5) by acting by analogy with a statute of which neither the meaning nor the objective covers the situation in question. On the other hand, a court is not creating law when it merely corrects verbal errors that context shows were only slips of the legislative tongue.

Current legislative terminology, by implying a single concept of "statutory interpretation," tends to obscure the important difference between the finding of meaning, on the one hand, and the imputation of meaning or the judicial creation of law, on the other. Moreover, even within the latter category it fails to distinguish adequately between the various contexts, outlined above, in which judicial law making with respect to legislation takes place.

Considerations such as these suggest that the law needs a more discriminating terminology for designating the five or six different functions that a court performs with respect to legislation (several or most of which cannot be rationalized in terms of "meaning" without using misleading fictions), and a more intelligible delineation of these several functions in the light of the growing recognition of the courts' broad responsibility in correcting or supplementing legislative actions.

There has been much discussion of "statutory interpretation" with all its connotations of discovering meaning. On the other hand, there have been few clearly articulated notions of how far the court may or should go in creating law when confronted by a specific enactment. The problem is especially significant whenever there is, as there is in the United States, a general constitutional separation of powers. Although the courts have long been sophisticated about judicial law making in the broad context of the common law, they tend to sweep it under the rug of "statutory interpretation" whenever statutes are involved. This not only makes it hard to develop a wholesome concept of judicial creativity with respect to statutes but bastardizes the concept of meaning in the authentic sense, thereby tending to cut the law off from other fields with which it shares the general problems of communication.

The issue is raised most clearly in the “equity rule” cases and the “*casus omissus*” cases. It is also present, though in more subtle and insidious form, in the “strict construction” and “liberal construction” cases. A court that was interested only in ascertaining the meaning of a statute would have little occasion to construe it either “strictly” or “liberally.” If this is so, strictness and liberality in the reading of statutes, at least in their more extreme forms, represent the judicial constriction or extension, and therefore rewriting, of the statute, rather than interpretation in any authentic sense. This is not necessarily to condemn the substance of strict construction, but only to suggest the advisability of recognizing it for what it really is.

It is desirable to point out that this dichotomy between the ascertainment of meaning and the imputation of meaning (Professor Cohen’s “legisputation”) can improve our understanding of the creative aspects of the judicial administration of statutes, as the following papers demonstrate, without putting us in the line of heavy fire that Professor Witherpoon directs at attempts to use a somewhat different dichotomy to divide functionally what he contends should remain functionally integrated. I refer, of course, to his strictures on the dichotomy between interpretation or judicial law making within the scope of the statute, on the one hand, and judicial law making by analogy with the statute, on the other.

In view of difficulties such as these, the Journal is fortunate in having two highly competent legal scholars to discuss the proper role of the court in transcending statutory meaning in the normal lay sense for the purpose of adding to, improving, or even amending the statute. The two essays that follow fully attest that competence.