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JUDICIAL "LEGISPUTATION" AND THE DIMENSIONS OF LEGISLATIVE MEANING

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The realists have done so dramatic a job of unmasking certain pretensions of judicial objectivity[1] as to nourish an unfortunate cynicism which views statutory construction as no more than a subtle judicial de-

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1. Typical are these celebrated unmasking jobs: Hutcheson, *The Judgment Intuitive: The Function of "Hunch" in Judicial Decision,* 14 CORN. L.Q. 274 (1929); Frank, *What Courts Do in Fact,* 26 ILL. L. REV. 645 (1932); M.R. Cohen, *The Process of Judicial Legislation,* in LAW AND THE SOCIAL ORDER, 112-147 (1933).

vice for usurping that which rightfully belongs to the legislative arm of government. Although the exposé of the realists has focused a much-needed light on what the judicial function is *not,* the jolt of the exposé has served unwittingly to detract from observing what the function in this respect actually *is.* It is much like the unmasking of the heroine in grand opera. If the face uncovered is disappointingly not that of the raving beauty that one had imagined, it is not difficult to gain a very wrong and unfortunate impression of the real quality of her operatic voice. Granted that the task of ascribing meaning to vague and ambiguous statutes is *not* merely an exercise in formal two-dimensional logic; granted that the meaning of such statutes is *not* precisely discovered, but is somehow fashioned by the courts; granted that the maxims of construction are *not* the instruments of discovery that they, on the surface, might seem to be; granted that the courts in fashioning meaning do *not* blink at considerations of policy—granted all of this: Does it necessarily follow that they are really *making* law wholly out of judicial cloth, and thereby arrogating to themselves a power that more properly is within the province of the legislative branch to exercise? The answer to this question depends on the meaning that one ascribes to the word "making." Much disservice to government, and much unnecessary emoting over the distribution of governmental powers result from the failure carefully to isolate the various dimensions of the term.

The most obvious type of judicial law-*making* would be an instance in which both legislative language and purpose are unmistakably clear, yet the court, at odds with the legislative purpose, proceeds to ignore the language or to invent an ambiguity for the sole purpose of dissipating it, and then fills the void that it creates with its own cherished policy. This is law-making of the usurpatory variety, and though as bald as the bald eagle, is perhaps also as rare. Another type of judicial law-making is of the non-usurpatory variety, in which the legislative body, for a variety of reasons, consciously delegates to the judiciary the task of creating norms that it does not wish or perhaps finds too difficult to establish. The delegation may, for example, be a function of the inability of the legislative branch to enact specific workable standards of control into statutory law because of the complexity of the subject matter involved. An example is the Sherman Antitrust Act, in which open-ended, flexible control machinery rather than specific legislative norms were needed to cope with the complex variables in the subject matter sought to be regulated. The delegation, on the other hand, might well be a function of the failure of competing social or economic interests, battling in the legislative forum, to come to a workable legisla-

tive compromise. In such a situation, one not uncommon method for resolving the unresolvable is the purposive use of vague words in a statute. The higher the level of abstraction of the statutory language, the greater the chances for agreement. Once it is reached, the struggle, in effect, is shifted from the legislative to the judicial arena—it being tacitly understood that, in settling the problem of meaning, the courts are really resolving the conflict of competing interests. The technique involves a strategic use of obfuscating language; the process, though more artistic, is not unlike that of the machinery of voluntary arbitration.

Whether usurpatory or not, these examples of judicial law-making have this much in common. They involve, though in varying degrees, not as much a search for the *discovery* of legislative policy, as the conscious *creation* of *judicial* policy. They are, in the clearest sense of the term, examples of judicial legislation. Of these examples, the usurpatory type is obviously out of bounds; the others, because they are anchored on conscious legislative choice, may, at bottom, be legitimately structured as expressions of what the legislature itself really desired.

But what of the varied instances in which there is no discernible evidence of a desire or willingness to delegate such policy-making function to the judiciary, but in which legislative expression of policy is beset with vagueness and ambiguity? When the problem of meaning is localized on the *surface,* and the court examines the corpus of the statute as a detective would a *corpus delicti,* and then proceeds to reconstruct the statute as a detective would the crime, it is a misnomer to label such a function "judicial law-making" except, of course, when it is evident that the job of reconstruction is hasty, arbitrary, or otherwise not warranted. Barring this, however, the search, no matter how crude and actually mistaken, is for legislative meaning, and thus for legislative policy. Typical of the surface problems are aberrations of syntax, abnormal omissions and commissions of language. If the metaphorical flow may be pardoned, it is the problem of the broken tooth, the severed rib, the dislocated vertebra, the foreign splinter or imbedded piece of glass. Restoration and correction by dentist or doctor would be no more originally creative than the restoration of a statute that is maimed or injured by the careless or hasty use of the vehicle of language. At best, what is involved is skilled craftsmanship. There are objective standards to follow: the human body does have normally expected features. And so do words.

There may be injuries below the surface—internal injuries as the medics would call them—a twisted hernia, a blood clot, an abdominal

block. In the statutory realm there may be internal inconsistencies within or between statutes, the correction of which may well call for quick judicial surgery, lest serious consequences ensue. There are those who would loudly insist that the consent of the patient—in this case the legislature—first be obtained; and that no matter how serious the situation, the judge should not proceed on his own, for otherwise he would be acting beyond the scope of his authorized power. But if the surgeon did operate without prior approval, it would most likely be not because *he* wanted the patient to live, but rather because it would not be unreasonable to assume that, under the circumstances, most people would prefer surgery to certain suffering. Similarly, if the judge boldly resolved the statutory inconsistency, it would most likely be not because *he* valued consistency, but that it would not be unreasonable to assume that the legislature valued it more highly than it did inconsistency. If such is the basis for judgment, it is no less objective than the standard of reasonable man in the law of torts. Thus, a judge in reconciling two apparently inconsistent statutes would not necessarily be *making* law in the sense that he would be substituting his private judgment for that of the legislative branch. The basis for judgment could be nothing more than the estimate of probability of legislative behavior—the same kind of probability theory that is used when it is decided that the legislature in using a word or phrase could most likely only have meant what most people using the English language mean by the term.

It is when the courts go searching for legislative meaning beneath the surface of the specific enactment to the more hidden recesses of the legislative mind that one is apt to discern a more bristling resistance to what is deemed to be judicial law-making, and thus an unwarranted interference with the legislative prerogative. The sub-surface search for meaning not infrequently takes place when the court approaches a statute not as a specific rule, but as a principle from which to reason—a landing field, as it were, from which subsequently to take off. A statute requiring the muzzling of dogs, without the qualifying word "only" before "dogs," might well, under this approach, be interpreted as meaning a general class of potentially harmful animals, and thus include within the larger class the case of the lion or tiger. But in the search for principle, the court would not feel necessarily confined to the words or to the context of the particular enactment the meaning of which is in question. It might search for a broader base on which to perch; it might look to the past, examine other particular expressions of policy for connecting links, and inductively piece together a pattern of past policy—a gestalt—of which the legislative body itself might not

have been consciously aware. Much of this mode of procedure is not unlike the probings of the psychiatrist who searches for the more hidden, inarticulate expressions of feelings and goals in an attempt to fit the particulars of experience into a more meaningful whole. Once the pattern is discerned—or, as one jurist has suggested, "divined"[2]—the judge's function is an interpretation much like that made by the psychiatrist, i.e., that of fitting the particular problem case within the larger framework of the legislature's own values and goals.[3]

In principle, at least, if the search for legislative meaning erases the stigma of judicial law-making in the sense that there is no conscious attempt to substitute judicial for legislative policy—it should make little difference whether the probing is on the epidermal, endodermal, internal or subconscious levels. For these are but different aspects of the organism being examined. To the extent that the search in these areas is in earnest and not a subterfuge for the establishment of judicial policy, the labels "judicial law-making" or "judicial legislation" are perhaps ill-advised and unfortunate, for they bespeak of something created out of whole judicial cloth, and not something earnestly searched for. I would suggest a substitute term considerably less harsh, and more fitting: It is the process of *judicial legisputation.* Since the actual meaning or purpose of vague or ambiguous statutes cannot be discovered with absolute certainty, the court would endeavor to do its best to impute meaning or legislative purpose. When it so imputes, it would not really be legislating, it would be *legisputating.*

To legisputate is not to discover precise legislative meaning. Granted ambiguity and vagueness, precise meaning is obviously not there to find. To legisputate is to impute *probable* meaning—not probable judicial meaning, but probable *legislative* meaning. Probable in what sense? Not what the legislature probably would have done were it rushed and harried, because it probably would have done what it did do—namely, pass a vague and ambiguous statute. No—probable in the sense of what it would have done had it the time and the awareness of the problems that hindsight now permits.

But, granted this for the moment, not all kinds of legisputations are treated with the same degree of respect or deference. I venture to suggest at least one reason for this: That the respect and deference vary in direct proportion to the reliability of the standards available for

2. Frankfurter, J. in Keifer & Keifer v. Reconstruction Finance Corp. & Regional Agricultural Credit Corp., 306 U.S. 381 (1939).

3. An example of this method is seen in United States v. Hutcheson, 312 U.S. 219 (1940).

testing objectively the plausibility of what is imputed. The greater the reliability of these standards, the greater the confidence that the judiciary will be held in appropriate check and confined to limited quarters. The greater the reliability of these standards, the greater the confidence in the ability to predict what the interpretation of the law will be. Imputations drawn from the epidermal level are usually regarded as the most reliable, since they relate to language and syntax, and are, accordingly, subject to objective critical standards of common usage. Unwarranted deviations from these accepted standards would expose a sensitive judiciary to justified charges of usurpation, and thus serve to curb excesses of judicial power.

On the other extreme of the spectrum are the imputations drawn from the subconscious level of legislative purpose. In terms of reliability, they bear to the first type of imputation a relationship not unsimilar to that which psychiatry bears to medical science. There is greater trust in the physically observable than in fine-spun theories of the intangible human psyche. Judicial theory-spinning which endeavors to weave meaning out of disparate expressions of policy of different legislative bodies at different points of time are looked upon with understandable suspicion. The theory-spinning somehow remains on the level of plausible hypothesis; competing plausible hypotheses are readily available, but not so readily available are the criteria for convincingly determining one as being more plausible than the other.

In the middle of the spectrum are imputations bottomed on the avoidance of legislative inconsistencies. Here, objective standards are available—the rigorous standards of logic. But logic is useful for *exposing* inconsistencies or contradictions in legislative policies; something more than logic is needed for choosing between them. That extra something is a policy the plausibility of which is not susceptible to such rigorous proof—thus the belief in the view that it is more properly a function of the legislature than of the judicial branch.

II

The hypothesis that has been ventured endeavors to explain merely *why* there are gradations in attitudes towards different types of legisputations. It does not tell us at what point judicial legisputations *should* or *ought* to be regarded as legitimate, granted gradations in the reliability of proof. The *why* is behavioral in scope; the *ought* is normative, requiring an analysis of ends as well as means.

Those who would limit judicial legisputations to those instances in which standards of proof are fairly objective and rigorous would

give great weight to the value of certainty—certainty for the legislative body that the authorship of statutory policy is *clearly* legislative; certainty for those affected by legislation in knowing with reliance that the law, in the main, is just what it says. But a relentless pursuit of certainty is not without loss to other competing values, and it would be well to examine them before drawing too narrow a line for the confinement of the judicial function. Against certainty might be posed three competing values: flexibility, harmony, and insight. Carried to an extreme, certainty could be achieved by confining the court to the literalness of legislative language, no matter how awkward the artistry, how distorted the imputations, or harmful the consequences. But one price for its realization, under such circumstances, would not only be the injustice to those harmed by the literal construction, but an inordinate amount of delay in correcting what might not have actually been intended—granted the present complicated machinery of the legislative process. It would involve the introduction of bills to correct and adjust, committee hearings, debates, reports, parliamentary maneuvers, log-rolling and, finally, executive surveillance. Another price to pay would be the diversion of a scarce commodity—legislative time—away from high-level study and high-level policy making. In a stable society, the legislative body could better afford the time to deal with particulars, but in a society on the move, change and an accommodating flexibility, rather than constancy and certainty would be more the order of the day. Absorption in the details of policy would paralyze efforts needed for charting the main course. Clearly, then, a certain amount of flexibility in policy detail is needed, and it can be achieved by empowering the court, in the interest of eliminating absurdities, or inequalities, or other obvious policy oversights, to look at a statute not narrowly and exclusively as a rule, but as a principle from which to reason. *Riggs v. Palmer*[4] is a case in point, where a statute prohibiting property transmission occasioned by fraud was construed to prohibit transmission occasioned by murder. Fraud was treated not as a generic class, as the literal language might suggest, but as a species of a larger generic class imputed to avoid absurdity of policy. The need for flexibility is also occasioned by the lapse of time, during which rapid social change may have outmoded specific referents in statutes, but not necessarily the principle underlying them—the need, for example, to adapt principles extracted from horse and buggy statutes to analogous problems of the automobile age. Or the need might be not for change in

4. 115 N.Y. 506, 22 N.E. 188 (1889).

the specific referents, but in the changed social attitudes towards these referents—as in the case of the illegitimate child.[5]

The values of harmony and insight, as distinguished from flexibility, must be viewed against a projected image of the legislature as a continuing policy-making body, and not as a succession of disparate policy-making groups wholly and sharply cut off from the pull of the past. The reason for this would seem clear: the body politic, which the legislature is empowered to represent, is a continuing organism which moves forward only from the habit patterns of the past. So viewed, a mechanism is needed to insure not only internal consistency with the immediate present, but to fit present policy meaningfully and harmoniously into the mosaic of the past. It is not meaningful to treat later enactments automatically as abruptly superseding everything in the policy area that preceded it. There is always the problem of how much of the past was cut off, and with what intensity. The literalness of an order, later in time, to move a small shipment of freight from a spur to a main track might well need softening in view of an unexpected delayed approach of a crack passenger train. What is too often lost sight of is that the problem of harmony usually is not the easy one of reconciling logical inconsistencies of *language,* but of reconciling the competing public values behind the language—values with complex dimensions of intensity as well as extensity.

As with harmony, so with insight, which aside from its own intrinsic value, is necessary instrumentally if real harmony is to be achieved. It is insight that is needed to bring to the fore of consciousness the deeper meaning of policy that is implicit in the seemingly disjointed and varied expressions of diverse legislative bodies over a wider range of time. What on the surface seems like loose legislative filings might, to the discerning eye, reveal a design shaped by a magnetic value field of which the legislative body itself was not aware.

The values of flexibility, insight, and harmony, in effect, add new dimensions to the concept of legislative meaning. Their pursuit suggests that meaning is something more than what might be imputed from the surface literalness of the language of the last legislative enactment; that meaning, as such, also has dimensions in depth as well as in breadth. It suggests, further, that the legislative body whose meaning is probed is not the actual one that enacted the legislation in question, but an idealized version of that body—a continuous one with ties to the past,

5. See, for example, Marshall v. Industrial Commission, 342 Ill. 400, 174 N.E. 534 (1930).

less harried, in fuller command of the salient factors and a desire to be consistent with itself.

If the values of flexibility, harmony and insight were readily achievable by the legislative branch, I would not hesitate to suggest that their realization, and therefore the final articulation of meaning, be left to that branch. For it would bespeak consistency with our basic philosophy of government. But, in the nature of things, the legislative branch, as it is presently constituted, is ill-suited for the task. Its forte is compromise, i.e., the making of treaties of peace with competing interests; it is hurried—accordingly, the craftsmanship of law-making suffers; its mood is not contemplative and reflective; it does not have time, granted its incredible pressures; its machinery for adapting the new to the old is at best cumbersome; the occasional restatements, revisions and codifications, while helpful in crystallizing meaning up to a point, are ineffective in sealing off the flow of new interpretative problems.

This is not to say that the courts are perfectly suited for the task of dealing with the dimensions of meaning. Judges are not specially trained in the complexities of juristic method; they are not subjected to the rich seasoning of ethical philosophers; they are, by and large, plucked from a life of busy, successful practice, and not from the quieter halls of academe. But on balance they seem better equipped. The institutional framework into which they are thrust is, despite crowded dockets, more contemplative and unhurried; and the very nature of the problems which judges face impels them to develop skills for fulfilling their task in breadth and depth. To allow the judiciary to deal with the problems of meaning as a multi-dimensional phenomenon is not, of course, without danger. There is always the risk that the judiciary will, advertently or inadvertently, go off on its own path, completely ignoring legislative footprints; there is even the greater risk that multi-dimensional latitude would cause undue harm to those affected by the law because of the lessening of predictable certainty and the increase in the element of surprise. But aside from the restraining influence of the critical eye of the legal profession, the legislature is not without remedy for correcting unwarranted strays from expected paths; nor are methods completely wanting for minimizing surprise or softening its impact when it is unavoidable.

The problem of the permissible scope of judicial legislation would thus ultimately seem to involve a choice between two competing kinds of injustices. The first is the injustice of uncertainty—injustice to those who would rely on the clarity and predictability of the law to guide their conduct within permissible bounds so as to avoid the sting

of legal sanctions. The wider the range of meaning, the wider the scope of judicial legisputations, and, accordingly, the greater the uncertainty. The second is the injustice of haste, oversight and undersight resulting from the cumbersomeness and complexity of the legislative mechanism—injustice to those who, because of these infirmities, would be denied equality and fairness of treatment under law. The choice between these two injustices is clearly not between black and white. As is true of much of the law, it is between a slightly lighter and a slightly darker shade of gray. But the blurred lines become somewhat less blurred when it is realized that at stake is not certainty *per se,* but the substitution of one kind of certainty for another. With the sacrifice of the certainty of literalness of language there is no need necessarily to assume the absence of the certainty of principle behind such language.

To choose the broader range of legisputations is not to advocate an ignoring of legislative goals. To the contrary, it means clarifying them and making explicit what is implicit in them. If it means smoothing their rough edges; if it means reconciling them; if it means extending or limiting them when tested by the unforseen consequences of the concrete case, it does not necessarily mean the substitution of judicial for legislative policy. Clarification, refinement, and harmonization may be the added increments, but it is the clarification, refinement, and harmonization of *legislative* policy in order to make *that* policy as rational as possible, and thereby to maximize *its* effectiveness. In so doing, the approach to legislative meaning is not through the narrow lens of the grammarian, but through the broader vision of the ethical philosopher, who, though confronted with the specific of a moral command, cannot begin to discern what it really should import without endeavoring somehow to fit it into the value scheme as a whole.