A PLEA FOR A LAW OF INTERPRETATION

By Helen Silving†

Legal interpretation raises three basic questions: What is the nature of rules of interpretation? Are rules of interpretation effective, i.e., do they facilitate the administration of justice? Are they desirable?

The first mentioned question would seem to presuppose a definition of the term “interpretation,” and this position of the problem leads at once into the core of the entire set of questions. Does “interpretation” mean the same in law as it does in other fields of social expression, such as science, religion, literature, or art?

Interpretation is specification of meaning, but at law it is always at the same time application of meaning, procedure, action. This is true even in cases of “abstract interpretation,” i.e., in those cases in which interpretation does not dispose of a concrete case but sets forth an exposition of meaning to be applied in potential future cases. In law, interpretation is “binding,” whether binding in a case at bar or in a class of future cases. The binding force of legal interpretation disposes of the question of whether such interpretation is right or wrong, true or false. When binding, interpretation is right and true, whether or not it would be otherwise right or true. The validity of legal interpretation—in contrast to other types of interpretation—does not depend on the intrinsic soundness of the interpretative proposition but is governed by external, formal standards—the legal rules of interpretation. The very scope and meaning of the concept of legal interpretation are determined by such legal rules. Thus, the initial problem posed above is reversed: In law, rules of interpretation are the primary idea, and “interpretation” merely their derivative.

It is hoped to show that when assuming the form of binding legal provisions, rules of interpretation are effective in the sense of affording guidance to those entrusted with the function of interpretation, and that the effectiveness of such rules is not limited as is that of non-legal interpretative rules.

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1. Abstract interpretation is admissible in international law. See particularly the opinion of the Permanent Court of International Justice in the case of Polish Upper Silesia (Ser. A, No. 7, at 18, 19). In national laws interpretation determines only concrete controversies, and in the American law abstract interpretation by courts is unconstitutional, for it violates the principle of separation of powers.

2. The term “binding” is used here in a specifically legal sense. Biblical interpretation may be also regarded as binding, but outside of the field of Church law, it is binding only upon the conscience of the believer.

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It is further proposed to show that adoption of legal rules of interpretation is, at least in the field of statutory law, desirable.

The Nature of Legal Interpretation

The nature of legal interpretation has been a constant subject of juristic attention. Traditional conceptions of its meaning and function, however, rarely assume it to be law. They are rather divided into two groups: (1) one which regards it as an art to be discovered intuitively; (2) the other which regards it as a science proceeding according to a particular scientific method. Whereas the first group considers interpretation to be free, the second claims it to be subject to rules of method, logical rules. The problem as thus formulated also has been discussed as one involving a choice between judicial freedom of decision and legislative intention, and the general tendency at present is toward the former's expansion.

The traditional "science" of interpretation, consisting of a collection of principles of interpretation or rather of interpretative wisdom, is at present overwhelmingly rejected. Efforts to reconcile these frequently conflicting principles on logical grounds and thus to arrive at a system of interpretation failed.

Modern attempts at formulating a sociological science of interpretation, i.e., one which emphasizes sociological factors, cannot develop beyond theoretical speculations as long as the prevailing rules of procedure are maintained. Judge Frank in opinions and other writings demonstrated this shortcoming of present law. In the absence of access to sociological material and of an accepted method of judicial sociology, whatever sociology may be invoked in decisions easily can be shown to be judicial arbitrariness, or as is sometimes said with candor, a judicial hunch. The advocates of a sociological science of interpretation are those proponents of the freedom of judicial decision who somehow hesitate to admit it to be entirely free. "Sociological interpretation" is a line of thought similar to that which advocates weighing of interests by judges. When carried into practice, weighing of interests can be demonstrated to amount partly to a weighing of imponderables and partly to subsequent justifications of conclusions foreclosed before the problems at issue arose. The same is correspondingly true of sociological interpretation.

3. See particularly Words and Music: Some Remarks on Statutory Interpretation, 47 Col. L. Rev. 1259, 1265 (1947), and the decision cited there. Cf. also Judge Frank's dissent in Repouille v. United States, 165 F.2d 152 (1947) and his concurring opinion in Roth v. Goldman, 172 F.2d 788, 790 et seq. (1949).
4. Berolzheimer, The Perils of Emotionalism, in Science of Legal Method 166 et seq. (1921) points out the historical fallacy of the theory of the "adjustment of interests."
The proposition that interpretation is an art is frequently but a counterpart or another version of the statement that interpretation is not a science, hence not subject to definite rules. At other times, the assertion that interpretation is an art is intended to convey the idea of "intuitive interpretation," and such interpretation is not always regarded as tantamount to "free interpretation." It presupposes a mental or emotional contact between legislator and judge, which causes the latter to "feel" rather than to understand the message conveyed by the former. The context of the words, their background, occasion, environment, etc., are said to play a role in transmitting the message and to afford guidance. But these elements are inchoate and incapable of generalization.

The proposition advanced in this paper is that though legal interpretation may be scientific or artistic, neither science nor art is its ultimate source. It is rather ultimately governed by rules of law which determine "meaning" at law, and that includes the meaning of "meaning" itself.

At law, language is always used, in a sense, as "code" language. The meaning of legally relevant conceptions, even of those derived

5. On the subject of interpretation as an art see particularly Frankfurter, Some Reflections on the Reading of Statutes, 47 Col. L. Rev. 527 (1947), and Frank, Words and Music, etc., supra, note 3.

6. For the proposition that the meaning of a sentence is to be felt rather than to be proved, see Mr. Justice Holmes in United States v. Johnson, 221 U.S. 488, 496 (1911).

7. In his last book, Vom Stil des Rechts, Beitragze zu einer Ästhetik des Rechts (1947), p. 20, Triepel pointed out that apart from Herbart's theory basing law on anesthetic "displeasure invoked by discord," no attempt has been made at specifying the meaning of the statement that law is an art or has an aesthetic "side". Of course, Triepel was not acquainted with American law and literature.

Comparisons of the interpretation of law with that of works of art are important contributions to the theory of culture. However, they cannot serve practical needs of legal interpretation so long as our knowledge of the meaning expressed in the various forms of art is yet rather limited. On the subject of such meaning see Langer, Philosophy in a New Key (1946).

8. In social reality word and sense are related to each other in a manner similar to that which—in the opinion of English Judges (22 How. St. Tr. 301)—obtains between a letter and its sense. "Your Lordships ask us"—they answered to the House of Lords in 1789—"whether the sense of the letter be matter of law or matter of fact?" We find a difficulty in separating the sense of the letter from the letter. The paper without the sense is not a letter. There can be no word without sense but at best a sound, figure or gesture, singly or in combination. Let the generic term for sounds, figures or gestures, or their combination, be called a "symbol," it being understood that "symbol" in this context does not "symbolize" anything. A symbol becomes a word by virtue of interpretation which institutes it a symbol for something, invests it with meaning. There is no meaning and hence no words apart from and prior to interpretation. Functionally, meaning is interpretation. Since words have no meaning apart from their interpretation, the possibilities of interpretation are inherently not limited. See Smith, Interpretation in English and Continental Law, J. of Comp. Lec., Series XVI (Law), No. 6, 153-164, at 153 (Montreal, 1927). In each instance, however, when a given symbol is interpreted in a different manner from the one in which it has been hitherto interpreted, a new word is in effect created. In each such case the social function of the symbol as a word, i.e., as a means of communicating meaning, is jeopardized. Thus, it may be said that though it is possible to assign to a symbol a large or even an unlimited number of meanings, such procedure, unless aimed at a special goal, is devoid of sense. A certain, however rela-
from other fields of knowledge or from everyday life—says Radbruch—is never identical with the original meaning but is always more precise in accordance with legal standards; it is broader, narrower or entirely transformed. One may disagree with Radbruch's generalization when applied to the substantive scope of all legal terms, but one cannot dispute the formal proposition that in law words primarily mean what the law says that they mean. This proposition has two implications. In law, the "common usage" meaning of words is not self-evident. The law determines whether "common usage" or "legal usage," any other usage, or a specific artificial meaning should prevail in a given case. The issue was squarely faced by Lord MacNaghten when he declared that the opinion of judges of acknowledged authority is probably a safer guide to the meaning of a word than any definition or illustration in a dictionary. Although in another instance a court may decide otherwise, yet this very discrepancy of judicial rulings shows that "meaning" is a more complex phenomenon in law than it is in other fields of social expression. Nor are legal references, express or implied, to the so-called "common usage" self-explanatory. Rather, they require at least a determination by some legal authority of what will be taken as "common usage." The very statement that a word needs no interpretation because its meaning is clear, when made in legal context, has a different scope from that of a non-legal statement to the same effect. It implies a choice between "legal usage" and "common usage" in the light of which the meaning is clear, when made in legal context, has a different scope from that of a non-legal statement to the same effect. 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generally accepted sense are so used only by virtue of legal incorporation of such sense and to the extent only that such incorporation reaches.

"Meaning" in a legal context thus being ultimately a matter of legal fiat and not inherent in either the quality of words or in their linguistic or social import, what words mean at law must be gathered from rules of law governing meaning. These rules in turn may refer to "common usage," reason, beauty or harmony, convenience or social purpose as guides to the legal authority entrusted with interpretation. The law may further provide for a system of reviewing interpretative determinations with a view to testing their accordance with linguistic or social use, their scientific or artistic quality, and in this sense it may be said that legal interpretation is required to be grammatical, sociological, logical, scientific or artistic. Or, the law may leave to the enforcing authority a freedom of interpretation, and such authority may in its discretion use grammatical, sociological, logical, scientific or artistic methods. Thus, interpretation may be said to be scientific or artistic. In either case, its character is primarily determined by law.

The Law as the Source of Scope and Meaning of "Meaning"

As suggested above, the very scope and meaning of legal interpretation or meaning are determined by law.

Legal interpretation is mostly limited in scope to a concrete issue raised on the basis of the facts of a case. On the other hand, it is broader in scope than other forms of interpretation, in that it also covers those facts which are not hypothetical and variable but given and thus themselves call for finding. What fact situation underlies even an interpretative decision may be controversial, and the relative significance of facts as appearing on the record and facts as restated by the court has not been clearly defined. It can hardly be disputed that these are legal and not scientific or artistic problems.

The distinctive treatment of the interpretation of statutes and that of precedents is a matter of legal fiat and not merely one of inherent qualities of these forms of law. For inherently they are less dissimilar than it is usually assumed. The opinion prevails that in the case of statutes, the language, the actual words, are authoritative and the subject of interpretation, whereas in the case of judicial opinions the

15. A typical instance of a divergent reading of one record by different judges may be found in United States v. Congress of Industrial Organizations, 335 U.S. 106 (1948).
words are not decisive but rather the *ratio decidendi*, decisional law consisting in what the courts do rather than in what they say. As shown above, the words of statutes are not the sole subject of statutory interpretation, for they are interpreted as limited to the facts of a case. On the other hand, it would be erroneous to assume decisional law to be wholly "unwritten." True, it may be possible to derive from a judgment in a case an entirely different rule of law from the one announced by the court, and it may be said that the only authoritative pronouncement of the court is the statement "judgment for plaintiff" or "judgment for defendant." Yet, in order to formulate a rule from the case it is necessary to resort to the statement of facts as written, either as restated by the court or as found in the written record. The record contains the "language" of decisional law. In spite of these similarities between statutes and judicial decisions, different principles of interpretation may be adopted for them, and these may contribute to the difference in the meaning of statutes and of precedents.

The most controversial problem of the meaning of "meaning" at law is the question of what the concept "meaning of a statute" sought to be discovered in the interpretative process actually means. Is it the subjective intention of the legislator, or an objective meaning of the statute itself independent of the will or intention of its maker? In legal practice these alternatives are to a great extent expressed in two contradictory rules: the one admits, the other rejects, preparatory works as evidence of the meaning of statutes.

The theory of subjective legislative will assumes "meaning" to be the sense attributed to a sentence by the speaker or writer. This theory has been violently challenged on many grounds. The various phases and aspects of the controversy are worth restating.

16. Said Burrows, *Interpretation of Documents* (2d ed. 1946) p. 39: "Both statutes and judgments are sources of law, but with this difference: the actual words of an Act constitute the law and decisions upon their construction and effect and upon their application are authoritative; whereas in the case of a judgment it is the *ratio decidendi* that constitutes the principle of law and that *ratio decidendi* may be expressly stated—either completely or, more usually, in relation to the issue before the Court—or may be left unstated and to be gathered by inference from the actual language of the judge and the effect of the decision. A rule of law may, therefore, properly and legitimately, be built up in a mosaic composed of a number of cases which amplify, correct and explain one another, and thereby the rule emerges in a complete form. It is a mistake, therefore, to interpret a judgment (The word 'judgment' is here used to mean the judge's statement of his reasons) as though the words themselves constitute the law, and judges have often protested against general words used in one connection in a judgment being taken as an authority for a different set of facts which were not before the judge at the time and consequently were not in his mind." It should be added that even where the *ratio decidendi* is expressly stated in the opinion, it does not necessarily follow that this *ratio decidendi* set forth by the judge is binding.

17. Bentham, as is known, pointed out that there is more writing in "unwritten law" than in "written law."
Meaning or intention has been said to have a different import when referring to a will, a contract, or a statute. Whatever language a testator may have chosen in expressing his intention, it is this subjective intention and not its expression which is alleged to be the ultimate object of inquiry.\(^{18}\) In contracts, on the other hand, the element of reliance by the addressee is taken into account, and meaning is taken to be not what the promissor had meant but what the promisee can justifiably expect the promissor to have intended or meant. Attention is thus directed to the objective meaning of language. This is in contrast to statutes, where, unless they have been judicially construed and reliance placed upon such construction rather than upon the statutory terms themselves, the risk of interpretation is born by the addressee. An argument frequently advanced in favor of the objective theory of meaning within the sphere of statutory interpretation is that, realistically speaking, there is no such thing as a subjective intent or meaning, i.e., a "will," of the legislator. This argument has been so often repeated that it has come to be regarded as a jurisprudential truism. According to Wurzel, it applies even in cases of laws emanating from one person, as for instance, an absolute monarch, for he "would have to be a professional lawyer even to know the titles and general contents of the many laws and ordinances promulgated in his name."\(^{39}\) Speaking of the problem of legislative will in a representative democracy, Wigmore pointed out\(^{20}\) that "an actual legislative will" does not exist either in the voters at large, or in the legislators as a body. Only an infinitesimal number of the voters are beforehand acquainted with the terms of a particular bill, and they cannot "will" what they do not know. So far as the legislators are concerned, in nine cases out of ten, they do not know or care about the terms of the bill for which they vote. In the last analysis, therefore, the only actual legislative will is the will of a few individuals belonging to the drafting committee.

\(^{18}\) Powell, *Construction of Written Instruments*, 14 IND. L.J. 199, 207 et seq. (1939), distinguishes between wills and *inter vivos* declarations of trust, on the one hand, and *inter vivos* conveyances not involving trusts and contracts, on the other. The former set forth ideas and desires of one person, and the task of the interpreter is like that of a theologian interpreting Scriptures, complicated by the fact that often these instruments are drafted by persons other than the testator or settler. But see, e.g., Gray v. Pearson, 6 H.L. Cases 61, 106, 10 Eng. Rep. 1216, 1234 (1857), where Lord Wensleydale said in a concurring opinion: "The expression that the rule of construction is to be the intention of the testator is apt to lead into error, because that word is apt to be understood in two senses, viz., as descriptive of that which the testator intended to do, and of that which is the meaning of the words he has used. The will must be in writing, and the only question is, what is the meaning of the words used in that writing."

\(^{19}\) Wurzel, *Methods of Juridical Thinking*, in *SCIENCE OF LEGAL METHOD* 286, 352 (1921).

The Supreme Court of the United States has applied an even more stringent standard of what constitutes legislative will. It has taken the realistic position of admitting as evidence of legislative will utterances of only such persons who have actually and not merely constructively influenced the passage of a bill, and only such utterances which unequivocally demonstrate the position taken by the legislature. It thus denied evidentiary value concerning the meaning of a statute to statements of a legislator who was not a member of the Judiciary Committee which reported the bill in question and who did not vote for its passage.\textsuperscript{21} It declined to consider the fact that Congress had failed to amend a bill where the proposed amendment was not reported out of committee, so that it did not appear whether the amendment was thought unnecessary or undesirable.\textsuperscript{22} It declared a report not previously submitted to members of the committee and contradicted without challenge on the floor of the House by a ranking minority member to be of little weight.\textsuperscript{23} It refused to take notice of committee changes of a bill made without explanation, on the ground that the reasons for such changes are entirely speculative, and that "the interpretation of statutes cannot safely be made to rest upon mute intermediate legislative maneuvers."\textsuperscript{24} This realistic attitude seems to have been somewhat modified in a recent decision inferring an intention of Congress from an exhibit which the members of Congress can hardly be presumed to have read.\textsuperscript{25} In international law, the issue of whether or not preparatory works are admissible seems to depend on the question of who are the parties to the litigation. Subject to certain reservations, the Permanent Court of International Justice held preparatory works in general admissible.\textsuperscript{26} It excluded such works in cases in which some but not all the parties to the litigation were among the original signatories of the treaty under construction.\textsuperscript{27}


\textsuperscript{22.} Order of Railway Conductors of America v. Swan, 329 U.S. 520, 529 (1947).


\textsuperscript{24.} Trailmobile Co. v. Whirls, 331 U.S. 40, 61 (1947).

\textsuperscript{25.} Shapiro v. United States, 335 U.S. 1 (1948), and see particularly Mr. Justice Frankfurter's dissenting opinion criticizing the lack of realism of the majority view (at pp. 44 et seq.). \textsuperscript{Cf.} also Hilton v. Sullivan, 334 U.S. 323 (1948), where the Court considered not only statements of the sponsor and the active proponents of the statute under construction, but also those of hostile witnesses testifying before the Senate Civil Service Committee. The latter statements were used to show knowledge of Congress that a certain interpretation would be placed on the Act (pp. 338, 339).

In Transcontinental & Western Air v. C.A.B., 336 U.S. 601, at note 6, pp. 605, 606 (1949), the Court read a statute in the light of the Conference Report of a previous bill which was not passed on the ground that the clause subject to interpretation crystallized in that Report.

\textsuperscript{26.} For cases supporting the general rule admitting preparatory works see Sorensen, Les Sources du Droit International, Étude sur la Jurisprudence de la Cour Permanent de Justice Internationale (1946), pp. 215 et seq.

the reason being that a party cannot be taken to have had an intention in the formation of which it did not participate. Thus, the meaning of a treaty may vary in accordance with the personalities of the litigants.

More extreme opinions entirely reject the doctrine of the subjective intent or meaning of the legislators, and refuse to look behind the words of a statute under any circumstances. They accept a position akin to that contained in the parol evidence rule of private law. This is the position followed in England.\(^2\) Its underlying idea is a particular conception of the nature of democratic procedure. According to it, a statute speaks with the voice of the three Estates of the Realm and the meaning which the draftsman or any other member attaches to it cannot affect its construction and effect.\(^2\) In the United States the reverse rule is advocated as flowing from the principle of separation of powers. The controversy is here formulated in terms of the antithesis of \"libre recherche\" by judges and legislative intent as found in preparatory works. In a famous dispute between Radin\(^3\) and Landis,\(^3\) the latter took the position that \"The Anglo-American scheme of government conceives of law-givers apart from and at times paramount over courts,\" and that hence the contention \"That a discoverable intent [of the legislators] . . . is irrelevant to the judge . . . disregards not only theoretical but practical considerations of Anglo-American government.\"\(^3\) In Germany the doctrine of the objective meaning of statutes was occasionally advocated on the absurd

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28. The rule was laid down in England in 1881. When the case of R. v. Bishop of Oxford, 4 Q.B.D. 525 (1879), came before the Court of Appeal the judges referred to the speech of Lord Chancellor Cairns in the House of Lords, for assistance in elucidating the policy and meaning of the Public Worship Regulation Act of 1874. For this they were rebuked by Lord Selborne, S.E. Ry. Co. v. Railway Commissioners, 50 L.J.Q.B. 201, 203 (1881), and the rule is now settled in England that courts may not seek the aid of parliamentary debates, reports of Royal Commissions, or other preliminary documents, when interpreting the meaning of obscure words of statutes. Smith (supra, note 8, at p. 156) pointedly remarks: \"Lord Halsbury even committed himself to the paradox of asserting that the draftsman of a statute was the worst possible person to interpret it, apparently because he actually knew what it meant.\"

29. Re Dean of York, 2 Q.B. 1 (1841).

30. Radin's position is stated in Statutory Interpretation, 43 Harv. L. Rev. 863 (1930), and in A Short Way with Statutes, 56 Harv. L. Rev. 388 (1942).


32. Id. at 886, 887. Radin at first took the position that \"When the legislature has uttered the words of a statute, it is \textit{funtus officio}, not because of the Montesquieu separation of powers, but because that is what legislating means.\" Statutory Interpretation, note 30 supra, at 870. In A Short Way with Statutes, note 30 supra, he relies rather on principles of constitutional history in the light of which the American statute is neither the continental \textit{law} (\textit{loi, Gesetz}), which is the lineal descendant of the Roman-canonical \textit{lex}, nor the same as the English statute emanating from a sovereign. There is hence, in Radin's opinion, no primacy of legislation over the judiciary in the American law, and no reason to look for the intent behind the statute like a theologian might seek the intent of the Scriptures.
ground that "the statute may be more intelligent than the legislator." 33

The theory of subjective legislative will, however, has one clear advantage as against the theory of objective meaning. Its scope is less indefinite. It aims at grasping the understanding placed upon a statute by a limited number of persons, the legislators, whether as individuals or as corporate body. The question of what the objective meaning of a statute is, per contra, has never been clearly answered or even formulated. Meaning being concurrent interpretation, whose concurrent interpretation is the objective meaning if it is not that of legislators and addressees? Is it the meaning attributed to a statute by everybody or by a particular group, such as judges, lawyers or businessmen, or are the groups of persons whose interpretation is determinative varying in accordance with the type of statute under consideration? Is it the interpretation of contemporaries of the enactment only or also that of later generations? Whose sense is the "ordinary and natural sense" if it is not the ordinary and natural sense of legislators and addressees?

Some of these questions, of course, also arise within the framework of the rule providing that the subjective intent of the legislator governs meaning. But then they can be answered if it is shown that the legislator had an intention with respect to the particular question and what that intention was. For instance, the legislator in a particular instance may intend that a word should be interpreted according to its meaning current among businessmen, in another instance, that it should be interpreted in the light of historical or in the light of future development, etc. Where recourse to the intention of the legislator is barred, these questions arise as independent general problems, and unless a particular statute in its wording or a particular system of law suggests an answer to them, they remain open questions. The foremost American advocate of the exclusion of preparatory works, Professor Radin, significantly avoids this initial problem of objective

33. Thoel, cited by Gmelin, Dialecticism and Technicality, in Science of Legal Method, 85, 98 (1921). In his recent book, Vorschule der Rechtsphilosophie, Radbruch bases the objective theory of meaning on the following reasoning: "Juristic interpretation is directed toward the objective meaning of positive law, i.e., the meaning expressed in the rule of law itself, not to the subjective meaning, i.e., the idea of the persons participating in its creation. Therein lies the difference between juristic interpretation and philological interpretation. Philological interpretation is re-thinking of an idea thought before . . . juristic interpretation, on the other hand, is drawing ultimate inferences from a thought (zu Ende Denken des Gedachten). For jurisprudence is a practical science, and must give an immediate answer to any legal question and cannot deny decision on the ground of gaps, contradictions and obscurities of the statute. Therefore, it must understand the statute better than did the persons who participated in its creation, derive from it more than these persons put into it." However, preparatory works are used in interpreting statutes in Germany. Cf. Erbe, Der Gegenstand der Rechtsvergleichung: XIV Z. F. ausl. u. intern. Privatrecht, 222 et seq. (1942).
statutory meaning by shifting the attention of the judge to "the purpose of the statute as a whole" and to judicial feeling about the value of that purpose.34 What the purpose of a statute is, to be sure, may be also a subject of controversy, as for instance evidenced by the "purpose" of the Selective Training and Service Act of 1940 in the light of the majority and dissenting opinions in Trailmobile Co. v. Whirls.35 And "statutory policy" as interpreted by a court majority may be declared "questionable" by the minority, as seen in Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Board.36

Nor can the purpose of a statute be legally dissociated from its words, unless some other method of ascertaining such purpose is suggested. All these methods are in reality methods of decision praeter or contra legem,37 in the light of which the function of statutes becomes questionable. One might just as well disregard the statute entirely, and decide on the basis of an appropriate social factor, such as industrial custom or custom of trade, as an independent source of law.38

On the other hand, it can hardly be denied that the contrary view set forth in the theory of subjective legislative will also raises serious

34. A Short Way with Statutes, supra note 30, particularly pp. 421, 422.
36. 336 U.S. 301, 318 (1949).
37. See text at note 4 supra, on sociological interpretation.
38. Mr. Justice Jackson, concurring in Walling v. Portland Terminal Co., 330 U.S. 148 (1947), which held trainees not to be "employees" within the meaning of the Fair Labor Standards Act, found that "Congress never intended to regulate the subject at all," and hence refused to base his determination of the case on the interpretation of the Act, and relied rather on the "good faith understanding of the parties following a long-established custom of an industry whose labor relations have long been subject to collective bargaining" (pp. 155, 157). In Bay Ridge Operating Co., Inc. v. Aaron et al., 334 U.S. 446 (1948), the majority, speaking per Mr. Justice Reed, rejected the argument that under the Fair Labor Standards Act "an agreement reached and administered through collective bargaining is more persuasive in defining regular rate than individual contracts," and refused "to give decisive weight to contract declarations as to the regular rate because they are the result of collective bargaining" (at p. 463). Mr. Justice Frankfurter, dissenting (pp. 477 et seq.) branded the majority's adherence to the words of the statute as "legal dialectic" and stressed the social reality of industrial customs and the importance of considering the actual relation of economic forces in any given case. For "The Fair Labor Standards Act is not a legislative code for the government of industry. It sets a few minimum standards leaving the main features in the employment relation for voluntary arrangement between the parties" (p. 486). In Transcontinental & Western Air v. Civil Aeronautics Bd., cited supra, note 25, the question before the Court was whether § 406 (a) of the Civil Aeronautics Act of 1938, which empowers the Civil Aeronautics Board to fix and determine the fair and reasonable rates of compensation for the transportation of mail by aircraft and "to make such rates effective from such date as it shall determine to be proper . . ." confers upon the Board authority to make the rates retroactive beyond the date on which an air carrier's petition was filed. The question was decided in the negative. The majority, speaking per Mr. Justice Douglas, held that the clause cited above "does not necessarily mark a departure from the customary pattern of fixing rates prospectively," and that the "make effective" clause "was inserted only to make clear that the rates could be made retroactive to the date of the application" (p. 758). Mr. Justice Jackson, dissenting, said (p. 760): "I see no justification for holding that this language means anything less than just was it says. . . ."
juristic difficulties. Although “collective intent” in the light of modern psychology\(^9\) is not as unrealistic a concept as it is made out to be by jurists, there still remains the problem of reaching or expressing such intent by means of available legal methods. However, this problem is not peculiar to the theory of legislative will but arises whenever a psychological element is at issue in law. The law does not solve such issues but rather shifts them.\(^4\)

It is not the purpose of the present paper to suggest a solution of the conflict between the theory of subjective legislative intent and that of objective statutory meaning. Nor could proof of the exclusive “correctness” of either theory be made on a jurisprudential basis, for legal correctness, i.e., validity of any such theory is not ultimately determined by jurisprudence. Possibly, the conflict of the two theories is less marked than it would appear to be at first impression.\(^4\) If existent, however, it can be legally expressed and solved solely in terms of legal rules admitting or rejecting preparatory works as evidence of statutory meaning. It hardly needs elaboration to show that a rule of that type is not a perfect corollary of any philosophical, psychological, sociological or linguistic concept of “meaning.”

Roughly assuming the rule admitting preparatory works to correspond to the theory of subjective intent and the rule rejecting such works to correspond to the theory of objective meaning, it becomes evident that the choice between the two theories of meaning is ultimately a matter of legal fiat and not a scientific or artistic quality of meaning itself.

\(^9\) One of the foremost exponents of modern psychology, Sigmund Freud, recognizes the reality of psychological experiences of groups or masses. See Massenpsychologie und Ich-Analyse.

\(^4\) The statement that preparatory works are legitimate sources of law because the intention of the legislator governs meaning is a political statement. In order to express a legally correct thought, the relation must be reversed: the intention of the legislator governs because and to the extent that preparatory works are legitimate sources of law. Indeed, in law the term “intention of the legislator” is merely a figurative expression of the rule admitting preparatory works in evidence.

All allegedly psychological phenomena in the law are to a larger or smaller extent “constructive.” Legislative intent is “constructive” intent. From constructive intent only one step leads to “representative” intent consisting in proving the intent of a group by putting in evidence expressions of certain individuals.

\(^4\) Since the law can express meaning solely by enacting a legal rule, the question is posed whether there may be rules which unequivocally point to the theory of subjective intent or to that of objective meaning. This question must be answered in the negative. Preparatory works might very well be used to show objective meaning. Other legal rules may serve as indicia of either theory. Whatever the nature of subjective intent which may be discovered by the use of preparatory works, such intent may be also reached by evidence of surrounding circumstances and rules of construction. Since the circumstances surrounding the enactment of a statute were presumably known to the legislator, they are an incidental link connecting the understanding of the latter and that of the addressee. Thus there is no absolute contradiction between “subjective intent” and “objective meaning.”
Effectiveness and Desirability of Legal Rules of Interpretation

As seen from the preceding sections, a minimum law of interpretation is an *essentiale* of any legal system. The problem of the effectiveness and desirability of rules of interpretation arises only with respect to individual rules. The distinctive quality of these rules as against other rules of law consists in that they are applicable not independently but only in conjunction with other rules whose meaning they serve to specify. Their merit consists in that they are general rules which in specifying simultaneously the meaning of numerous enactments, promote economy of legislative or other documentary language, and assist in disposing of ambiguous and unforeseen cases.

An apparently most convincing argument against legal rules of interpretation is that advanced by Wurzel.42 His main proposition is that "true" rules of interpretation are meaningless, for a legislator cannot by legislative act ultimately impose a manner of reading his will upon the subjects of his commands. If a legislative command is ineffective, because it is misunderstood, "the legislator may supplement it by a new command, differently expressed." It is not within his power, however, to compel or increase "comprehension" of his commands.

There is no denying the fact that the human possibility of conveying ideas by means of language is limited,43 and that no rule of interpretation can overcome that ultimate limitation of language as a means of communicating ideas of speaker or writer to an addressee. The proposition advanced here is merely that even in those cases where this limitation does not apply, linguistic possibilities being adequate, it may be impracticable within reasonable confines of time and space to specify the meaning of each of the innumerable statutes and other documents to the fullest possible extent. Rules of interpretation can substitute for potential numerous specific linguistic expressions. As thus understood, there may be meaningful legal rules of interpretation.44

When are such rules meaningful? When they impose not only a type of comprehension, an end effect of interpretation, but a method of arriving at such comprehension. Expression or possibility of ex-

43. Said Lord Halsbury in Tubes v. Perfecta Seamless Steel Co., Ltd., [1903] 20 R.P.C. 96 (1902): "I doubt whether any one of us has not more than once found that human language is but an imperfect instrument for the expression of human thought.
44. Wurzel's argument is to a large extent a terminological one. He distinguishes between "true" rules of interpretation and rules of law disguised as rules of interpretation, and thus in effect rejects the idea of interpretative legal rules.
pression in terms of method rather than in terms of substance is a feature which legal rules of interpretation share with other rules of law. All true rules of law are ultimately rules of procedure. They instruct what action is to be taken or how a certain result is to be reached.

The problem of the effectiveness of rules of interpretation can be subdivided into two questions: Can a rule of interpretation increase comprehension? Can any other desirable end be attained by the use of specific rules?

The first question is predicated upon understanding of the meaning of "comprehension." But comprehension is an ambiguous concept. Ordinarily comprehension consists in invoking in the minds of the speaker or writer and of the addressee identical or similar ideas or experiences. As seen from the preceding section, however, in matters of statutory interpretation, comprehension may have a different meaning. Under the theory of the objective meaning of statutes, the ideas and experiences of the speaker, the legislator, are irrelevant, and nothing definite is substituted for them. For the purpose of simplification it will be assumed that the theory of subjective intent prevails. The complication introduced by the theory of objective meaning will be dealt with later.

Assuming comprehension to have the ordinary meaning stated above, it is submitted that a rule of interpretation can serve as a code, a common tool, of the draftsman of a statute or other legal document, and of the person applying such statute or document. In order to serve as a tool of comprehension, such rule must be known to the speaker or writer and to the addressee, and it has been aptly stated that "the rules are really laid down for the guidance of the draftsmen, and we may reasonably assume that the draftsmen do their work with these instructions in mind." 45 Binding rules of interpretation enable the draftsman to know in advance at least how the addressee will proceed or what sources he will use in his search for the intended meaning of the document at issue. It may be assumed that he formulates the rule accordingly. It is not contended here that all doubts concerning the meaning of words can be resolved by the use of rules of interpretation. Only some types of cases can be disposed of in advance. In others the scope of misunderstanding can be narrowed. A few cases decided in recent years may be used to illustrate this proposition.

In the case of the United States v. United Mine Workers of America 46 the question before the Court was whether the term "per-

45. Smith, supra note 8, at 155.
sons' as used in the Norris-La Guardia Act included the Government of the United States. The question was answered in the negative on the basis of the rule of construction that a sovereign is presumptively not intended to be bound by its own statute unless named in it, and on the basis of the Court's interpretation of the common usage of the term "persons." But there was a vigorous denial of the decisive force of the rule of construction, and of considerations based on the alleged common usage of the term "persons." The doubts would have been conclusively resolved at the time of drafting, had the draftsmen been then aware of the existence and binding force of the rule of construction adopted by the court, in other words, had this rule been known to be a rule of law rather than a so-called "canon of construction."

In Federal Power Commission v. Panhandle Eastern Pipe Line Co. the question was whether the Federal Power Commission had jurisdiction under the Natural Gas Act to prohibit a gas company engaged in interstate commerce from selling its leases. The Court held that the Commission had no such jurisdiction, the result being inferred from a specific exception to Commission authority contained in Section 1 (b) of the Act which reads in part as follows: "The provisions of this Act . . . shall not apply . . . to the production or gathering of natural gas." The majority, speaking per Mr. Justice Reed, held this language to be unambiguous. "Of course"—it said—"leases are an essential part of production." Said Mr. Justice Black, in dissent:

I agree with the Court that this language is "unambiguous" and that this Court should give the language its "clear and natural meaning." "Production" of gas would thus mean the act of bringing forth gas from the earth, and "gathering" would mean the act of collecting gas after it has been brought forth. Such are the "clear and natural" meanings we had heretofore attributed to these word symbols. [Citations]. It was the physical acts incident to the "production and gathering" of gas—local activities—that our prior decisions emphasized Congress intended to leave states free to regulate.

There is nothing unusual about a controversy over a meaning which both majority and minority regard as "clear." But neither is the underlying issue incapable of a general solution. The real question

47. See Mr. Justice Frankfurter's concurring opinion, supra note 52, at 307 et seq., and particularly at 314 et seq.
50. Supra note 48, at 1256.
51. Id., at 1262, 1263.
is: Does a term having clear meaning mean only what it says or also all the incidents of what it says? That question might be answered differently with respect to statutory enabling clauses and with respect to exceptions from such clauses. In any event, the answer could be formulated in abstract terms in such a way as to afford guidance for legislators and judges.

When a word has both a technical and a common meaning, a binding rule of interpretation providing that a particular one of these meanings should prevail unless express provision is made to the contrary would be most salutary. In *Crane v. Commissioner* the question before the Court was whether the term "property," as used in a statute providing for taxation of gain or loss on property acquired by devise on the basis of its fair market value at the time of its acquisition, is or is not the same as "equity." The Court, Justices Jackson, Frankfurter and Douglas dissenting, held that it is not. Speaking for the majority, Mr. Chief Justice Vinson, relied in the first place on the dictionary meaning of the word "property":

The only relevant definitions of "property" to be found in the principal standard dictionaries are the two favored by the Commissioner, i.e., either that "property" is the physical thing which is a subject of ownership, or that it is the aggregate of the owner's rights to control and dispose of that thing.53

It is instructive to compare an instance of Mr. Justice Holmes's use of the term "property." Writing informally to Pollock, he said:

A patent is property carried to the highest degree of abstraction—a right *in rem* to exclude, without a physical object or content. It is matter reduced to Boskievitch points.

Obviously, there is a legal use of the term "property" which does not attach to a physical object at all. Perhaps, had the draftsmen of the statute at issue in the *Crane* case known that the dictionary meaning of "property" was to prevail, they would have made a careful study of dictionary meanings, and possibly chosen a different term.

It can hardly be denied that comprehension of legislation is increased if legislators and judges use the same dictionary. Rules of interpretation can provide them with it. It is not essential that the same type of dictionary be adopted for all statutes. It may be desir—

52. 331 U.S. 1 (1947).
53. The Court cites the following dictionaries, *supra* note 52, at 6, n. 14: *Webster's New International Dictionary, Unabridged*, 2d Ed.; *Funk and Wagnalls' New Standard Dictionary*; *Oxford English Dictionary*. None of the legal dictionaries was consulted, and neither was *Words and Phrases*.
able to adopt different types of dictionaries in accordance with the character and qualifications of the addressees of particular statutes. One might even go so far in "unusual cases" as to disregard a specific statutory definition where it would create "obvious incongruities in the language," and "destroy one of the major purposes" of a provision.

Nevertheless, it would be unrealistic to deny that most statutes are drafted with a view to being interpreted by lawyers. Statistical data on how many laymen read texts of revenue statutes might prove revealing. But there is no reason why particular statutes or types of statutes should not contemplate direct reading by laymen without lawyers serving as intermediaries. In the interest of overall understanding, such contemplation, if any, should be made much more explicit than it is made by mere general abstention from the use of technical language.

True, a provision requiring statutory terms to be read in their technical or legal rather than in their common use sense does not resolve all problems that may arise. There may be several technical meanings or groups of technical meanings, such as the meaning attributed to a given term by another statute and the common law meaning, or divergent statutory meanings. More detailed rules of interpretation, however, may be of assistance in resolving such conflict of meanings.

In Rutherford Food Corporation v. McComb the meaning of the term "employees" under the Fair Labor Standards Act was derived from social legislation of the same general character as the Act under construction. The common law meaning was rejected.


"It appears to me that the statute deliberately and designedly avoided anything like technology. I should judge from the language and the mode in which the statute has been enacted that it contemplated what would be a horror to the mind of the lawyer, namely, that there not be any lawyers employed at all, and that the man who was injured should be able to go himself and say, "I claim so much," and that then he should go to the county court judge and say, "Now please to hear this case, because my employer will not give me what I have claimed." It appears to me that that is the meaning and construction of the whole statute, and that is what the Legislature intended, and that is the reason why it avoided any technical phrases. It strikes one at once that, if anything of a technical application or a technical commencement of the litigation was intended, the Legislature was competent, and had sufficient knowledge to say what it meant.


57. Courts accept the contrary proposition as guiding principle. Compare the cases cited in note 11, supra.


on the ground that "the Act concerns itself with the correction of
economic evils through remedies which were unknown at common
law." 61 In Fleming v. Mohawk Wrecking & Lumber Co., 62 on the
other hand, in construing a provision of the Emergency Price Control
Act, 63 the Court rejected the argument that interpretation applied to
a similar provision of the Fair Labor Standards Act 64 should be con-
sidered as binding, on the ground that a power granted by the former
Act "is not dependent on the provisions of another Act having a his-
tory of its own." The cited cases can be reconciled, and general rules
of construction evincing from them formulated as follows: Statutory
terminology prevails over common law terminology in cases of statutes
enacted in derogation of the common law. However, the meaning
attributed to a term by a statute governs only in the case of another
statute of the same general character, and not in the case of one
having a history of its own. If followed in other cases, such rules
can develop into common tools for statutory draftsmen and judges,
and can increase understanding among them, just as the existence
of general rules can increase certainty of the law. Had the rule
enunciated in the Rutherford case been known to the draftsmen of the
Fair Labor Standards Act, they would have closely studied the inter-
pretation of the terminology of the National Labor Relations Act
and the Social Security Act before using the term "employee."

In cases of two conflicting statutes, the intended solution of the
conflict could be best established if at the time of the enactment of the
later statute a rule of construction were in existence disposing of con-
licts of that nature in the absence of a contrary provision. In Levin-
son v. Spector Motor Service 65 the question before the Court was
whether "checkers" or "terminal foremen" were exempt from the
overtime compensation provisions of the Fair Labor Standards Act
under the clause of that Act rendering it inapplicable to "any em-
ployee with respect to whom the Interstate Commerce Commission
has power to establish qualifications and maximum hours of service
pursuant to the provisions of section 204 of the Motor Carrier Act,

49 STAT. 620, 42 U.S.C.A. § 301 et seq. Decisions that define the coverage of the
employer-employee relationship under the Labor and Social Security acts are per-

61. Citing the opinion of the Circuit Court, 156 F.2d 513, 516, 517 (10th Cir.
1946).


63. 56 STAT. 23, as amended, 50 U.S.C. APP. SUPP. V, § 901 et seq.

64. § 4(b) and (c) of that Act, 52 STAT. §§ 1060, 1061, 1062 (1938), 29 U.S.C.
§ 204 (1946), as interpreted in Cudahy Packing Co. of Louisiana v. Holland, 315 U.S.
357, 788 (1942).

The Court said that "Congress has prohibited the overlapping of jurisdiction of the Administrator of the Wage and Hour Division, United States Department of Labor, with that of the Interstate Commerce Commission as to maximum hours of service," and resolved the conflict in favor of the latter agency.

In the Court's view, the Fair Labor Standards Act incorporates by reference not only the provisions of the Motor Carrier Act but also the regulations issued under it by the Interstate Commerce Commission, which is thereby empowered to determine the scope of the incorporating act. If the result of the decision were generalized, the underlying rule could be expressed as follows: A statutory incorporation of a provision of another statute also incorporates future administrative determinations issued under it. Whatever its intrinsic merits or shortcomings, had such rule of construction been in existence at the time the Fair Labor Standards Act was under discussion, and known to its draftsmen, they would have been forced to face and resolve the issue which was to arise almost a decade later. The words of the Fair Labor Standards Act, if formulated with knowledge of the rule, would have been a clear indication of the intent of Congress to let the Interstate Commerce Commission's safety program prevail.

Another conflict most frequently involved in matters of statutory interpretation is the intertemporal one between the meaning as prevailing at the time of the enactment of the statute and that accepted at the time of its application. In Packard Motor Car Co. v. National Labor Relations Board the Court held foremen to be "employees" within the meaning of the National Labor Relations Act and entitled to unionize. While approving of the political result of the decision, Mr. Justice Douglas dissented, pointing out that at the time the Act was passed foremen were undoubtedly not included within the term "employee." Similar problems arise in determining whether automobiles are "vehicles" under laws enacted before the invention of automobiles, requiring towns to maintain roads in good repair for vehicles; and whether phonographic discs are "copies" of music entitled to protection under a statute enacted before the phonograph was imagined. These questions invoke the broader one of whether the legislator, though unaware of the future existence of such devices, can be said to have "intended" automobiles or phonographic discs to be covered, and thus pose the problem of the proper

68. 49 Stat. 450 (1935).
69. Supra note 67, at 496.
70. These examples are cited by Wigmore in The Judicial Function, op. cit. supra note 20, at p. xxxvi.
meaning of the term “legislative will” in general. This problem has been discussed above. Suffice it to say in the present context that in those cases in which the legislator contemplates development, the existence of a rule of construction imposing either a historical or a contemporary reading of statutes unless a contrary meaning is shown to have been intended, would give the legislator occasion to express his intention concerning future developments of meaning.

The foregoing examples demonstrate the effectiveness and desirability of rules of interpretation as means of increasing comprehension within the scope of the doctrine of subjective legislative will. Such rules establish a contact between the speaker or writer, i.e., the legislator, and the addressee of the enactment.

The problem of increasing the measure of comprehension is somewhat complicated when posed within the framework of the theory of objective meaning. For instance, without resort to the will of the legislator it may be difficult to ascertain the group of persons to whom a statute is addressed, or whose comprehension is desired. As long as such initial problems are not solved, no complete answer can be expected to the question of the extent to which comprehension can be increased by means of rules of interpretation. However, it is only the “degree” of the increase in comprehension that cannot be established. Comprehension, being a similarity or identity of ideas of the persons involved (whoever they may be), must be capable of being increased to some extent by formulating a method of communication, a code, binding them. In fact, rules of interpretation may assist in solving the above indicated initial problems. Under the extreme version of the doctrine of objective statutory meaning, rules of interpretation may be the only guarantee of comprehension.

In summarizing it may be said that whatever the meaning of “meaning” within the realm of statutory interpretation, its comprehension can be increased by rules of interpretation. Of course, absolute certainty can never be reached, but the scope of misunderstanding can be considerably narrowed.

Turning now to the problem of the effectiveness of rules of interpretation as means of reaching goals of interpretation other than, or supplementary to, an increase of comprehension, two functions of such rules are worth emphasizing: Assistance in disposing of unforeseen cases, and forcing potential future issues upon the minds of legislators.

No rule of interpretation can foreclose the existence of the “unforeseen case” and the problems it invokes. As soon as the unforeseen case arises and becomes known, however, a pre-existing binding
rule of interpretation serves as a tool of resolving doubts concerning coverage *vel non* of the case by a statute, and by accelerating comprehension decreases the likelihood of litigation. If as a result of the interpretative rule, the unforeseen case does not appear to be satisfactorily disposed of, recourse will be taken to legislation rather than to litigation.

Quite frequently future cases are perfectly well foreseen and nevertheless not resolved in advance because of misunderstanding between the several draftsmen as to the prevailing interpretation, or because the draftsmen are not sincerely keen on solving the ambiguity of the bill. An example is afforded in the case of the *United States v. United Mine Workers of America.*

When the bill at issue in the case was before the House, Representative Blanton, of Texas, introduced an amendment which would have made an exception to the provision limiting the injunctive power "where the United States government is the petitioner." Representative La Guardia opposed the amendment not on the ground that such an exception should not be made, but rather on the ground that the express exception was unnecessary, the meaning of the statute being clear. Mr. Blanton's answer was that Mr. La Guardia "does not know what extensions will be made." The debate shows that the case was anticipated, and that the meaning of the bill was controversial even at the time of the debate. Perhaps the proponents of the bill unconsciously were trying to avoid a clear solution. Had the rule of construction which later afforded the basis for the decision been known as a rule of law at the time of drafting, the draftsmen would have been forced to face the issue squarely instead of dodging it, as they did. In this instance also litigation would have been avoided.

Quite generally it may be said that, whether by increasing comprehension or otherwise, legal rules of interpretation introduce an element of certainty into the law.

A distinguishing feature of legal rules of interpretation as compared to scientific or artistic rules consists in the fact that the capacity of the former rules to perform their various functions is not ultimately dependent on the intrinsic reasonableness or convincing power of the rules themselves. These rules are artificial, and they are effective even if they are otherwise unreasonable. If the law contains a direction imposing the application of such rule, the objection that the rule is not true, or unwise, or does not conform to habits of

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72. The relevant parts of the debate are restated in the opinion in the case, *supra* note 21, at p. 277.
speech, is foreclosed. By virtue of being valid as legal rules, rules of interpretation become "true" in a twofold sense: (1) they are "true" in the legal sense of being binding irrespective of their intrinsic qualities; and (2) they become actually true as between legislators and judges, for they become habits of legal speech or communication between them. They are "true" in the same sense in which a code is true. An example may illustrate the proposition set forth here. Professor Radin critiques the rule providing that the expression of one thing is the exclusion of another (expressio unius exclusio alterius) as being "in direct contradiction to the habits of speech of most persons," hence, as "not true." This observation is perfectly correct when applied to the cited rule as a principle of hermeneutics or as an artistic rule. Once the same rule becomes a rule of law, however, it is irrelevant whether or not it is otherwise "true" or wise. It is valid, and therefore true as between the draftsman of a document and the judge interpreting it. Thus, no matter what its intrinsic merits or demerits, it accomplishes its ultimate function of enabling the judge to understand the meaning of the document intended to be conveyed by the draftsman. It serves as a code, and the "true" or natural meaning of words used in a code is not relevant.

**Practicability of Adopting Legal Rules of Interpretation**

In the last analysis, rules of interpretation are methods of increasing legal certainty. However, one of the most frequently encountered arguments against their validity sets forth the intrinsic uncertainty of these rules themselves.

The plain meaning rule above all has been subject to this criticism. Plain meaning has been said to be the result rather than a guide of interpretation, and the paradox of describing something...
as plain which it takes nine pages to explain has been emphasized. This criticism is undoubtedly correct when applied to the plain meaning rule in its present stage of rationalization. So far as future possibilities of the rule are concerned, however, the criticism is subject to limitations. This may be seen from a comparison with the argument advanced in reference to the concept constituting the contradictory opposite of "plain," the rule concerning "uncertainty" or "indefiniteness" of statutes. In *Winters v. People of State of New York*, holding a section of the New York Penal Law void for indefiniteness, Mr. Justice Frankfurter in his dissenting opinion, after pointing out that "indefiniteness" is "itself an indefinite concept," proceeded to demonstrate how that standard may and did acquire definite shape in the course of interpretative decisions, indicating "the directions to be followed and the criteria to be applied." Although the criteria cited by Mr. Justice Frankfurter from opinions delivered by Mr. Justice Holmes bear on the contents of the statutes at issue rather than on the concept of "indefiniteness" in the interpretative rule itself, they may be and in the argument of Mr. Justice Frankfurter are used to narrow down the meaning of the latter rule. Similarly, a collection and comparison of cases dealing with plain meaning may in due course endow with definiteness the plain meaning rule itself, and render it effective as a rule of law.

It has been frequently pointed out, however, that apart from the intrinsic indefiniteness of the individual rules of interpretation, indefiniteness results from their accumulation. It has been repeatedly alleged that these rules neutralize each other, that for each such rule a contradictory opposite may be cited, so that in effect there is no binding rule at all.

This imperfection of interpretative rules is frequently only apparent. There would seem to be circuitous reasoning, for example, in accepting the principle that words must be interpreted in the light of the intention expressed, and at the same time, the principle that

77. See note 13 supra.
78. 333 U.S. 507 (1948).
79. Id. at 520, 524, 525.
80. Id. at 537.
81. Lauterpacht, *Les Travaux préparatoires et l'interprétation des traités* in 48 Académie De Droit International 711, 713 (1934) says: "There is no author whose name is more frequently mentioned before international tribunals than is Vattel, and in Vattel's treatise there is no chapter more frequently cited than the seventeenth of the second book, where the author gives a complete list of rules of interpretation. In practice, this long list of rules of interpretation has been much more noticeable by its lack of pertinence and its excessive artificiality than by its actual utility. It is difficult to imagine a case in which a State could not, in order to support its claims, rely on one of the rules of interpretation elaborated by Vattel. Upon analysis, the majority of these rules neutralize each other." Compare Wurzel, supra note 19, at 309, 310; Radin, supra note 76, at 880.
the intention is to be ascertained from the words used in a document. When analyzed in terms of procedural rules, the two propositions lose all appearance of such reasoning. They mean (1) that a document must be read as a whole, (2) that extrinsic evidence is not admissible. It must be admitted, however, that in many cases the contradictions cannot be resolved in this manner, so that the original challenge remains to be answered.

The argument that rules of interpretation can be mostly neutralized and are therefore not true legal rules originated in continental Europe, and is being uncritically repeated in the common law countries. True, two contradictory rules contained in one statute or code afford no guidance whatever, unless some method of reconciliation can be established. Where, as in continental Europe, precedents are not binding, decisional law cannot effect a permanent reconciliation. Thus, the rules of interpretation, as received and incorporated in the codes, are preserved in continental Europe in the same form in which they were taught by the Roman jurists, as an unsystematized collection of wisdom. In countries of the common law, however, the fact that a rule has a contradictory counterpart is not a necessary bar to its legal character. The entire system of the common law is a system of selecting among opposing rules that which is most appropriate to a given fact situation. In the course of this process rules of conflict are formulated which govern the choice of opposing rules, circumscribing and delimiting the sphere of validity of each to defined fact situations. It may be assumed that if this process of the common law were permitted to function in the sphere of legal interpretation, it would have developed in due course a body of interpretative precedents of a legal character comparable to that of other common law precedents. But where particular types of decision are believed to be based on merely scientific grounds as contrasted with legal grounds, their law-creative operation is impeded. English and American jurists took over from the continental civilians their version of canons of construction. At the same time, they accepted the civilian belief that interpretation is not law. Indeed, they seem not to be aware of the fact that they possess in the common law method a tool for developing the rules of interpretation into Law, a tool not available to continental jurists.

82. Burrows, op. cit. supra note 16, at 6, finds a reconciliation of the two rules in the fact that "There is rarely a difficulty in ascertaining the general intention of the writer when the document has been read as a whole."

83. Schiller, Roman Interpretation and Anglo-American Interpretation and Construction, 27 Va. L. Rev. 733, 767 (1941). Anglo-American Jurisprudence has paid little attention to hermeneutics. Elaborate schemes of canons of construction such as that of Rutherford have been "practically borrowed outright from continental civilians."
In recent years the Supreme Court of the United States enunciated several rules governing the choice of conflicting rules of interpretation. In *United States v. Brown* 84 it held that "the canon in favor of strict construction (of penal statutes) is not an inexorable command to override common sense and evident statutory purpose," and the same principle was clearly applied in *Kordel v. United States*. 85 In *United States v. Sullivan* 86 it held that the plain meaning rule overrides the rule requiring the court to avoid construing an Act in a manner which would raise grave doubts as to its constitutionality. 87 Moreover, this point of the decision was cited as precedent in *Shapiro v. United States* 88 in which the Court said "The canon of avoidance of constitutional doubts must, like the 'plain meaning' rule, give way where its application would produce a futile result, or an unreasonable result 'plainly at variance with the policy of the legislation as a whole.'" 89 It is important to note that the rules of conflict in the *Sullivan* and the *Shapiro* cases are not coextensive, so that invoking the rule of the former case in deciding the latter can mean only that the proposition that there are rules of conflict is thereby recognized as having the force of a precedent. The cited rules of conflict are formulated in terms of sweeping generalizations. The relations of the various rules are fixed in an abstract manner. The method of the common law, however, requires that each rule be predicated upon specific facts as distinguished from others which in turn may generate another, conflicting rule. The rationalizing process leading to such distinctions is still outstanding. But it should be borne in mind that the law of the conflict of rules of interpretation is of very recent origin.

When the effort of creating effective rules of interpretation by rationalizing interpretative decisions is taken into account, the argument may be made that the issue of interpretation is shifted rather than solved in the course of such rationalization. Rules of interpretation may be said to increase rather than reduce interpretative problems by adding to them the issue of interpreting the rules of interpretation themselves. The answer to this argument is that shifting an issue is not a fatal defect as long as the issue is thereby narrowed. The nature and purpose of rules of interpretation, as defined in this paper, consists in their ability to serve as economy devices. They substitute for numerous documentary elaborations of meaning an abbreviated

84. 333 U.S. 18, 25 (1948).
85. 69 Sup. Ct. 106 (1948).
86. 332 U.S. 689 (1948).
87. Id. at 693.
88. 335 U.S. 1 (1948).
89. Id. at 31. The rule of the *Sullivan* case is cited in the margin, note 40.
general elaboration covering all of them. Should any such rule itself raise interpretative problems, under *stare decisis* such problems could be decided in a single case. As thus clarified, the rule could then effectively perform its function of assisting in the disposal of many other potential cases.

The preconceived idea that rules of interpretation are not and cannot be legal rules resulted in the fact that hardly a decision can be found which is exclusively based on a particular rule of interpretation. This fact in turn has been used as another argument against the legal character of such rules. It has been said that these rules are never contained in a square holding but are mostly set forth as supplementary grounds of decision, and that therefore they cannot be discovered and formulated by the usual methods of the common law. Indeed, it is said, they are never true reasons of judicial decisions but rather rationalizations of decisions previously reached and derived from indeterminate sources, mostly of a psychological nature. Again, it may be interesting to note that the last mentioned proposition has been set forth in the now waging controversy concerning the operation of precedents as applicable to all rules of the common law. The first mentioned challenge is a more serious one. However, it may be directed only at existing law, and leaves the possibility of developing a future law of interpretation intact. There is nothing inherent in the nature of a rule of interpretation which prevents it from being used as sole or as determinative ground of decision. Recent decisions seem to indicate that in resolving doubts increasing weight is being given to interpretative rules, and the inception of a *law* of interpretation seems to be noticeable.90

It is quite difficult, however, for this development of American law to reach the stage of a conscious process. This is explainable on the basis of the peculiar jurisprudential distinction which is drawn between rules of construction and rules of law. Once a rule of construction is used as a sole or determinative ground of decision, it is likely that it will operate as a precedent. When it operates as a precedent it is no more referred to as a rule of construction but is described as a rule of law. The theory is thus preserved that there are no legal rules of interpretation. Closely connected with this is the distinction that is drawn between words which are mere means of

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90. In United States v. United Mine Workers of America, 330 U.S. 258 (1947), the trend toward acceptance of binding rules of interpretation was rather clear. In turn, the interpretative proposition advanced in that case was the predominant ground of decision in United States v. Wittek, 69 Sup. Ct. 1108 (1949). See also United States v. Wyoming, 331 U.S. 440 (1947), decided on the authority of the construction of Heydenfeldt v. Daney Gold & Silver Mining Co., 93 U.S. 634 (1877), assumed to be binding in United States v. Morrison, 240 U.S. 192 (1916).
transmitting meaning and words which are constitutive parts of a legal
transaction, or ceremonial words. As soon as a certain interpretation
becomes legally associated with definite words, the road is open for
these words to be used as constitutive parts of the contemplated trans-
action, with the result that no other words will be admitted to bring
about the same legal effect. Again, the interpretative character of
an ensuing judicial determination is lost, the claim being made that
the court is faced with an "act" not a true "word" and that only
words are proper subjects of interpretation. What may seem to be
merely a matter of mistaken terminology actually obstructs the de-
velopment of a law of interpretation. Awareness of the true nature
of rules of interpretation is thus not a mere problem of juristic nicety.
Just as a verbal act does not cease to be a word by virtue of the fact
that a fixed legal consequence becomes attached to it, so an inter-
pretative rule of law does not cease to be a rule of interpretation by
virtue of acquiring the force of law.

There remains the problem of determining the exact stage at
which a rule of interpretation may be said to have acquired the force
of law. In the case of interpretative statutes 91 this problem is solved
in accordance with formal criteria. The general standards determi-
ning the question of whether a legislative enactment is in force are
also applicable to interpretative enactments. In the case of interpret-
ative decisional law the standards of the validity of rules are rather
flexible. The general flexibility of such standards in the field of de-
cisional law 92 is further complicated in the field of interpretative de-
cisional law by the above described reluctance of those entrusted with
interpretation to accept interpretative decisions as precedents. Per-
haps, due to this fact, there will be developed in the field of interpret-
atve decisional law standards of what constitutes a precedent more
stringent than those prevailing in other fields of law. The emergence
of decisional interpretative law of some sort, however, is an undeniable
fact. 93

91. Statutes dealing with principles of interpretation are collected and cited in 9
Wigmore, Evidence § 2938, note 3 (3d ed. 1940).
92. Spiegel's Estate v. Commissioner of Internal Revenue, 69 Sup. Ct. 301, 337
(1949).
93. In United States v. United Mine Workers of America, supra note 90, at 272,
273, Mr. Chief Justice Vinson, speaking for the majority, said:

It has been stated, in cases in which there were extraneous and affirmative
reasons for believing that the sovereign should also be deemed subject to a re-
strictive statute, that this rule [the rule that he is not subject to such statute un-
less expressly mentioned in it] was a rule of construction only. Though that may
be true, the rule has been invoked successfully in cases so closely similar to the
present one, and the statement of the rule in those cases has been so explicit, that
we are inclined to give it much weight here. Congress was not ignorant of the
rule which those cases reiterated; and, with knowledge of that rule, Congress
LAW OF INTERPRETATION AS SOLUTION OF JURISPRUDENTIAL PROBLEMS

Acceptance of a law of interpretation will prove to be of assistance in resolving many troublesome problems which are usually expected to be answered by jurisprudence as a science or philosophy of the law. Are there gaps in the law? Is the analogy argument a proper method of disposing of cases not explicitly covered by a legal provision? And if so, does the admission of analogy also cover the device which Wurzel calls projection? Is the *argumentum a contrario*, the rule of *expressio unius exclusio alterius*, or that of *ejusdem generis* a proper mode of reasoning? Jurisprudence explains the working of any such rule or argument; and hence may be consulted in the course of accepting or rejecting any such device in those instances in which the making of future law is at issue. But the question of whether or not any such device is valid as Law is to be determined not by jurisprudential generalizations but on the basis of the particular legal system involved.

One legal system may adopt the rule that there are no gaps in the law, *i.e.*, that all future cases are provided for, so that if a fact situation does not fit into any of the existing legal provisions, no action or remedy will lie. Another legal system may adopt the opposite rule, *i.e.*, assume itself to be incomplete. It may further contain provisions for a particular method of filling its gaps, or even for an order of priority among the various methods of filling such gaps.

One legal system may admit analogy as a valid method of arriving at a decision, another system may exclude it. Furthermore, within the same legal system there may be fields in which analogy is admissible and other fields in which it is not. It is also possible for a legal system to adopt a particular type of analogy, as for instance, analogy to a definite statute, but reject another type, such as analogy drawn from principles of an entire legal scheme.

The same is true of the “problem” of projection. As presented by Wurzel, this method of law-creation would seem to be inherent in “juridical thinking.” Therefore, it deserves elaboration. Wurzel would not, in writing the Norris-La Guardia Act, omit to use “clear and specific [language] to that effect” if it actually intended to reach the Government in all cases.

Has the decision ground of the case become a rule of law by virtue of that very case? There is hardly any doubt that it has advanced in the direction of becoming one. United States v. Wittek, *supra* note 90, practically confirms the legal character of the rule of construction advanced in the Mine Workers’ case.

94. *Note 19 supra*, at 342 et seq.

95. The rule “No gaps in the law” is tantamount to “Judgment for the defendant” in all cases not provided for in the law.

96. In criminal law analogy is generally excluded. But see the Danish Penal Code of 1930.

97. *Supra* note 19, at 344 et seq.
describes "projection" as "extension of a concept found in formulated law to phenomena which were not originally contained in the concept, or at least were not demonstrably a part of the group of images forming the concept, without at the same time changing the nature of the concept as such." By way of illustration, Wurzel cites the extension of a statute passed in 1700 imposing a tax on mills "run by machine power" to steam or electric mills, although in 1700 by "machine power" one had no idea of anything except machines driven by wind or water. The application of the statute to steam or electric mills—Wurzel claims—is neither subsumption nor analogy, and would be permissible even if the statute prohibited extension by analogy, for the nature of the concept "machine power" need not be changed in order to apply it to steam machinery. "There is no gap, we can apply the concept immediately and directly; we attach the new phenomenon to the old concept as an integral part, although it was not originally contained in it—in short we project the old concept into the new phenomenon."

It is evident that whenever projection is applied, there is an underlying assumption, whether express or tacit, that words are to be interpreted in accordance with their meaning as prevailing at the time of application rather than in accordance with that obtaining at the time of the enactment of the statute at issue. It is perfectly imaginable that a legal system should exclude such assumption and prohibit law-creation by projection, or that it should prohibit such law-creation for particular cases or types of cases. There is nothing inherent in "juridical thinking" which imposes such method of law-creation upon all legal systems or upon the disposition of all types of cases within any such system. As between the rule imposing historical reading and that imposing contemporary reading of legal language, the law is the first source of determining the choice, and the law may formulate a general rule imposing the one or the other reading upon all statutes or upon particular statutes as distinguished from others.

Similarly, the question of whether any of the numerous rules of construction, such as expressio unius exclusio alterius, ejusdem generis, etc., is applicable must be decided on the basis of existing law adopting or rejecting any such rule as a general principle or for particular types of situations.

As suggested above, however, law-makers concerned with the shaping of future law will always have to consider policy arguments in the sphere of the law of interpretation as in other fields of the law. Examples of policy arguments which may be advanced de lege ferenda are set forth in the following.
Although legal rules of interpretation may successfully serve their purpose, whether or not they are otherwise reasonable or true, from the point of view of policy, in introducing such rules into the law, reasonable rules are preferable to unreasonable ones, for the former will be more readily accepted and followed.

Many rules of interpretation are not merely means of transmitting meaning but are also independently law-creative. This factor must be considered. Thus, when a potential general rule of interpretation accepting or rejecting projection is discussed, it should be remembered that the type of rule adopted affects the development of the law. An important policy argument against projection will be the following: In letting the meaning of a statute as prevailing at the time of its application govern rather than that accepted at the time of its enactment one actually makes law dependent on contingencies of linguistic development which does not necessarily coincide with the spirit or purpose of the statute.\(^9\)

The problem of the intrinsic reasonableness of particular rules of interpretation must be distinguished from that of the reasonableness of adopting rules of interpretation at all within particular branches of law, e.g., decisional law. As shown in the first section, the difference between the nature of statutory law and decisional law is much less pronounced than is generally assumed. Nevertheless, from the point of view of policy concerned with the “growth of the common law” in the accepted forms of the common law, one might very well argue that it would be better to dispense with rules of interpretation and the incident certainty within the field of decisional law. No position is taken here with respect to that point. Within the field of statutory law the policy situation is insofar different from that prevailing in decisional law as the former law presupposes a prior policy determination that statutory law is preferable to decisional law in situations governed by statute. Such a determination implies that the statute be administered as meant.

In this connection it is important to distinguish the problem of whether or not rules of interpretation should be applied to the body of law known as decisional law from the problem of whether rules of interpretation themselves should be decisional or statutory. The present writer is inclined to favor decisional interpretative law. Any law of interpretation will have to cope with the jurisprudential prejudice that interpretation is not and cannot be law. Decisional law is better equipped to perform the educational function of overcoming this prejudice than is statutory law.

\(^9\) The situation is further complicated by the fact that the spirit or purpose of the statute is also expressed in words which have a changeable meaning.
CONCLUSION

There can be no law without a law of interpretation, for even the maxim of "free interpretation" presupposes legal authority of judges to interpret freely, and possibly also their legal duty to interpret reasonably. Interpretation being thus primarily a matter of legal fiat, the issue of legal interpretation is narrowed down to the question of whether or not specific rules of interpretation should be adopted. These rules have been attacked on various grounds. Their logical possibility and practical effectiveness have been challenged. At the same time, no suggestion has been advanced for a constructive substitute for them.

The recent expansion of statutory law and the increasing use of written documents in modern life give weight to the argument in favor of adopting legal rules of interpretation, for the essence of documents lies in their meaning, and rules of interpretation are means of increasing the probability that documents will be applied as meant. It is hoped that some of the challenges have been rebutted and that it has been shown in positive terms that legal rules of interpretation are logically possible, that they may be practically effective, and that adoption of such rules is desirable. The effectiveness of legal rules of interpretation can be increased by juristic consciousness of the legal character of such rules. Such consciousness may be promoted by a restatement of the law of interpretation.