Approaching Statutory Interpretation in New Mexico

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APPROACHING STATUTORY INTERPRETATION IN NEW MEXICO

Except for one notable contribution a basic, overall approach to statutory interpretation is not to be found in the various articles and materials on the subject. This Note adopts the one exceptional approach (Hart and Sacks) and applies it to selected cases decided by the New Mexico Supreme Court as presently constituted. While the Hart and Sacks approach used here may seem simple and perhaps too obvious to waste the reader's time, it should be noted that the New Mexico decisions, as do the decisions in most states, indicate a definite lack of any basic line of attack when confronted with the problems of statutory interpretation.

This lack of approach in New Mexico does not necessarily mean that most statutory interpretation decisions reach the wrong result. Indeed, many of the cases selected for analysis here reached the correct result, but for the wrong reasons. Consequently, the desired certainty and predictability in the law are not furthered, and the New Mexico attorney is not aided in analyzing his clients' problems for the purpose of advising conduct or litigation.

All would agree that the importance of statutory interpretation is increasing due to the ever increasing bulk of statutory law and, hence, cases calling for interpretation of statutes. What, then, is this intriguing approach that will end all our problems of construction? Hart and Sacks state that in interpreting a statute a court should:

1. Decide what purpose ought to be attributed to the statute and to any subordinate provision of it which may be involved; and then
2. Interpret the words of the statute immediately in question so as to carry out the purpose as best it can, making sure, however, that it does not give the words either—

2. A short bibliography can be found in Hart & Sacks, supra note 1, at 1147-48. For a more comprehensive bibliography see Sanders & Wade, Legal Writings on Statutory Construction, 3 Vand. L. Rev. 569 (1950).
3. The New Mexico Supreme Court has retained its present membership, with one exception, since August 1, 1960. The justices are David W. Carmody, James C. Compton, Irwin S. Moise M.E. Noble, and recently elected Paul Tackett.
4. This Note in no way attempts to present statistics on right versus wrong results according to the Hart and Sacks approach.
5. For a criticism of the purpose approach see Radin, Statutory Interpretation, 43 Harv. L. Rev. 863, 875-78 (1930).
(a) a meaning they will not bear, or
(b) a meaning which would violate any established policy of clear statement.6

The basis of this formulation is that every statute is, of necessity, a purposive act, and that no statute can be properly interpreted without considering the purpose which ought to be attributed to it. It does not say that the court's function is to ascertain the intent of the legislature with respect to the particular matter at hand.7 The court is bound by the words used together with relevant elements of the context, in the broad sense, and cannot give effect to a particular known intention of the legislature that conflicts with the general and subordinate purposes of the statute as written.8 Attributing purpose to the words of the statute and carrying out that purpose to the matter at hand, then, is the court's function.

The first words that a court should examine are those of a general statement of purpose found in the statute itself. This statement should be accepted, however, only if it "appears to have been designed to serve as a guide to interpretation, is consistent with the words and context of the statute, and is relevant to the question of meaning at issue."9 Such a statement being absent, however, the court must infer purpose according to the words as written in the immediate context and certain relevant extrinsic aids.

First, the court should assume, "unless the contrary unmistakably appears, that the legislature was made up of reasonable persons pursuing reasonable purposes reasonably."10 Then the court should

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6. Hart & Sacks, supra note 1, at 1200, 1411. Hart and Sacks explain what can be expected of a theory of statutory construction:

When an effort is made to formulate a sound and workable theory . . .
the most that can be hoped for is that it will have some foundation in experience and in the best practice of the wisest judges, and that it will be well calculated to serve the ultimate purposes of law.

Id. at 1201.

7. See text accompanying note 12 infra. Courts often speak of "intention" when they mean "purpose." Since appellate courts usually handle difficult problems of statutory construction rather than easy ones to which a statute unquestionably applies, how likely is it that the legislative body which enacted the statute had any "intention" as to the particular fact situation in issue? The legislature is likely to have actually considered only a few of the infinite number of situations which could possibly arise under a statute.

8. See Hart & Sacks, supra note 1, at 1157:

(b) The general words of a statute ought never to be read as directing an irrational pattern of particular applications. (c) What constitutes an irrational pattern of particular applications ought always to be judged in the light of the overriding and organizing purpose.

9. Id. at 1413.

10. Id. at 1415.
use the technique of purpose set forth in *Heydon's Case* in 1584 which essentially compares the new law to the old. In other words, the court is to look at the “mischief” existing in the law prior to enactment and at the reason for the remedy provided in the statute. Third, the court should hypothesize instances of “unquestioned application of the statute” to which the issue at hand may be analogized.

If substantial doubt still exists in the interpreter’s mind, then certain outside contextual aids may be used: development of the prior law, general public knowledge about the mischief that was thought to require a remedy, public announcements of officials directly involved in the process of enactment (e.g., governor, committee reports), and internal legislative history. As to the use of legislative history, however, Hart and Sacks point out two important limitations:

*First* The history should be examined for the light it throws on general purpose. Evidence of specific intention with respect to particular applications is competent only to the extent that the particular applications illuminate the general purpose and are consistent with other evidence of it.

*Second* Effect should not be given to evidence from internal legislative history if the result would be to contradict a purpose otherwise indicated and to yield an interpretation disadvantageous to private persons who had no reasonable means of access to the history.12

11. 30 Co. 7a (K.B. 1584). The formula can be found in Hart & Sacks, supra note 1, at 1144, and Jones, *Extrinsic Aids in the Federal Courts*, 25 Iowa L. Rev. 737, 757 (1940):

> [F]or the sure and true interpretation of all statutes . . . four things are to be discerned and considered:
> 1st. What was the common law before the making of the Act.
> 2nd. What was the mischief and defect for which the common law did not provide.
> 3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth.
> 4th. The true reason of the remedy.
> And then the office of all the Judges is always to make such construction as shall suppress the mischief and advance the remedy . . . and to add force and life to the cure and remedy according to the true intent of the makers of the Act. . . .

12. Hart & Sacks, supra note 1, at 1416. The federal courts and a few state courts are looking more to extrinsic aids as guides to the interpretation of statutes. Jones, *Statutory Doubts and Legislative Intention*, 40 Col. L. Rev. 957, 959 (1940). And many law review articles advocate the use of such aids. *Contra*, Radin, supra note 5, at 872-73. It must be remembered that such aids are not substitutes for the purpose approach:

Consider the difference between going to the legislative history with a question about general purpose carefully formulated after analysis of the
The use of committee reports and internal legislative history is strictly limited in New Mexico, however, as in most other states, because of a lack of publication. Indeed, it is a rare statute that has a written history. Thus, in New Mexico the court will usually have to rely exclusively on the statute itself.

Also to be considered in inferring purpose are post-enactment aids. Popular construction of a statute plus the court’s own prior interpretations of it are relevant in attributing purpose.

After inferring purpose, the court should attempt to carry out that purpose without giving the words of the statute “a meaning they will not bear,” or “a meaning which would violate any established policy of clear statement.” The first proposition or prohibition will always operate, if at all, to prevent expansion of the scope of a statute. Legislatures must necessarily use the imperfect vehicle of written language to communicate general authoritative directions which in every case require interpretation. The courts are bound by the statutes as written and they cannot give effect to unenacted purpose or intention. Thus, this requirement that words must bear the meaning given them may work to defeat actual legislative intention. The meaning of words depends upon context, and courts need to be “linguistically wise.” Dictionaries can be of help in determining the boundary lines to the meanings of words. Maxims of construction, such as expressio unius est exclusio alterius, may also be useful as simple devices for checking a certain result to insure that the words of a statute have not been given a meaning they will not bear.

This use of maxims of construction should not be confused with their usual incorrect use in state courts as substitutes for interpretation. The usual use of maxims is incorrect for two reasons. The first is that maxims are not in fact substitutes for interpretation, but mere labels that are attached to the results of some interpretative process which has already taken place but which remains unrelated and obscure. Professor Radin ably pointed out this objection while considering the plain meaning rule:

statute and the rest of its context, and plunging into the morass of successive versions of the bill, committee hearings, committee reports, floor debates, and conference reports with a blank mind waiting to be instructed, on the assumption that it is equally probable that the legislature did or did not “intend” a particular result and trying to find out which.

Hart & Sacks, supra note 1, at 1264.

13. Court opinions seldom discuss the popular construction of statutes. Hart & Sacks, supra note 1, at 1164.

14. See quotation in text accompanying note 6 supra.

15. Most words have several meanings, not just one. The way to determine which meaning is the correct one is by reference to the context. And an essential element of the context of every statute is its purpose.
As a matter of fact, in most cases when courts say that a statute is plain and therefore needs no interpretation, they do so in the inverted fashion which marks so much of the judicial process. They have already interpreted, and they then declare that so interpreted the statute needs no further interpretation.\(^6\)

The second objection that can be made to this use of maxims of construction is the fact that in doing so a court forces these rules upon the legislature and thereby acts outside its judicial authority. It is a popular, and perhaps accurate, notion that legislatures enact poorly worded, redundant statutes because of prior experience with interpretation disasters.\(^7\)

The Hart and Sacks approach also prohibits interpreting a statute by giving the words "a meaning which would violate any established policy of clear statement."\(^8\) Again actual legislative intent may be defeated, and a linguistically permissible meaning of statutory words may require avoidance because of other policies which Hart and Sacks consider to be "constitutionally imposed. The policies have been judicially developed to promote objectives of the legal system which transcend the wishes of any particular session of the legislature."\(^9\)

In general, the requirement of clearness will vary according to whom the statute is addressed. Thus, the need for clarity is greater when the words are addressed to private persons than to, say, judges. One particular policy of clear statement is pointed out. "[W]ords which mark the boundary between criminal and non-criminal conduct should speak with more than ordinary clearness. This policy has special force when the conduct on the safe side of the line is not, in the general understanding of the community, morally blameworthy."\(^10\)

So completes a summary of the Hart and Sacks approach. Before the cases can be considered, however, there remains one possible stumbling block to a summary application of this formulation in

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16. Radin, supra note 5, at 869. This usual use of maxims has been widely discredited by writers. Contra, Landis, A Note on "Statutory Interpretation", 43 Harv. L. Rev. 886, 892 (1930). Courts must not be entirely unaware of the problems of their use, however, because often maxims are ignored or stated and carefully avoided. One interesting point is that for every rule of construction there is an opposite rule that can be argued. Llewellyn, Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed, 3 Vand. L. Rev. 395 (1950).

17. The Supreme Court of New Mexico has also found it necessary to sprinkle its decisions with maxims of construction. One need only consult the New Mexico digest to discover the numerous cases in which such maxims were used.

18. See quotation in text accompanying note 6 supra.

19. Hart & Sacks, supra note 1, at 1413.

20. Id. at 1413, 1240-41.
New Mexico. New Mexico has found it necessary to enact a statutory interpretation statute.\textsuperscript{21}

In the construction of constitutional and statutory provisions the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the legislature or repugnant to the context of the constitutional provision or statute:

First. Words and phrases shall be construed according to the context and the approved usage of the language. \ldots \textsuperscript{22}

The remaining rules (2 through 8) in the statute refer to particular situations and may be ignored in this discussion.\textsuperscript{23} The question arises, however, to what extent, if any, this statute prohibits the use of the Hart and Sacks theory of statutory interpretation developed above. Perhaps the statute compels the use of this or similar theory. How does one go about interpreting a statutory construction statute?\textsuperscript{24} May one approach be used to reach a result which would compel the use of another approach thereafter?\textsuperscript{25}

The first rule of the statute reads in part: “Words and phrases shall be constructed according to the context. \ldots” Is this legislative direction inconsistent with the Hart and Sacks approach? Probably not. An important element of context is purpose. The only remaining problem is whether the word “context” is limited to the four corners of the statute or whether it refers also to extrinsic aids such as legislative history or even to the prior “mischief” that required a statutory remedy. Shouldn’t we assume that because statutes are purposive acts the legislature would not reasonably limit the court’s ability to discover purpose? If so then, so far, the statutory construction statute not only is consistent with the Hart and Sacks approach, but also directs the court to follow a purposive approach whether it be identical to theirs or not.

The second part of the first rule—“Words and phrases shall be construed according to \ldots the approved usage of the language”—seems to fit in perfectly with the Hart and Sacks theory. This lan-

\begin{itemize}
\item \textsuperscript{21} Why should this statute be necessary?
\item \textsuperscript{22} N.M. Stat. Ann. § 1-2-2 (Supp. 1967).
\item \textsuperscript{23} It is interesting to note that the particular rules were probably adopted to avoid stilted judicial interpretation. The word “may” is used in four of the seven remaining rules to prevent the court from arriving at unintended results. For example, “words importing the singular number may be extended to several persons or things. \ldots” \textsuperscript{22}
\item \textsuperscript{24} The first rule of interpretation not only has never been construed by the New Mexico Supreme Court, it has never even been cited.
\item \textsuperscript{25} This problem is not unlike the one presented by the rule—“Every generalization has an exception”—which is itself a generalization.
\end{itemize}
The only limit placed upon the first general rule is that any resulting construction should apply "unless such construction would be inconsistent with the manifest intent of the legislature or repugnant to the context of the . . . statute." It would seem that this limitation applies to the other seven specific rules of construction rather than the first because if the first has been properly followed then the limitation of meeting legislative "intention" must necessarily have been met. This redundancy with regard to the first rule is further exemplified by the repeated reference to "context."

Of course, the redundancy disappears if we consider the word "intent" to mean something other than purpose, i.e., the wishes of the legislature with regard to particular fact situations. That we should not so interpret the term becomes evident after two important considerations. First, the limitation would seldom, if ever, apply because it would be the rare instance in New Mexico when the court could discover the actual intent of the legislature with respect to a particular situation. Moreover, the legislature, of necessity, could only contemplate a limited number of specific situations when the act was passed. Second, even if the legislative intent were discoverable, then that intent could not be given effect contrary to the ascertained purpose without producing inconsistent results. Should we assume that a reasonable legislature would desire such irrationality in the law?

The New Mexico statutory construction statute, therefore, is not inconsistent with the theory formulated by Hart and Sacks. Perhaps the analysis was weighted in favor of the result reached, but as far as this Note is concerned the New Mexico statute shall not constitute a barrier to the application of the Hart and Sacks approach to the New Mexico cases.

The cases selected for discussion may seem somewhat limited in value. Cases that involve statutes as part of general codes have been excluded in order to avoid the problems and added policies connected with the interpretation of such statutes in light of the purposes of other provisions and of the code as a whole. For the most part cases that involve isolated statutes have been selected. Similarly,

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26. See text accompanying notes 14-15 supra.
27. See note 8 supra.
in order to avoid added problems of *stare decisis*, only cases construing statutes for the first time have been chosen. The limitations on the kind of cases selected will not, it is hoped, impair the value of demonstrating a workable theory of interpretation.

The first example case to be considered, *State v. Peters*, involved the following criminal statute:

Any person confined in the state penitentiary who shall escape or attempt to escape therefrom shall be guilty of a felony and upon conviction thereof, shall be imprisoned in the state penitentiary for not less than two years, which sentence shall not run concurrently with any other sentence such person then be serving.

The interpretation problem arose because the defendant had escaped from a prison honor farm rather than from the state security prison located outside Santa Fe. The issue before the court was whether the term "penitentiary" included the prison honor farm. The New Mexico court answered the question in the affirmative; but used a short approach which in no way resembled a purpose approach. The court examined another New Mexico statute and determined that it compelled the result reached in the case. That statute provides for the management and general government of the penal institutions, prisons farms as well as the security prison, to be placed in the hands of a single commission. The court reasoned from this statute that "the prison honor farm is an integral part and parcel of the state penitentiary, and escape therefrom is an escape from the state penitentiary."

The fallacy in this approach ought to be apparent. The decision by the legislature concerning the administrative structure depended upon policies (e.g., efficiency) which are irrelevant to the policies governing the deterrence of escape from different kinds of penal institutions. Is it reasonable to assume that the purpose of the administrative act has any relation to the purpose of the criminal escape act? Indeed, had the New Mexico legislature found it convenient to establish separate commissions for the different institutions, would the New Mexico court have felt compelled to construe "escape from the penitentiary" as necessarily excluding escape from a prison honor farm?

28. For an interesting analysis of *stare decisis* see Hart & Sacks, *supra* note 1, at 565-651.
The question now is whether the court reached the correct result regardless of its peculiar reasoning.\textsuperscript{33} What purpose ought to be attributed to the escape statute? Surely the primary purpose is that of deterrence, as in all criminal statutes. Why, then, would the legislature distinguish, for purpose of deterrence, between an escaper from the security prison (to whom the statute unquestionably applies) and one from the prison farm? It is unlikely that the legislature considered the problem of escape from the prison farm or had any intent in regard to that particular situation. By way of analogy, however, the importance of deterring the honor farm escaper is equal to that of deterring the security prison escaper, i.e., reinforcement of the deterrent factor connected with the original criminal act, protection of society from a repetition of the criminal acts until rehabilitation is accomplished, costs of re-apprehending the escaper, and the immediate dangers involved in the escape itself (though, perhaps, somewhat less on a prison farm). The analogy having been made, then, it would be irrational according to the purpose of deterrence to apply the escape statute to escapers from the security prison and not to those from the honor farm.

Defendant asserted that he had been prosecuted under the wrong statute, that he should have been charged under another which prohibited escape from custody while under criminal sentence, "though not actually within the confines of the penitentiary."\textsuperscript{34} The sentence for escape under this statute was identical to that provided in the statute under which he was convicted. The same kind of interpretation problem would have been involved because the legislature was unlikely to have thought of the prison honor farm, but rather escape from the time of conviction until delivery to the security prison. Nevertheless, this statute, rather than helping defendant, reinforces his conviction because the two statutes together indicate a general legislative purpose to "cover the field."

The only problem remaining is Hart and Sacks' second prohibition, i.e., the meaning attributed to "penitentiary" must not violate any policy of clear statement. The applicable policy is that criminal statutes should be extraordinarily clear in order to ensure that the addressees are properly notified. In this case, however, the defendant could hardly claim surprise. Being confined in a minimum security institution could not have led him to believe that he was free to choose confinement or freedom, even though the opportunities for escape were greater.

\textsuperscript{33} The court also cites cases from other states, an idea that is criticised in the analysis of another case. See text accompanying note 82 infra.

\textsuperscript{34} N.M. Laws 1955, ch. 143, § 2 (repealed 1963).
The New Mexico court reached the correct result, but for the wrong reasons. In *State v. Weddle* the court reached the wrong result. The case involved the distribution of appellate jurisdiction. In order to relieve the New Mexico Supreme Court of its intolerable case load, the New Mexico legislature created a court of appeals, and at the same time defined the appellate jurisdiction of the new court. Four main areas of appellate jurisdiction were provided, one being:

C. criminal actions except those in which a judgment of the district court imposes a sentence of death or life imprisonment; . . .

The court also provided that the appellate jurisdiction of the Supreme Court "extends to all cases where appellate jurisdiction is not specifically vested by law in the court of appeals." The question in the *Weddle* case was whether jurisdiction of an appeal of a determination on a Rule 93 motion belongs to the New Mexico Supreme Court or the New Mexico Court of Appeals. The only possible basis for jurisdiction in the court of appeals would be section 16-7-8(C) (criminal actions) quoted above. The court held that such appeals do not fall within 16-7-8(C). Again the court failed to adopt a purposive approach. The court reasoned that because Rule 93 was copied from 28 U.S.C. §2255 (1964) and because the federal courts had concluded that §2255 proceedings are civil, actions under Rule 93 should be considered to be civil. The court then added:

Having so concluded, is it still possible to bring the proceeding within the terms of §16-7-8(C), supra? That it is not, would seem to be

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35. In 1963 the New Mexico legislature repealed the escape statute and enacted a new provision:
   Escape from penitentiary consists of any person who shall have been lawfully committed to the state penitentiary:
   A. escaping or attempting to escape from such penitentiary; or
   B. escaping or attempting to escape from any other lawful place of custody or confinement and although not actually within the confines of the penitentiary. . . .

36. 77 N.M. 420, 423 P.2d 611 (1967).
39. Interestingly, the legislature also passed a unique statute designed to prevent either appellate court from wasting time on questions concerning the distribution of appellate jurisdiction. N.M. Stat. Ann. §16-7-10 (Supp. 1967). Whether or not the New Mexico Supreme Court could properly entertain the issue in accordance with this provision, the case still presents an interesting statutory interpretation question.
obvious. We see no language of the legislature that could be considered to be ambiguous in this regard, so as to present a question of interpretation. We only enter upon a process of interpretation when language of a statute is ambiguous, and to ascertain legislative intent. We see nothing in words used by the legislature which can remotely be considered to have contemplated appeals under Rule 93 as appeals in "criminal actions" as that term is used in §16-7-8(C), supra.

The best that can be said for the court's reasoning is that it is largely irrelevant. The fact that the federal courts have labeled the §2255 proceedings as civil for purposes apart from the interpretation of jurisdictional distribution statutes should not serve as such as interpretation of New Mexico's jurisdiction statute. Is it improper to treat Rule 93 motions as civil for some purposes, yet criminal for others? Should the indiscriminate use of labels serve as a substitute for the proper analysis of purposes? Surely illogical inflexibility does not promote the ultimate purposes of law or public confidence in the judiciary.

Ought §16-7-8(C) to be considered to include appeals from determinations of Rule 93 motions? The court found "nothing in words used by the legislature which [could] remotely be considered to have contemplated [such] appeals." That conclusion is unsupported by reasoning in the court's written opinion.

The legislature in attempting to reduce the case load of the supreme court enacted broad provisions for the distribution of jurisdiction. It is doubtful that the legislature considered very many particular instances of application, much less Rule 93 motions. The general subsection (C) relating to criminal actions would seem to indicate the inclusion of Rule 93 motions, not their exclusion. These motions arise from criminal actions regardless of how they are labeled. Is it reasonable to assume that the purpose of having the court of appeals handle direct criminal appeals precludes that court from taking appeals on motions that arise out of criminal actions? There is nothing to indicate that the legislature distinguished the two situations in terms of the purpose of the act to distribute the case load between the two courts.

Thus, the court reached the wrong result because of its failure

40. Is this the plain meaning rule? See text accompanying notes 14-17 supra.
42. The dissent also dealt with the same kind of irrelevancies, although on that plane several good arguments were made. The majority opinion, however, failed to answer the points raised by the dissent.
to consider legislative purpose.\textsuperscript{43} Some cases, however, indicate that the court is not completely unaware of such an approach, although purpose could have been examined more carefully. \textit{State v. Schwartz}\textsuperscript{44} involved the following statute which was passed in addition to several criminal statutes prohibiting gambling:

All persons who shall claim money or property lost at gaming, or when said money or property may be claimed by his wife, child, relation, or friend, said person, although he may have gambled, is hereby exempted from the punishment imposed by the laws prohibiting and restraining gaming.\textsuperscript{45}

The defendants were all arrested and charged under the criminal gambling statutes. Before trial each one instituted a civil action against all the others for recovery of gambling losses. They then argued that the charges ought to be dismissed by virtue of the above provision. The trial court denied the motion and the supreme court was no more sympathetic to the defense.

The court reasoned that the provision in question as well as the others in the same article were "designed" to deter gambling. If the defendants were allowed sanctuary under the provision, then gambling would be encouraged instead of discouraged. Defendants must come forward with their civil suits before being charged in order to take advantage of the immunity; "otherwise the whole purpose of the act would be defeated."\textsuperscript{46}

The court, because of the rather interesting and novel argument of the defense, was forced to resort to some analysis of purpose. While the purpose approach led to the correct result, the court failed to complete the analysis. Surely the initial purpose of the provision is to deter gambling. A potential gambler faces the risk that he will be unable to enforce his claim for winnings or the risk that, if paid, his winnings are subject to recovery by the loser. The problem is that the statute is actually brought into play only after

\textsuperscript{43} The statute distributing areas of jurisdiction to the court of appeals was amended subsequent to the decision. The following addition was made: "the court has jurisdiction to review on appeal: . . . D. post-conviction remedy proceedings except where the sentence involved is death or life imprisonment." N.M. Stat. Ann. §16-7-8 (Supp. 1967). If the court continues to approach this statute in the same manner, the legislature may be forced to waste more of its time on corrective amendments.

\textsuperscript{44} Legislative reaction to a statutory interpretation decision, however, is not necessarily an indication that the court misinterpreted a statute. The interpreting court cannot give effect to unenacted intent or purpose. \textit{See} text accompanying notes 8-15 \textit{supra}.


\textsuperscript{46} \textit{State v. Schwartz,} 70 N.M. 436, 374 P.2d 418 (1962).
it has failed to deter. In such a situation is the provision designed to obtain informers, as the court suggests? If so, why do only losers receive the exemption, but not winners who cannot sue for losses? Moreover, if the informer argument is valid then the critical element for a case such as this would not be whether the loser has been criminally charged, but whether the person against whom he claims has been charged. Thus, a loser who has been charged would still be able to escape liability by bringing suit against his winner (informing) up to the time when the winner is charged.

The informer argument is apparently fallacious. The statute is more likely designed to encourage private enforcement by immunizing a civil plaintiff against criminal prosecution. The loser cancels the criminal "evil" which has already taken place. If this analysis is accurate then the critical element would not be whether the winner has been criminally charged, but whether the loser has been charged. If the winner has been charged there is still a need to lure the loser into the open by means of the immunity so that the criminal "evil" can be erased. On the other hand, once the loser has been charged he is already out in the open and still able to bring his civil action against the winner; the reason to grant him immunity has disappeared. This inapplicability of the policy of the statute together with other policies which the court mentions serves to completely undermine the argument of the defendants.

The failure of the court to thoroughly examine the statutory problem limits the value of the decision as solid precedent. The opinion fails to indicate whether the critical element of being charged lies with the winner or loser. Time and litigation expense will likely be wasted in the future to resolve questions which a proper decision would have answered, or at least indicated an answer by making possible reasoned analogies.

47. "The statute imposes a duty upon one invoking it. It requires him to come forward, disclose and make known the criminal act by the filing of a civil action for recovery of his losses." Id. (emphasis added).

48. The informer argument would be more persuasive if there were other informer provisions.

49. The indirect effect, which adds to the initial deterrent purpose, is the obtaining of informers, but this is not the primary policy. Also, while the statute has failed to deter the parties to the civil action, it serves to deter others in the future as it reestablishes the monetary status quo.

50. See text accompanying note 46 supra.

51. The state also made the argument that the criminal acts repealed by implication the prior enacted immunity statute. The court answered this contention with: We find no merit in the position of . . . the appellee. There is no inconsistency in the intent, purpose, or applicability of the two acts. State v. Schwartz, 70 N.M. 436, 438, 374 P.2d 418, 419 (1962). Had the purposes of the two different kinds of acts been carefully examined, a more satisfactory explanation might not have been so difficult to verbalize.
In Hensley v. State Board of Education\(^5^2\) the correct result was again reached, but the court's reasoning was rather inadequate. Appellee had been employed as a teacher in the Forrest school district (Quay County) for four consecutive years and had been given notice of re-employment for the fifth consecutive year, 1960-61. Shortly thereafter the State Board of Education ordered the consolidation of the Forrest and Melrose districts, and appellee was employed by the consolidated district for the school year 1960-61. In the spring, however, she was notified by the governing board that she was dismissed from her position for the school year 1961-62. She “requested a hearing and appeared before the governing board of the consolidated district but that board refused to recognize appellee as a tenure teacher and refused to grant her a hearing as provided by statute for a tenure teacher before dismissing her, and retained non-tenure teachers in the school districts.”\(^5^3\) The applicable statute reads in part:

A. On or before the closing day of each school year . . . the governing board of each school district in the state . . . shall serve written notice of reemployment of or dismissal upon each teacher by it then employed, certified as qualified to teach by the . . . state board of education . . .

B. The notice of dismissal required under subsection A of this section to a certified teacher who has taught in a particular county or other particular administrative school unit for three (3) consecutive years and holds a contract for the completion of a fourth consecutive year in a particular district shall specify a place and date for a hearing not less than five (5) days nor more than ten (10) days from the date of service of such notice at which time the teacher may appear. . . .\(^5^4\)

Appellee appealed the decision of the governing board to the State Board, which ruled that she did not have tenure because she had not taught in the consolidated district for three successive years with a contract for the fourth.

The supreme court upheld appellee's right to tenure for two "reasons." One was that since the consolidated district was a continuation of the old districts, "it follows, therefore, that the newly consolidated district was the 'particular district' in which appellee earned tenure."\(^5^5\) The second was as follows:

\(^5^2\) 71 N.M. 182, 376 P.2d 968 (1962).
\(^5^3\) Id. at 183-84, 376 P.2d at 969.
\(^5^4\) N.M. Laws 1955, ch. 71, § 1 (repealed 1967).
\(^5^5\) Hensley v. Board of Educ., 71 N.M. 182, 185, 376 P.2d 968, 970 (1962).
We do not find, nor think the legislature intended, that a new designation of name or a different governing board destroys the actual existence of the "particular" districts which merged to form the consolidated district insofar as the acquisition of tenure is concerned.56

The first reason given by the court is not a reason at all, but merely a restatement of the central question, namely, whether a consolidated district ought to be considered to continue the old districts for purposes of tenure. The second reason merely states a belief as to the intent of the legislature. Yet, how likely is it that the legislature considered this particular problem? Even if such an intent was formed, it is unlikely that the court found evidence of it outside of the purpose of the tenure statute.

What purpose ought to be attributed to that statute? Surely it is designed to provide job security for teachers who have proven their worth to the school system and have gained valuable experience in the process.57 The initial three year period is a trial period during which a teacher may be discarded for much less cause than one who has tenure. And in the situation of teacher reduction, tenure teachers are retained while non-tenure teachers are not.58 On the other hand, the statute is so worded as to prevent a teacher from carrying his tenure to another school district. Now why would a reasonable legislature want to do that? Is it not because that, while the state certification standards may apply uniformly throughout the state, the standards above the minimum may vary from district to district because of simple supply and demand? Therefore, a district with higher standards should not be compelled to employ a teacher, with tenure from a district with lower standards, who might not have originally been accepted, or indeed, had previously been rejected.59 Another purpose may be to discourage teachers from moving to new districts, thus insuring certainty of personnel from year to year.

Accepting these to be the purposes of preventing the transporting of tenure and considering the original purpose of tenure, what result do they indicate in the case of consolidation of school districts? The answer to this question is more complicated than in the cases con-

56. Id. (emphasis added).
57. Id.
58. The reason given for appellee's dismissal, i.e., a reduction in the teaching staff, without more, would not appear to be a good and sufficient reason for the dismissal of a tenure teacher when other teachers without tenure are retained in her place and stead. Id.
59. This of course assumes that the district to which the teacher is transferring has non-tenure teachers. See note 58 supra. Otherwise, the higher standard might very well constitute good cause for non-retention.
sidered so far because of the problems presented by dual purpose. On the one hand, the purpose of tenure (i.e., providing job security for experienced teachers) would be defeated if tenure were to be eliminated by consolidation, because if one teacher is to lose his tenure then, to be consistent, all teachers from both districts must lose their tenure. Moreover, while maintaining tenure would reinforce the purpose of deterring teacher mobility, the removal of tenure would seriously undermine that purpose. On the other hand, assuming a reduction in teaching staff is indicated and assuming that the two districts in question have different standards for the employment of teachers, the removal of tenure would allow the better qualified teachers to be retained.

How is this conflict of purposes to be resolved? The court must balance the relative effect of the alternative results on the purposes of the statute. In this case there is a lack of evidence to support a definite conclusion, but it is likely that the balance would weigh heavily in favor of retaining tenure. The profound effect of loss of tenure on the purposes of job security for other districts because of fear of consolidation and deterrence of teacher mobility far outweighs the effect of tenure retention on the need for teacher reduction, which is a problem only when the two districts have unequal employment standards. The court should look more closely to the actual effect on purposes that would occur in a particular consolidation case. It would be a most unusual case, however, that would upset the balance that favors the retention of tenure.

In the Hensley case the court resorted to legislative "intent." The intent of the legislature regarding a certain set of circumstances may be useful as an indication of the purpose that ought to be attributed to a particular statute, but this intent is not only difficult to discover in New Mexico, but may have been impossible for the legislature to form at the time of enactment. For example, it is impossible to say that the members of a legislature have had any intention, in the sense of a construction placed upon the language of a statute, with respect to issues raised by the existence or occurrence of objects, events or other circumstances which were not in existence at the time of the enactment. The case of Raburn v. Nash had to deal with such a situation although the decision did not rest on the

60. Since consolidation is effectuated primarily for economic reasons, economies of scale might often be the result thus requiring a reduction in the teaching staff.
61. See text accompanying note 12 supra.
62. See discussion of new applications of old enactments in Hart & Sacks, supra note 1, at 1203-17.
63. 78 N.M. 385, 431 P.2d 874 (1967).
determination of that issue because of the court’s “even if” argu-
ment.

A criminal information had been filed on March 4, 1965, charg-
ing the appellant with forgery. After a preliminary hearing, peti-
tioner disqualified the resident judge. Another judge was designated
to preside and trial was set for April, 1967. The petitioner sought
dismissal of the information because he had not been afforded a
speedy trial.\textsuperscript{64}

The petitioner relied in part upon a New Mexico statute which
reads: “All indictments shall be tried at the first term at which the
defendant appears, unless continued for good cause.”\textsuperscript{65} Petitioner
conceded that the statute does not expressly apply to defendants
informed against, as opposed to those indicted, but argued that
the legislative policy of the statute ought to be extended to place
a duty on courts to speedily bring defendant to trial.

The New Mexico court held that the statute did not apply either
directly or as a declaration of policy for two reasons. First, “the
New Mexico statute relied upon . . . was clearly not enacted with
a view to carrying into effect the constitutional guarantee of a speedy
trial. It was enacted long before New Mexico became a state and
has been carried forward into our laws without change.” Second, the
statute does not apply to informations because the statute was en-
acted in 1865\textsuperscript{66} while informations were not authorized by constitu-
tional amendment until 1925.\textsuperscript{67}

The court’s first argument is correct as far as it goes. The statute
could not have been an attempt to carry out a New Mexico con-
stitutional right because the New Mexico constitution was not in
existence at the time. The implication is, however, that the purpose
of the statute, therefore, was not directed toward speedy trials. But
what other possible purpose could be attributed to it?

The second argument, that the statute cannot apply to defendants
informed against because informations were not authorized at the
time, is equally unconvincing. The court should examine the pur-
pose of the original enactment (speedy trial) and decide whether the
purpose is served by an interpretation that attributes to the lan-
guage the particular, unforeseen change in issue. Is there any reason

\textsuperscript{64} The petitioner had also been charged in February, 1965 with escape, to which
he entered a plea of “not guilty by reason of insanity.” A psychiatric report was or-
dered and received, and petitioner was convicted of escape in October, 1965. Although
it is a court policy not to allow the same jury to hear two cases against a single defend-
ant in the same term, that same policy would not seem to also preclude the 1966 term.


\textsuperscript{66} N.M. Laws 1865, ch. 57, \$ 17.

\textsuperscript{67} N.M. Const. art. 2, \$ 14 (Amended 1923).
to assume that the purpose of speedy trials is served by distinguishing between defendants indicted and those informed against? And even if we assume that the statute does not directly apply, the court ought to agree with petitioner's argument that the statute declares a legislative policy of imposing a duty on the courts and its officers to speedily bring petitioner to trial. The reasons for a speedy trial in the case of indicted defendants (i.e., to guard against prolonged imprisonment, to suppress public suspicion against the defendant from arising because of delay, and to prevent the evidence from going stale) are no less important to defendants who have been informed against.

Thus, the court in *Raburn v. Nash* failed to consider the problems of new applications of old enactments because no thought was given to purpose. There seems to be no criteria for determining which cases require inquiries into purpose and which do not. In *State v. Shop Rite Foods, Inc.* the court was reluctant to look at purpose and thereby reached the wrong result. The criminal statute involved reads:

> It is unlawful for any merchant to advertise or offer for sale any item of merchandise with a limitation upon the number of such items which any purchaser may purchase at the advertised price. It is further unlawful for any merchant offering or advertising any such item of merchandise in his place of business at any given price to refuse to sell to any prospective purchaser for cash the whole or any part of his stock of such items at such price.

The defendant was charged under the first sentence of the statute for advertising to sell “Swift's Butterball Broad Breasted Hen Turkeys” for 33 cents per pound for the first turkey and 39 cents per pound for all additional turkeys. A similar advertisement appeared with regard to the sale of Coca-Cola. The question before the court was whether the advertisement limited the number of turkeys (or cokes) that could be bought “at the advertised price.” The court held that it did not:

68. These policies are set out in the case.
69. In addition to the court's "even if" argument relating to petitioner's contribution to the delay, the court also stated: "Furthermore, the statute relied upon, unlike those requiring dismissal for failure to bring to trial within the prescribed period, is only directory." Why the court would not feel obligated to follow the statute when it applies is not indicated in the opinion.
70. 74 N.M. 55, 390 P.2d 437 (1964).
72. The store advertised to sell two cartons of king-size Coke for 29 cents each, additional cartons for 39 cents.
A cardinal rule in the construction of a statute is to ascertain and give effect to the intent of the legislature as it is expressed in the words of the statute. And Penal statutes must be strictly interpreted with respect to the offense. . . .

Applying these rules of construction, it becomes apparent that the advertised price was one or two items at one price and additional items at a higher price. The informations charged neither a limitation upon the number of items which any purchaser might buy at the advertised price nor a refusal to sell to any prospective purchaser the whole or any part of such items of merchandise at the advertised price.73

The court has "applied" its rules of construction and determined that a consolidation of the two advertised prices equals "at the advertised price" and since no limit is placed on purchases at the higher price the statute has not been violated.

The point is that the rules of construction used by the court have made nothing "apparent."74 What purpose ought to be attributed to the statute? If its purpose is not to discourage loss leader advertising and sales, it is difficult to ascertain what else is sought to be remedied.75 Of course, it is not aimed merely at the advertising and sales of goods in limited quantities at below-cost prices, but at any such practices at prices substantially below the market price. This kind of strategy is called loss-leader selling because the seller takes a loss on the particular item in order to bring in more customers to buy other goods at the regular prices. When the dust has settled he expects to make an overall profit that he would not have made without the loss-leader. Rightly or wrongly this practice is discouraged by prohibiting limits being placed on quantity in order to protect the small businesses and eventually the consumer.

This purpose of discouraging loss-leaders is certainly not being carried out if the statute is held not to apply to defendant's practices. Defendant was certainly limiting the number of turkeys that could be purchased by a particular consumer at the advertised price of 33 cents. This is only slightly different from advertising a good at a low price and placing a limit on quantity without mentioning that quantities above that number may be purchased at the regular price.76

74. See text accompanying notes 16-17 supra.
75. The state argued that the statute was enacted as a deterrent to loss-leader practices.
76. The court could conceivably hold this set of facts as not prohibited by the statute, reasoning that the limit implies that the buyer may purchase more at the regular price, thus analogizing this case to Shop Rite.
Thus, if the seller is willing to part with his stock at the regular price the statute and its purpose can be completely avoided by virtue of the court's opinion.

The words of the statute will bear the application of it to the defendant. The only question is whether giving the words this meaning will violate any policy of clear statement. Statutes defining criminal conduct ought to speak with more than ordinary clearness, but is not the practice of defendant clearly within the words of the statute, i.e., advertising a price (33 cents) and limiting the number (1) that may be purchased at that price? Moreover, the statute is not directed to people generally but to merchants who are likely to be aware of its existence. Could the defendant have possibly thought that his advertisement did not violate the statute?

The court in Shop Rite ignored purpose in favor of rules of construction. What mysterious technique of interpretation did it use to determine that the defendant was not within the scope of the statute? The answer would be of great help to the New Mexico attorney. The only advice the opinion gives him is to concentrate on meaningless "rules" of construction and hope that the court's esoteric statutory approach will work out in his favor. The best advice would be for him to waive oral argument, if it were not for the cases that attempt to discover purpose and thus keep him guessing. In State v. Vigil\textsuperscript{77} the New Mexico Supreme Court used a purpose argument to construe the word "publish" in a notice statute.

The case involved the village of Espanola and two newspapers. The village sits on the border between Rio Arriba County and Santa Fe County. For some time prior to April, 1963, the village had published all of its legal notices in both the New Mexican, a daily printed in Santa Fe, and the Rio Grande Sun, a weekly printed in the Rio Arriba County side of Espanola. Both newspapers are of general circulation in all of Espanola and each has a second class postal permit in the county in which it is printed, but neither has one in the county of the other. Sometime after April, 1963, the Espanola village council decided to publish all future ordinances and legal notices only in the New Mexican. The Rio Grande Sun brought suit to compel the council to publish in its newspaper. The primary statute reads as follows:

\begin{quote}
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\textsuperscript{77} 74 N.M. 766, 398 P.2d 987 (1965).
prosecution . . . to show that no such publication was made: Provided, however, that if no such newspaper is published within the limits of the corporation, then, and in that case, such by-laws may be published by posting copies thereof in three (3) public places, within the limits of the corporation. . . .

In order to discover the definition of a legal newspaper the court had to consult another New Mexico statute, which reads in part:

Any and every legal notice or advertisement shall be published only in a daily, a triweekly, a semi-weekly or a weekly newspaper of general paid circulation, which is entered under the second class postal privilege in the county in which said notice or advertisement is required to be published. . . .

The New Mexican argued that the word “published,” which is italicized in the first section, means to give notice by advertising in a newspaper of general circulation in the municipality regardless of where it is physically printed. The Rio Grande Sun, on the other hand, insisted that the word “published” is synonymous with the word “printed.” The trial court, guided by the second class postal privilege requirement in the second section, required that legal notices be published in both papers since neither had the privilege in the other’s county.

The supreme court answered the Rio Grande Sun’s argument that “publish” means “print” mainly by a purpose argument: “the aim of a statute requiring legal publication is so that the contents of the notice may be brought home to the public generally.” The court reasoned that the word “publish,” therefore, does not mean print. To reach its conclusion about purpose, however, the court relied mainly upon cases from other states. Thus, the court seemed to be transferring the determination of purpose of other state courts concerning their differently worded statutes to the New Mexico enactment. It is difficult to understand how those decisions are relevant to the New Mexico provision. Even if the New Mexico provisions were identical to that of another state, several other variables might preclude the other state court’s interpretation. Why is the New

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79. In deciding whether to consult this second statute the court resorted to the pari materia doctrine, which the court declared is used only in the case of ambiguity. It would seem, however, that whether to use another statute to aid in the interpretation of the statute in question is an initial question which ought to be answered on the basis of materiality, not ambiguity.
Mexico court unable to make a confident, independent determination of what purpose ought to be attributed to the New Mexico statute.\footnote{82}

The analysis should go something like this: Since the purpose of the New Mexico provision is to serve notice of city ordinances the term "publish" ought to be given a meaning that will best carry out that purpose. The effective notice of a publication depends largely upon its circulation, not upon the actual location of its printing press. To require that a newspaper be actually printed in a locality may serve to defeat the purpose of the statute, which is to give notice.

The court partially abandoned the purpose approach when it considered the issue of whether the second class postal privilege requirement of the second statute required legal notices to be placed in both newspapers. The court's argument was that that requirement was only directory, not mandatory,\footnote{83} and that "such a literal application of § 10-2-2, supra, to the factual situation present herein would defeat the purpose of the legislature in § 14-25-7," which is designed to give notice. The court made this diagnosis without considering the purpose of the particular requirement.

Why would a reasonable legislature, after providing for the requirement of general circulation also require that the newspaper have its second class postal privilege in the county in which the notice is required to be published? The reason seems to be to further the cause of notice. Since the privilege is entered where the business of the publication is transacted during the usual business hours, the paper is likely to have more local news and therefore better interest and better circulation in the locality. The notice is thus likely to be more effective. Of course, certain kinds of situations could result in that requirement defeating the purpose of notice, but it remains nonetheless.\footnote{84}

Applying the requirement to the present situation would seem to compel publication in both papers because the purpose of notice would be furthered. After all, publication in two newspapers of general circulation is likely to afford more notice than publication in only one. However, as the court said, "The purpose of publication..."

\footnote{82. Decisions from other states might best be used as devices for checking a particular result.}

\footnote{83. See note 69 supra.}

\footnote{84. In such situations the question becomes: To what extent can specific statutory language be ignored in order to further the overall purpose of the statute? See Wiggins v. Lopez, 73 N.M. 224, 387 P.2d 330 (1963). Statute required notice of bond election to be posted in 5 conspicuous places and be published in a newspaper in a certain form. School board posted 5 notices correctly, sent a personal notice to each boxholder in the district (not required), but did not publish notice in the newspaper as directed. Instead, a news story appeared in the paper containing all the information as required by the statute for formal notice. Held, notice not given as required by statute.}
statutes is to give notice to the citizens, not to double the cost of publication. . . .”\(^8\) Besides, why should a town or village be required to publish in two newspapers just because it lies in two counties, when the legislature considers one to be sufficient in the case of towns wholly within one county? While the legislature is unlikely to have considered an Espanola situation, the court should not, and did not, apply the statute inconsistently so as to burden certain uniquely situated towns.\(^8\)

In light of the foregoing analysis of the New Mexico cases, what general criticisms can be made of the supreme court’s methods of statutory interpretation? Some decisions were correct and were arrived at with an approach not entirely unlike that advocated by Hart and Sacks. Others were correct but used reasoning which has been criticized by this Note. Still others reached the wrong result because of the method used. So what? No court can be right all the time. And why is the reasoning so important so long as the correct result is reached?

Ours is a society composed of individuals all striving to attain their wants and desires. Each person, however, cannot be allowed to maximize his goals at the expense of his fellows. Each is allowed to pursue his goals consistent with the rights and similar pursuit of others. It is thought that the individual pursuit of happiness actually serves to maximize the goals and satisfactions obtained by society as a whole. This interdependence of people, however, requires the kind of rules of order which will advance this system.

The rules are not necessarily complete. The common law evolves as conflicts between people occur and are brought before the judiciary. The formal rules in the form of legislative acts undergo clarification and refinement as they are interpreted by the courts in the light of specific and novel controversies. The court’s role is an important one, and its usefulness is evaluated according to its ability to decide controversies justly and according to reasoning that is acceptable and convincing. With regard to statutory interpretation it is the court’s duty not only to carry out the legislative will with regard to the parties directly concerned, but to arrive at its decision by reasoning that is convincing and is calculated to serve as a guide to future conduct by everyone so that similar conflicts and uncer-

86. The argument could be made that by reading the two provisions together, the New Mexican is optional while the Rio Grande Sun is required, i.e., the newspaper must be of general circulation and printed within the municipality, and an out-of-city newspaper cannot be substituted. In this regard the number of times each newspaper appears might be determinative. Thus, the New Mexican could be substituted because it is a daily while the Rio Grande Sun is a weekly.
tainty may be avoided. This is the importance of the written opinion; we are not only concerned with the litigants, but also with the value that experience and precedent can have for the rest of society.

The need for strong, well reasoned and consistent opinions, therefore, is obvious. The wrong result reached by unconvincing reasoning dearly disappoints not only one of the parties to the action, but also non-parties. This does nothing to promote public confidence in the judiciary, which is a necessity if courts are to function as effective problem solvers. The court’s function is to discourage litigation by the use of well reasoned decisions that can be relied upon, are just and acceptable to the public, and indicate the kind of future conduct which will avoid similar problems and conflicts. The court’s function is not to discourage litigation because of a lack of predictability on the part of potential litigants or because of a lack of faith in the court’s ability to decide controversies justly.

Correct results based upon obscure or faulty reasoning also fail to contribute to public confidence or predictability. The losing party is unconvinced and disillusioned, attorneys find it difficult to advise conduct or litigation, and the public is not satisfied by the result nor confident about the kind of conduct that can avoid similar conflicts. Consider in this regard the value of canons of construction, conclusions without reasoning, and the improper use of other cases or statutes.

Convincing decisions which employ reasoning calculated to reach the correct result and to prescribe future conduct on the part of litigants and non-litigants alike should be the goal of the court. And because statutes are purposive acts, what better way to attain this goal than to develop and consistently apply an approach to statutory construction that is designed to discover legislative purpose and carry out that purpose consistent with the language used and with any established policy of clear statement?

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* Nicholas R. Pica aided in the research and analysis of the cases used in this Note.

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