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FACTORS INFLUENCING JUDGES IN INTERPRETING STATUTES

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There has been recent discussion [1] of abandoning the literal meaning rule and most of the other rules of statutory construction. A broader principle is favored which will allow the full play of the rational processes of the court. This view has great appeal, and, in terms of freeing judges who apply rules as rules without regard to their object, serves a need. But if it means a sudden release of the judiciary from always starting with a statute as it reads—as it is written—as it has meaning for most of us—it is a harmful suggestion. Law is something more than administration and the court must recognize that it cannot always reach the rational result for the particular case without sacrificing systematic treatment for guesswork. There *is* a science of principles and rules which is basic to an orderly society. This paper will attempt, however, to appraise recent cases from the viewpoint of factors influencing judges in interpreting statutes rather than the more conventional one, for the purpose of finding any new or useful ideas that may be there.

I. Philosophy or Predilections of the Judge

A. *Any Source of Intention*

Recently [2] the Postmaster General excluded certain books from the preferential postage rate on the ground that they had blank pages. After Congress had amended the statute to provide that books with incidental blank spaces for student notations should be entitled to the preferential rate, the Postmaster again excluded some of the same books on the ground that they were not permanently bound and therefore not books within the meaning of the statute.

Judge Groner found no clear indication of Congressional intention in the statute. In searching for a rational basis for decision he looked to an industry exhibit before the Congressional committee preparing the amendment to the statute. The exhibit contained some books which were not permanently bound. From this Judge Groner inferred that the committee and through it Congress must also have intended to include loose-leaf books when the statute was amended, although the only purpose of the amendment was to provide for books with incidental blank pages and not to define what was meant by the

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1. Horack, *The Disintegration of Statutory Construction*, 24 Ind. L.J. 335 (1949).
2. McCormick-Mathers Pub. Co. v. Hannegan, 161 F.2d 873 (D.C. Cir. 1947).

word book. Because the committee had looked at an exhibit of books it was decided that Congress had intended to include all books in the exhibit which the industry was contending should have the preferential rate.

It is difficult to see how an inference can be made from what industry wanted to what Congress intended to give it. The search of Judge Groner for other elements than the ones present on the face of the statute, and customary rules of interpretation, did not succeed in adding anything. The search was not a necessary or a productive one. Obscuring his reasoning he says, "[I]t follows *logically* that textbooks of the make and quality of those of appellant were considered and purposely included by Congress in the list of publications entitled to the book rate." [3]

Judge Groner apparently did not like the fact that the Postmaster General should seek another basis in the statute for excluding part of the same general type of books after Congress had amended the statute. But in spite of the amendment there was an appropriate problem of interpretation for the Postmaster General as to whether the word book meant one permanently bound. This problem is not best answered by guessing at Congressional intent by reference to an industry exhibit intended to influence that intent, or at least that of the Committee.

Adherence to old principles requiring a simple reading of the statute (which the court does, but shies away from) would seem an adequate basis for judicial treatment of this type of case, and one less likely to bring in irrational elements which are not subject to satisfactory evaluation. The plain meaning rule thus used is not an inexorable or inflexible formulation to prevent the use of common sense. It provides a restraint on arbitrary action—a starting point beyond which the judge need not move unless required to do so by necessity. It establishes the norm for legislative interpretation. Departure therefrom should be justified by something more than that some basis for interesting speculations as to Congressional intent can be found.

A second ground which undoubtedly influenced Judge Groner might be called attitude or predisposition. It was exhibited by his statement that the administrative efforts to remove evils, "if evils they be," were not favored in this type of case where Congress had retained for itself the right to determine what should be carried as second class matter. But Congress had not seen fit to define "book" specifically. Any existing evils would be a good and traditional background for determining the meaning of Congress. It would certainly be difficult to justify an interpretation based upon the idea that Congress intended to foster the evils. At this point the onus must be placed on draftsmanship. If Congress has not made its position clear, evils necessarily are a proper source for the discovery of meaning.

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3. *Id.* at 875.

B. *Consistency with Related Legal Principles*

In *Morris v. McComb,*[4] the Supreme Court split five to four on the question of whether the maximum hours of service of drivers and mechanics (where only a small part of the business was interstate in character) fell under the Motor Carrier Act, which is administered by the Interstate Commerce Commission, or under the Fair Labor Standards Act.

The minority thought decisions on interstate commerce, with respect to the scope of federal power, did not establish a pattern or system of law which ought to influence the Court's judgment when Congress referred to interstate commerce in delineating the jurisdictional boundaries between two agencies. According to their view, the meaning of "interstate commerce" in the Constitution in the context of the struggle for federal power was not the same thing as the meaning Congress might intend for the phrase "interstate commerce" when used in a statute devoid of constitutional questions relating to power of the Federal Government.

To the majority of the Court, the factors of eliminating jurisdictional decisions and consistency of interpretation on what is interstate commerce were of major importance. Irrespective of the proportion of interstate commerce, they held that the Interstate Commerce Commission had jurisdiction.

This split in opinion occurred in spite of the fact that the Court had already decided upon a *policy* of placing as many cases under the Fair Labor Standards Act as could be squeezed into it.[5] There is here a conflict between those who interpret chiefly upon the basis of some policy which has been decided upon (or which is desired) and those who seek a reasonably systematic expression of law. To the minority of the court, the factors of systematic expression of law and the policy of elimination of jurisdictional cases should not override already settled policy which placed as many employees as possible under the more favorable Fair Labor Standards Act rather than under the more conservatively administered Motor Vehicle Act.

Justice Murphy suggested the "rule" that exemptions from the operation of humanitarian legislation are to be narrowly construed:

> "Due respect for the legislative purpose militates against such a result. We are dealing here with a statute that is dedicated to the proposition that laboring men are to be treated as something more than chattels. And their rights are not to be discarded by adherence to formalistic dogmas of interpretation. Section 13 (b) (1) is not just an exercise in grammar. It is part of the living fiber embodying the rights of those who labor for others." [6]

Distrust for the Interstate Commerce Commission and the desire to have

4. 332 U.S. 422, 68 Sup. Ct. 131, 92 L. Ed. 44 (1947).
5. United States v. American Trucking Ass'ns, 310 U.S. 534, 60 Sup. Ct. 1059, 84 L. Ed. 1345 (1940).
6. 332 U.S. at 439.

the widest possible scope to the Fair Labor Standards Act are the chief grounds upon which the dissent of Murphy rests. Under such a theory, all legislation should be interpreted to accomplish the desire or predilections of the particular judge who happens to be making the decision. Systematic, or even reasonably systematic, expression of law can never rest upon such a basis.

If, of course, the Supreme Court as a body of intelligent men were to be committed the duty of formulating law as they thought it ought to be,[7] and of correcting Congress where it may have legislated poorly, inadequately, or even in favor of special interests, then such reasoning would seem acceptable.

C. *Attitude toward Administrative Decision*

A few years ago Judge Parker held that a letter of advice with regard to the administration of the Emergency Price Control Act for the guidance of price attorneys operating under the OPA was not entitled to the weight that courts accord to administrative interpretation evidenced by settled administrative practice. The court through Judge Parker said:

> "And we do not think that the Administrator's case is helped by what is referred to as the 'Gottesman-Ailes Interpretation.' This interpretation does not, of course, like a regulation, have the effect of law. Being merely a letter of advice with regard to the administration of the act promulgated by assistant general counsel for the guidance of price attorneys operating under the office, it is not entitled to the weight that the courts accord to an administrative interpretation evidenced by settled administrative practice. . . . *It would be absurd* to hold that courts must subordinate their judgment as to the meaning of a statute or regulation to the mere unsupported opinion of associate counsel in an administrative department."

Then the judge makes an amazing switch to apply the general rule. He continues:

> "Since, however, the interpretation in question received the sanction of the Administrator as an official interpretation, it is entitled to *respectful consideration* by us in interpreting the regulation. . . ." [8]

The court here shows it is entirely out of step and patience with administrative regulation but does not know what to do about it. The constructive attitude would be to insure workable rules for the interrelationship of courts and administrative agencies, and to fire away on the political front at the substantive aspects of bureaucratic action. Idle and confusing, it is, to state, as this judge does, on the one hand that the interpretation was a mere letter of advice, then immediately to follow it with "since" it had received the

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7. A view already present in certain classes of cases, particularly those involving special interest legislation. See part III of this article.

8. Southern Goods Corp. v. Bowles, 158 F.2d 587, 590 (4th Cir. 1946) (italics added).

sanction of the Administrator as an official interpretation, it was entitled to respectful consideration. The emphasis of the case is to encourage disregard by judicial tribunals of administrative interpretation. To do so promotes disregard for law. The courts as the stabilizing institution of society should not lead in this direction.

A better approach to such problems is found in a case before the federal district court, where Judge Murphy says of an interpretive bulletin of the Office of Housing Expediter:

> "The right of an administrative agency to issue interpretations of this character is already established. Such interpretations are entitled to great weight . . . and will be held controlling unless in manifest conflict with the statutory terms." [9]

The court then quotes the Supreme Court of the United States:

> "While the interpretative bulletins are not issued as regulations under statutory authority, they do carry persuasiveness as an expression of the view of those experienced in the administration of the Act and acting with the advice of a staff specializing in its interpretation and application." [10]

It is a brave lawyer who would hazard a general statement of the rule under the Administrative Procedure Act. Common sense tells us that the only possible rule is the one stated by the Supreme Court in the last quotation. A citizen is entitled to some protection with respect to his over-the-counter dealings with his government. At some point even easual information of government officials must be a part of the context in which law is administered, just as custom is frequently so ingrained in law (either through the jury system, or otherwise) as to be inseparable from it. To a lesser extent, perhaps, the same must be true where the government is contending that the meaning of a regulation was clear in the public mind because of informal efforts to make it clear.

D. *Premises Derived from Modern Science*

Modern scientific findings and attitudes are appearing in the opinions of several judges as dominant factors influencing their judgment in interpreting legislation, determining the common law and in settling constitutional issues. Such sources of law are regarded by them as furnishing for many cases a better premise than traditional rules of law.

Where the judge is testing the old rule in the light of modern knowledge, an examination of these possible sources of law may be useful. In a recent case the court had to determine the constitutionality and appropriate interpre-

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9. Woods v. Palumbo, 79 F. Supp. 998, 1001 (M.D. Pa. 1948).
10. *Id.* at 1001 n. 3, quoting from Overnight Motor Transp. Co., Inc. v. Missel, 316 U.S. 572, 581, 62 Sup. Ct. 1216, 86 L. Ed. 1682 (1942).

tation of a statute allowing the judge in passing sentence in a criminal case to consider "any information that will aid the court in determining the proper treatment of such defendant." The judge under this statute substituted the death penalty for a jury recommendation of life imprisonment after consideration of information not admitted formally in court but obtained from the Probation Department and other sources. In upholding the right of the judge to do this the Supreme Court said:

> "Undoubtedly the New York statutes emphasize a prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime. The belief no longer prevails that every offense in like legal category calls for identical punishment without regard to the past life and habits of a particular offender. . . . Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence." [11]

Thus we see that the modern court determines even such important guaranties as due process in the light of modern scientific findings and ideals as well as in the light of the results of an analysis of applicable principles of law.

Murphy and Rutledge, though dissenting, have no quarrel with the use of modern science, but would decide the particular case, as a capital case, on their idea of the place of the jury system in American law.[12]

Judge Jerome Frank is an advocate of finding the premises of modern law wherever modern knowledge can shed light. In *Roth v. Goldman,*[13] he takes judicial notice of the report of the biologist Kinsey on sexual behavior and of books of psychiatrists and psychologists. These he uses in deciding whether Congress has constitutional power to authorize the Postmaster General to bar obscene books from the mails, and in making an interpretation of the law giving the Postmaster this duty. This excursion into scientific knowledge provides interesting reading, but no very intelligent application of the knowledge appears in the case. If Judge Frank could prove by the best available knowledge that the widespread dissemination of lewd and lascivious matter has no general effect on the moral tone of a people, he would have scored an important point. Instead, he talks of whether the average American opinion and that of the intelligentsia favor reading obscene matter and freedom of access to it on a commercialized basis.

Propaganda has developed too far in its insidious and hypnotic effect to

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11. Williams v. New York, 337 U.S. 241, 247, 69 Sup. Ct. 1079, 93 L. Ed. 1005 (1949).
12. ". . . the jury sits as the representative of the community; its voice is that of the society against which the crime was committed. . . . I agree with the Court as to the value and humaneness of liberal use of probation reports as developed by modern penologists, but, in a capital case, against the unanimous recommendation of a jury, where the report would concededly not have been admissible at the trial, and was not subject to examination by the defendant, I am forced to conclude that the high commands of due process were not obeyed." *Id.* at 253.
13. 172 F.2d 788 (2d Cir. 1949), *cert. denied,* 337 U.S. 938 (1949).

say that the earnest and sincere efforts of the most intelligent must not provide broadly for the average American and his mental health. Society would never have progressed except for some compulsive rules founded in morality and having the sanction of law. Perhaps society cannot legislate morality; nevertheless society can see through government that the conditions are provided for its fruition and the conditions for the fruition of immorality are deterred. Restrictions on the dissemination of matter which is utterly incompatible with the decency and dignity of man is a fair, effective and democratic way of eliminating one of the conditions generally conceded to lead to immorality. While what is "utterly incompatible" may be a general principle, it is one which men of good will find can be applied more fairly with respect to matters of this kind than would be the case with more specific rules which Judge Frank seems to advocate if any restrictions are to be applied. Administrative matters of this kind must be left at the administrative level. Courts will never be able to articulate useful specific rules unless they are willing to bear a burden of cases which makes them supplant the agency delegated the duty of making the determination.

In the broad area of human relations, the standards which have been generally applied have not tried to distinguish bad from good reading matter. That is left, as it should be in a free and democratic nation, to the individual. To do otherwise than deter that which is utterly incompatible with decency is to say that we should allow ourselves to be ruled by organized groups who will utilize all the knowledge of modern science to break down our will to seek the best society man can devise. The moral compulsions leading to the founding of this nation are still with us and provide a sound framework for the development of a nation which can lead towards international as well as national morality. Can it be said that there will be no compulsive principles necessary to bring about international morality? And these principles will have to be administered by men in the framework of their conceptions of morality tempered by law and science.

II. PUBLIC ATTITUDE AT THE TIME OF INTERPRETATION

The effect of the re-employment provisions of the Selective Training and Service Act as it applies to the ordinary contract of the Greyhound System came up for consideration in *King v. Southwestern Greyhound Lines, Inc.*[14] The contract attempts to create an independent contractor instead of an employer-employee relationship with the Greyhound Company in the maintenance of bus stations. The court held, in spite of the contract, that an ex-service man who had managed one of the bus stations before the war was to be considered an employee of the company entitled to the benefits of the Act.

14. 169 F.2d 497 (10th Cir. 1948).

The same factors which influenced the judges in deciding the *Greyhound* case appeared in the *Brooks* case.[15] There the Supreme Court of the United States decided that a soldier who was riding on leave in a private automobile could recover under the Tucker Act for injuries received from the negligent driving of a truck owned and operated by the United States although there were other benefits to which he was entitled as a result of his status as a member of the United States Armed Forces.

In both cases the real question is how much a court will be influenced in interpreting a statute by its knowledge that the legislature and the people at the time the interpretation is made are very much interested to see that the veteran has no cause for compaint from treatment by his government. This, if we are realistic, is part of the context in which the statute must be interpreted. Otherwise an adverse decision will merely mean appeal to the legislature and the whole problem becomes one of words, delay and confusion. If, of course, the strategy is one of avoiding the issue by delay, this interplay of court and legislature can produce the desired result.

When the context was different—a period of national emergency during the last depression—when non-veterans were almost as prominently in the picture as veterans the court reached a different interpretation.[16] It was then held that veterans' preferences did not exist with respect to certain ambiguous legislation. The interpretations in these last two cases both seem correct if we consider the difference in the public attitude at the time each was made. A court cannot close its eyes to realistic factors such as those exhibited in these cases if it is to function smoothly, efficiently, justly and even with appropriate regard for systematic expression of law.

III. Fundamental Public Attitude

Often when the phrase, "statutes in derogation of the common law are to be strictly construed," is used, the court is seeking a convenient way to make some policy of the common law which is reflected in basic notions of the people still operative in spite of some special interest legislation. This is the type of policy which would generally be reflected in the case if it were left to a jury.[17]

In *Shifflette v. Lilly* [18] the hotels had been able to secure legislation softening the strict rule of liability of innkeepers to their guests in respect to their persons and property. In spite of rather clear wording, the statute was interpreted as placing such a burden of proof of certain factors on the hotel keeper that almost all such cases would have to go to the jury where the result would

15. Brooks v. United States, 337 U.S. 49, 69 Sup. Ct. 918, 93 L. Ed. 884 (1949).
16. Gossnell v. Spang, 84 F.2d 889 (3d Cir. 1936).
17. Phelps, *What is a Question of Law?* 18 U. of Cin. L. Rev. 259 (1949); Phelps, *Appellate Court Articulation of General Standards of Conduct,* 8 Ohio St. L.J. 173 (1942).
18. 43 S.E.2d 289 (W. Va. 1947).

usually reflect concern for the guest. Statutes covering this type of problem accomplish no major change in law unless they are implemented by reasonable appellate court rules supporting the hand of the trial courts in taking such cases from the jury. Where the statutes are redrafted to take care of the "needs" of special interest groups, the law in operation remains virtually the same unless the trial court takes a stronger position in applying the law to the facts than is customary.[19]

The courts are vetoing or permitting the veto of legislation considered and passed by the legislature when they adopt rules which permit a strong public sentiment to override such legislation. Yet the Anglo-American system of law has always provided this means for expression of democratic sentiment both in civil and criminal cases. In our present day society, however, where the intelligent interplay of strong group pressures calls for more intelligent treatment of their problems, can a fairly won contest before the representatives of the people be allowed to be nullified at the whim of the people? The necessity for newer techniques for protection of all groups before the courts is one of the great challenges of our day. We passed from the day when brute force was an important element in trial by combat to the time when courts were established to try cases. There brute intelligence—or the rough sense of justice of the common man—was substituted for brute force. Today, are we to find a substitute for this rough sense of justice in trained and properly selected judges in whom runs the common touch bolstered by the deep insights of the law? While some danger lies in this choice, it seems that the same protection against arbitrary action exists that protects a democratic society—liberal and free education. Such legal education should not fail to provide better servants of society than the average juror. This does not mean that the jury system should be discarded completely, but it does mean that the hand of the judge in the trial of cases should be strengthened.

A strong argument can be made that the only appropriate protection for a fairly won legislative advantage which is *also* popular with the people is by the refusal of the courts to engraft any interpretations on the act. Regarding interpretations of the Federal Employers Liability Act Mr. Justice Douglas has said:

> "That purpose was not given a friendly reception in the courts. In the first place, a great maze of restrictive interpretations were engrafted on the Act, constructions that deprived the beneficiaries of many of the intended benefits of the legislation. . . . In the second place, doubtful questions of fact were taken from the jury and resolved by the courts in favor of the employer. This Court *led the way* in overturning jury verdicts rendered for employees. . . . And so it was that a goodly portion of the relief which Congress had provided employees was withheld from them." [20]

19. See note 17 *supra*.

20. Concurring opinion in Wilkerson v. McCarthy, 336 U.S. 53, 69, 69 Sup. Ct. 413, 421 (1949) (italics added).

With a keen insight into the problem, Mr. Justice Frankfurter asks the pertinent question for an appellate court whch is often lost sight of. He says:

> "Such power [to control the docket] carries with it the responsibility of granting review only in cases that demand adjudication on the basis of importance to the operation of our federal system; importance of the outcome merely to the parties is not enough." [21]

The cases of importance to the operation of the federal system will be those in which the court can enunciate an effective operative rule for the trial court or administrative agency. Occasionally the court will have to correct manifest injustice in spite of the fact that its opinion can be operative in the single case only. It must be admitted, too, that the cautionary effect of such a case may occasionally have definitive results in guiding trial courts to more just administration of law.

Parenthetically, because the appellate courts have given little attention to *how* to enunciate effective operative rules for the problem of unlawful searches and seizures, it is ridiculous to pay much attention to Supreme Court opinions on this subject. No touch of guidance is provided and the law on this subject is in a very unhealthy state. In such cases the general rule should be to uphold the trial court except where manifest injustice appears. The premise is too broad for articulation rulewise. Most trial judges understand the goal which is sought, and the application of the constitutional principle to the particular case, given a fair trial judge, will be just as sound as any arrived at by an appellate court.

IV. Protection of the Public

It is difficult to determine today what principles the courts will follow in criminal cases where traditionally the rule of strict construction or the rule of *ejusdem generis* would have dominated the thinking of the court. More and more consideration is being given by courts to the type of crime involved and to the need for strengthening enforcement of the law relating to that crime.

In Virginia a statute provided as an element of the crime of kidnapping that the act was "with intent to extort money, or pecuniary benefit." The court found that this element appeared where it was shown that a motorist had been forced at the point of a gun to start driving the defendant from Richmond to Washington.[22] "Pecuniary benefits" was interpreted to cover free transportation. While the crime was serious, it may be doubted if the statute was intended to include it—at least under older applications of the rule of strict construction.

A similar approach has been applied recently by the Supreme Court of the United States in determining under an escape statute when the penalty for

21. 336 U.S. at 66-67 (concurring opinion).
22. Krummert v. Commonwealth, 186 Va. 581, 43 S.E.2d 831 (1947).

escape began to run where a person had been serving several consecutive sentences. The Court said:

> "We are mindful of the maxim that penal statutes are to be strictly construed. And we would not hesitate, present any compelling reason, to apply it and accept the restricted interpretation. But no such reason is to be found here. The canon in favor of strict construction is not an inexorable command to override common sense and evident statutory purpose. It does not require magnified emphasis upon a single ambiguous word in order to give it a meaning contradictory to the fair import of the whole remaining langnage." [23]

In another Virginia case [24] a broad construction of a statute was made so that the possession of a regular check-writing machine with intent to use it in forging checks was interpreted to be a criminal act within the meaning of a statute obviously intended to cover things "adapted" and "designed" for the forging and false making of any writing.

Where the crime involved has been less serious the Virginia court has continued to apply the rule of strict construction.[25] An owner of a truck standing in front of an ABC store who was seen to place in it an illegal quantity of liquor in small legal quantities was held not to be engaged in the illegal transportation of liquor. This view was followed in spite of the general rule during the prohibition era that it was not necessary to show that a vehicle was in motion to show illegal transportation of liquor. The court said the prohibition rule was based on a legislative directive that the Prohibition Act was to be construed liberally to effect its purpose. No such legislative directive appeared in the ABC statute.

The only difference between the kidnapping and forgery cases and the ABC violation lies in the nature of the crime. Unless this is an important factor, it is difficult to see why all such statutes should not be construed to accomplish their purposes as determined on a common sense basis. If anything, the seriousness of crime and its attendant punishment should make it more important to be sure the criminal understood the requirements of the law.

But it is hard and probably ought to be hard to get the human or the legal mind to avoid a consideration of the nature of the offense and the measure of protection needed by society. The Supreme Court has said: "We resolve the doubts in favor of that construction because deportation is a drastic measure at times the equivalent of banishment or exile." [26]

This problem will be a particularly thorny one in dealing with the enforcement of administrative regulations. Due to the mores of a free society, the crime of violating an administrative regulation ordinarily does not fall

23. United States v. Brown, 333 U.S. 18, 25, 68 Sup. Ct. 376, 92 L. Ed. 442 (1948).
24. Smith v. Commonwealth, 190 Va. 10, 55 S.E.2d 427 (1949).
25. Newman v. Commonwealth, 187 Va. 803, 48 S.E.2d 355 (1948); see also Patterson v. Commonwealth, 187 Va. 913, 48 S.E.2d 357 (1948).
26. Fong Haw Tan v. Phelan, 333 U.S. 6, 10, 68 Sup. Ct. 374, 92 L. Ed. 433 (1948).

into the same category as kidnapping and forgery. The violation will also usually be by the noncriminal elements of society. Yet, frequently, the need will be extremely great for supporting the full scope of the regulation or law if the end or purpose sought by the legislature is to be accomplished.

A good illustration is furnished by the recent case which held that a retail druggist who relabeled a medicine which he had purchased from a distributor residing in the same state had violated the Federal Food, Drug and Cosmetic Act. It may be doubted if under a rule of strict construction the retail druggist fell under the requirements of the Act.[27] Here the factor of seriousness of the offense from the standpoint of the public health is similar to the factor of seriousness of the crime discussed above and is bound to influence judgment of the court with respect to the interpretation of the law.

V. Outlining Appropriate Spheres of Influence for Administrative Policy and Judicial Policy

The case involving the Food, Drug and Cosmetic Act outlined at the end of the last section is also an important decision to show the great weight which will be attached by many judges to the factor of administrative necessity. Under this view, Congress wanted to give the act as extensive operation as the Supreme Court of the United States was willing to allow it under the Constitution. Readjustments of the act, if manifest unfairness to the retailer should occur, could be most expeditiously made by the administrative agency or by later Congressional amendment. The essential question in the mind of Congress was one of power. The administrative process could be seriously affected by a decision which skirted the question of power by creating a problem of statutory construction where none was intended to exist.

The minority of the Court could not bring itself to give a liberal construction of the act to accomplish its purposes and would have excluded the retailer in question from the requirements of the act. If this view had prevailed, it would have resulted in a number of court decisions drawing fine judicial distinctions, thereby weakening the act, and giving the draftsman of a new act insuperable difficulties.

The puzzling aspect of this case is the position of Mr. Justice Frankfurter, admittedly one who has regard for the fullest employment of federal power to protect the public against evils arising from the present day national marketing of drugs. He was able to fall back upon the old analytical conception of statutory construction. He says:

> "The decisive question is whether taking a unit from a container and putting it in a bag, whether it be food, drug or cosmetic, is doing 'any other act' in the context in which that phrase is used in the setting of the Federal Food, Drug, and Cosmetic Act. . . ." [28]

27. United States v. Sullivan, 332 U.S. 689, 68 Sup. Ct. 331, 92 L. Ed. 297 (1948).
28. 332 U.S. at 706 (dissenting opinion).

It would not be of especial concern if this were the only instance, but it is a pattern of thinking which is to be found in his opinions in several important decisions of the Court. Perhaps Mr. Justice Frankfurter falls back on this because he had to judge under such tremendous pressures that he fled to the protection of the analytical concept of justice where the justifications for decision can be easily demonstrated in the traditional way. The decision then comes from "the law" and the charge of personal administration of law can be avoided.

It is most unfortunate that Mr. Justice Frankfurter has been forced into this position. His talents for making the law fit the needs of the time are sorely needed—the fine touch of the intelligent mind dealing with all factors that make for intelligent decision. Neither Mr. Justice Cardozo nor Mr. Justice Brandeis had to face quite the obstacles of passion and prejudice which have fallen to the lot of Mr. Justice Frankfurter, which he has borne with dignity, reserve and courage. Justices Cardozo and Brandeis both had the urge for adherence to systematic expression of law and conformance to an absolute ideal of justice rationally determined. Yet they blended with those ideals a finer touch, which, in proper cases, allowed a discriminate and evaluative choice of other factors than systematic expression of law. Mr. Justice Frankfurter has not been able to do this in many cases. His opinions produce too much litigation, and this leads to just what he wants to prevent—uncertainty in law. There must be broad delineations of power by the highest court with administrative detail left where it belongs in the trial court and in the administrative agency. No appellate court can achieve administration of law; it can only guide.

In the case of drugs it would seem that the factor of permitting a full and systematic administrative development was much more important than the question of whether a retailer might in the early stages of administration of the act not have known exactly how he was affected by the wording of the act.

VI. STARE DECISIS AND LEGISLATIVE ACQUIESCENCE

The Supreme Court of the United States has not settled on a consistent theory with respect to the place of the court in the process of changing its own interpretations of the law. It has at least modified its original position to state that the doctrine of legislative acquiescence in judicial construction of statutes is at best only an auxiliary tool for use in interpreting ambiguous statutory provisions.[29] Yet in a similar problem the court by a five-to-four decision reverts to the older theory in holding that the Supreme Court will not easily reverse itself on questions of statutory construction since Congress can rectify the error.[30] The strong dissent puts its finger on the critical issue.

29. Jones v. Liberty Glass Co., 332 U.S. 524, 68 Sup. Ct. 229, 92 L. Ed. 142 (1947).
30. United States v. South Buffalo Ry., 333 U.S. 771, 68 Sup. Ct. 878, 92 L. Ed. 1077 (1948).

This view *does* saddle Congress with the load of correcting the court's own emasculation of a statute.

VII. Conclusion

A thoughtful consideration of the cases discussed in this paper must bring the conviction that whatever ought to be the case, legislation means at different times, different, often contradictory, things. Until each problem arises, a statute has no full meaning. An important part of the meaning of a statute must be derived from the facts and circumstances existing at the time the statute is interpreted. Two things bring this about: First, the judicial function is regarded today as administrative as well as interpretive. The court, particularly the trial court, must ask itself not only what the legislation means abstractly, or even on the basis of legislative history, but also what it ought to mean in terms of the needs and goals of our present day society. This approach is required by the insuperable difficulties of readjusting old legislation by the legislative process and by the fact that it is obviously impossible to secure an omniscient legislature. Second, if we are honest about it, the simplest legislation acquires its meat and bones and bite from administration—from the practical problems which must be passed upon and from the enforcement techniques which will be brought to its aid.

The idea is prevalent that clear drafting of legislation will state the law for the subjects covered by the legislation. Law does have normative significance and legislation properly and clearly drafted can accomplish its broad aims. But the important problems of legislation, particularly from the standpoint of the lawyer, do not appear either preceding or during the drafting of legislation. They appear in the court or administrative agency when conflicting ideas with respect to the legislation have developed. The answers will rarely be found in the legislation itself. The traditional rules of interpretation will occasionally furnish the answers, but the modern court must give increasing attention to all of the factors which should influence judgment.