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Hunt for Laws' "True" Meaning Subverts Justice

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Can you be sent to jail for conduct that does not violate the language of law but nevertheless is contrary to legislative intent? How precisely must Congress draft the statutes that govern our behavior? How far may courts legitimately go in filling the gaps left by the legislature?

The answers to these questions, raised by many of the cases we see in the courts today, have profound implications --not merely for those who litigate the issues, but, more fundamentally, for the way in which we govern ourselves. Over the past half-century the idea that the law consists of objective rules has been supplanted by the view that it is a matter of the subjective intent of those who promulgate legal instruments. I call this trend the subjectification of the law.

There are many examples of this subjectification of the law. In many states, for example, it is no longer possible to enforce a contract drafted by sophisticated, knowledgeable parties without a trial to decide what the parties really meant when they agreed to language that seems perfectly clear to the average Joe.

The subjectification trend is even more apparent in the way courts now interpret statutes. No longer is the statutory language the sole, or even the most significant, index of legislative will. Instead, attorneys and courts often engage in a kind of scavenger hunt through the contradictory

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documents that comprise a statute's legislative history, in the hope of discovering the law's "true" meaning. It is disconcerting to note how many briefs -- and judicial opinions -- start with reference to the legislative history and proceed on to a discussion of policy, overlooking the statutory language altogether.

While the subjective approach to legal language is now so pervasive it is difficult to imagine any other approach, it is actually of relatively recent origin. In a lecture delivered to the Bar Association of the City of New York in 1948, Justice Felix Frankfurter warned of the emergence of a then new and disturbing trend in legislative interpretation -- one that looked at what the legislature meant to do, rather than what it in fact did.

In the intervening 40 years, Justice Frankfurter's worst fears have been realized. The justice would no doubt be shocked to pick up a legal publication and find advertisements for the legal profession's latest cottage industry -- legislative-intent services. A typical ad promises to help the attorney "overcome the statute's 'plain meaning,' overcome contrary case law," "move from strength where no case law exists. . . . and more!" In light of such titillating promises, I feel almost prudish in reminding lawyers that, under traditional canons of statutory construction, once we discern the plain meaning of the statute that is the end of the matter.

As I see it, the subjectification of law has very serious implications. To the extent our legal environment provides fertile soil for entrepreneurs who can turn a profit from overcoming a statute's plain meaning, we inject a large dose of uncertainty into the law. Figuring out what 535 legislators, organized in two houses and a variety of committees, plus the president, may have meant in passing a statute is a cumbersome and inexact exercise, even if one is able to accept the idea of a collective intent.

It is also expensive. If the statute is carefully drafted, a lay person can frequently determine its plain meaning simply by reading it; figuring out what the legislature really intended requires costly and time-consuming litigation. Indeed, subjectification of the law encourages litigation: Even when the law seems clear, litigants may be willing to roll the dice that a court can be persuaded to overlook the statute's plain meaning.

The willingness of courts to look far beyond a statute's language also encourages legislators to be sloppy and evasive. If courts are not going to be bound by the statute's language anyway, why bother to be precise? Legislators often find it convenient to be vague and let the courts figure it out. Justice Frankfurter described a cartoon depicting a senator who tells his colleagues, "I admit this new bill is too complicated to understand. We'll just have to pass it to find out what it means."

To Justice Frankfurter, this was the epitome of legislative irresponsibility. I fear we may have long passed that point. It seems as if legislators now pass statutes because of, not despite, their lack of clarity. Indeed, imprecise or ambiguous language has become a tool of political compromise. The insider-trading laws, for example, are left intentionally vague, with some legislators taking the position that drawing precise lines would be bad in that it would allow people to stay clear of the law. Many provisions in the environmental laws, from the original Clean Air Act to the Superfund legislation, are written almost as if designed to invite litigation.

By using vague language, legislators can avoid making the difficult political choices that they have to confront when drafting a statute precisely. When statutory language is subject to varying interpretations, all sides can claim victory in the hope that the courts will eventually adopt their position. Legislators agree to disagree, and then try to influence future judicial interpretation by sprinkling the record with contradictory snippets of legislative history. This attitude is encapsulated in an excerpt from the Congressional Record, cited by Justice Scalia in a recent opinion, where a congressman is quoted as saying: "I have an amendment here in my hand which could be offered, but if we can make up some legislative history which would do the same thing, I am willing to do it."

When legislators leave statutory language ambiguous, they abdicate their responsibility of giving the law policy content. That function shifts from the politically elected -- and responsible -- branches of government to judges who are appointed for life. While some may view this as a desirable shift, it is clearly not how our government is supposed to work and subverts an important aspect of our system of checks and balances.

Dealing with nebulous statutory language and providing policy content for vacuous legislative enactments is also unhealthy for the courts. Judges who get into the habit of playing legislator find it tempting to start treating all laws -- including the Constitution -- as merely a springboard for implementing their own sense of right and wrong. As Justice Frankfurter remarked in his prescient lecture, it takes much self-discipline to determine statutory purpose in a principled fashion; the hunt for legislative intent, he noted, "might justify interpretation by a judicial libertine, not merely a judicial libertarian."

There is no easy way out of our present conundrum. The draconian solution, noted without much enthusiasm by Justice Frankfurter, would be to follow the English rule that parliamentary intention can be discovered only by reading the statute -- not committee reports or other tidbits of legislative history. I am confident that we shall never fully adopt that approach. Yet we have surely gone too far in asking courts to fill in the gaps the legislature has left, intentionally or not. While a sudden abdication of all reference to legislative materials could be disruptive, courts might start making it clearer that legislative intent not embodied in legislative language counts for very little.

By treating legislative history with a healthy dose of skepticism, courts can encourage lawmakers to embody their political compromises to the words of the statute, not in contradictory bits of rhetoric dotting the legislative record. Lawyers must be taught that the plain language of the statute sometimes makes litigation pointless -- if not frivolous. The time has come for the judiciary to make clear once again that we are a nation of laws, not of legislative histories.