Michigan Law Review

Volume 53 | Issue 4

1955

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Leo Weiss
Member, New York Bar

JUSTICE MURPHY AND THE WELFARE QUESTION

*Leo Weiss**

IN 1941, an Italian law professor arrived in the United States to make his home here. Born in Russia during Czarist days, he was educated in Austria, England, and Italy, finally settling there and becoming a citizen. A member of the Italian bar and teacher of law at the Universities of Florence and Rome, he found himself in 1939 unwanted in his adopted homeland. He went to France, where he practiced law until coming to this country. In New York City he joined the Graduate Faculty of the New School for Social Research, remaining in that post for five years, until he died, at the age of 44, in an airplane accident. His name was Alexander Pekelis.

During his short stay in the United States, Pekelis showed himself to be an acute commentator on the American legal and social scene. His foreign training perhaps helped him to understand our legal system better than many American lawyers who are too deeply immersed in its daily operations. With insights born of a restless and inquiring mind and his experience in analyzing parallel machinery in other countries, Pekelis was able to contribute much of value to our jurisprudence. A slim volume of his essays, put together by his friends after his death, testifies to that.[1]

Pekelis addressed himself to the problem of what a judge can do when he is faced with the necessity of deciding a hard case. If the statute is ambiguous, the court decisions conflicting, and the logic of the attorney's arguments unconvincing, where can the judge turn? While such occasions do not arise often, the judge must be prepared with the proper instruments, or he may suffer mightily before finding an answer. Pekelis' method of approaching this dilemma he called "welfare jurisprudence."[2]

The basic concept of "welfare jurisprudence" can be simply stated. A judge faced with difficult problems of statutory interpretation should decide which of the alternative decisions open to him will best advance the interests of the society in which he lives.

> ". . . our judges, who have long been asking themselves a series of inadequate questions about canons of construction, intents of the legislators, or lines of judicial authority [should] ask themselves . . . the only question that really matters: 'Which course of

* Member, New York Bar.—Ed.

1 PEKELIS, LAW AND SOCIAL ACTION, Konvitz, ed., (1950).

2 Id. at 1-41, "The Case for a Jurisprudence of Welfare."

my action—which rule of law—is going to serve best the general welfare of the society I am sworn to serve?' "[3]

Lest this quotation cause us to run off in the wrong direction, let us hear more of what Pekelis has to say.

"Jurisprudence of welfare is no answer to the problems of our time. In fact, it is no answer at all, but a mode of inquiry. It is an invitation to learn, a suggestion as to how questions should be asked, a call for the growth of a systematic participation of the judiciary—burdened with responsibility and stripped of its pontifical robes—in the travail of society. Jurisprudence of welfare is no easy solution of legal and social problems. . . . [I]t is not an attempt to impose a given concept of life or to present a given answer to the issues before us."[4]

A judge, then, rather than holding himself aloof from the affairs of his world, must immerse himself in those affairs. He must learn its realities and illusions, its ideals and purposes, its hopes and disappointments, its agreements and disagreements. Only then would he be capable of *asking* himself the "welfare question."

To be capable of *answering* that question the judge must also have a working knowledge of the social sciences. These are the tools with which he can build rational conclusions, based on the gathering of evidence by trained investigators and theory-making by informed minds. Without this he is helpless, or worse, ignorant, and dangerous because he does not appreciate his own inadequacy to deal with these matters. By recognizing and understanding the forces which shape the society, the judge can contribute to the attainment of its objectives. By deciding these doubtful but important cases through answers to the "welfare question," the judge can influence the direction in which we are going and the speed with which we will arrive. This is the creative role judges can play.

The vast majority of legal disputes never go beyond the trial court stage.[5] Decisions at that level mainly involve the questions whether enough evidence has been brought in to prove what the plaintiff claims and whether the defendant has brought in enough evidence to overcome the claim. They are concerned mostly with what happened. Interpretation of statutory or decisional law is questioned in only a small proportion of the cases. But these are the cases which can keep the judge awake at night. At least, those judges who recognize how diffi-

[3] Id. at 8.
[4] Id. at 40.
[5] See FRANK, LAW AND THE MODERN MIND (1930, 1949 printing).

cult the job is that society has assigned to them will be sorely troubled. When a case arrives at the stately portals of the United States Supreme Court, it usually brings with it, either in person or by proxy, several eminent gentlemen. They may be legal scholars, famous lawyers of long experience, even judges of great skill and high repute. It is a pleasure to commune with these great minds, except for one thing. They usually disagree violently on how the case should be determined.

This is not a new problem; it has been bothering judges for centuries. What is new is the recent effort to find out just what a judge does under these circumstances. No court ever says that it cannot make up its mind among the alternatives and that it will not, therefore, decide the case. It always decides the case. It seldom, however, gives in the written opinion an accurate description of the intellectual and emotional processes that went into its production.[6]

In the past, for example, judges often said that the law *was*—it existed—and a careful search would reveal its hiding place. Judges were law-finders. The law was not the opinion of one man or another, regardless of his scholarship, wisdom, or official position. It was a reality which existed outside of men's minds and the judge's job was to find it. Believing in this theory, common law judges did not mind surprising a litigant with a novel rule of law that neither he nor his lawyer had ever heard of before. Since the judge had merely *found* the law, he hadn't *made* it; it was not *new* at all. All men were presumed to know the law *as it was,* not as the courts *had said it was.* Judges did not feel it unjust to reverse a long line of precedents with the remark that earlier judges had not correctly found the law.[7] A one-paragraph dissertation can hardly do justice to a legal theory that flourished for centuries, but we need not dig any deeper into the matter. It is used here to demonstrate how a judge can shelter himself from blame for a decision which he feels is right, but which arouses heated criticism outside his courtroom. It still does not explain the mental operation though which he passed in order to determine the "correct" solution.

[6] Cardozo, "The Nature of the Judicial Process," in HALL (ed.), SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO 107-184 (1947). This was one of the first full-length confessions made by a judge about the inner workings of the judicial process. Because of this, and because Cardozo wrote it, the book has become one of the most influential works in American legal literature. Long before publication of this volume (1921), however, men like John Chipman Gray recognized the inadequacy of orthodox explanations of how judges decided cases. Roscoe Pound had also voiced his dissatisfaction with the conventional analyses.

[7] A description of the "law-finding" theories appears in Cohen, "The Process of Judicial Legislation," in LAW AND THE SOCIAL ORDER 112-147 (1933).

With the opening of the twentieth century the courts came up against a new perplexity, the tremendous growth of legislation. Statutes had once been used only to settle momentous issues; their appearance in court was an occasion judges seldom had to fear. Now, in a short time, every aspect of our social life became affected by the passage of laws. New tools were required to deal with this complication. Once again the courts tried to avoid blame for their decisions. When a law was ambiguous or its wording confused, the judges set about the task of determining "legislative intent." Upon finding the "intent" of the legislature, the court could state that it was not interested in arguments over the merits of the statute. These should be addressed to the legislature because policy-making was a legislative function. The court's job was merely to determine the legislative purpose when that was not clear from the language of the statute.[8] This bears a striking resemblance to the earlier theory. Previously, the judges had been looking for the "law," now they sought "legislative intent." In both instances they were seekers after something that had been created by someone else and the courts could not be reproached for what they found.

How find the "legislative intent"? You can't call up the presiding officer and ask him what the legislature meant. For one thing, the statute may have been passed years earlier and there may be no one alive who remembers the occasion. Besides, membership in a democratic legislature is a notoriously precarious way of making a living. The legislature of 1953 may have lost all the men of the earlier session who might be helpful to the judge. But the really serious obstacle is the theory itself. It does not look for the will of the individual members, it seeks the collective "intent" of the institution called the legislature. No individual member is competent to come into court and explain what the legislators meant when they passed a statute. At that point he becomes a private citizen, no more entitled to credence in this matter than any other well-informed person. Certainly, he knows no more about the legislative intent than the judge does. Still the problem must be faced. Somehow the judge must find out what the legislature wanted. And over the years, American judges developed certain instruments which they hoped would be useful in this monumental undertaking. Technological progress contributed its share to this aspect of our lives too.

[8] Two articles by Max Radin contain severe criticism of the idea that in interpreting statutes the court's job is to determine the legislative intent. "Statutory Interpretation," 43 HARV. L. REV. 863 (1930), and "A Case Study in Statutory Interpretation," 33 CALIF. L. REV. 219 (1945).

As the twentieth century progressed, debates and reports of state legislatures and the Congress became more complete and more easily available. They grew to be the main prop of the system designed to determine the legislative intent. Investigations, committee recommendations, arguments on the floor over the merits of a bill, all combined to produce what became known as a bill's "legislative history." This material, the remarks of those who were for, those who were against, and those who were indifferent, could be sifted and a collective intent of the legislature culled from it. At least that was the theory.[9]

The courts also adopted a series of well-known "canons of construction." These had Latin names, their content was mysterious, and many judges were completely confused about what function they were supposed to serve. In effect, these canons amounted to presumptions that if the legislature said one thing, it also meant something else which it did not say explicitly. While this method had the advantage of never going outside the statute to solve the problem, it also resulted in ascribing to legislators "intent" which they obviously never had.[10] Many decisions show signs that these and other means of determining legislative intent were used in a selective way, so that the judge's ideas on the substance of the legislation—its policy—were often fulfilled. At the same time, judges busily disclaimed the role of policy makers or assessors of the legislature's wisdom. They claimed merely to be giving effect to what the legislature wanted done.

Does "welfare jurisprudence" allow the judge to decide cases as it pleases him? With this approach would he be free of all outside restraint, responsible only to his own notions of what is good for the society? Would it be impossible to draw general rules of conduct from judicial decisions because the next judge who heard the same facts might come to a different conclusion, based on his own ideas of the public welfare? The answer to all these questions is a clear and loud "No"! It is often forgotten that the problem of what role the judge is to play does not arise in the vast majority of cases. Only the most difficult problems, the ones to which no clear answer can be found in the statutes or the judicial opinions, arouse debate over how the judge is to find answers. Most of the time, legislation and court decisions guide the judge easily to the determination of his case, leaving him

[9] The two articles by Radin cited in note 8 are also critical of the use of "legislative history" to help a judge decide problems of statutory interpretation. This follows, of course, from rejection of the "legislative intent" theory, since the only function of the "legislative history" would be to determine the "legislative intent."

[10] For a collection of cases in which these canons are discussed see READ AND MACDONALD, CASES AND OTHER MATERIALS ON LEGISLATION 786-852 (1948).

in no quandary unless, for some reason, he is unwilling to follow them. It is the exceptional case that requires the exercise of the judge's creative faculties.[11]

Why are these exceptional cases so difficult to handle? If the statute is not clear and the court decisions give no answer, why cannot the judge merely decide the case one way or the other? Why will he be severely criticized regardless of whether he gives judgment for the plaintiff or the defendant? Why is it not enough merely to give an answer—any answer—and then refer the disappointed party to the legislature for redress of grievances and change of law? After all, it is the legislature which sets policy, not the court. Exceptional cases are such precisely because they do not concern only the parties who appear in court. When the Supreme Court ruled that the Louisville & Nashville Railroad and the Brotherhood of Railroad Firemen must not contract to destroy the rights of Negro employees,[12] that decision affected every Negro in the United States, millions of people belonging to other minority racial and religious groups, thousands of employers, and hundreds of labor unions. All must now conform to the rules laid down in that decision. Millions of others were indirectly affected because the structure of our society was profoundly influenced by this case. In a sense, every American was affected, as well as generations of citizens not yet born. No one today would argue that the *Dred Scott* decision,[13] because it returned one runaway slave to one owner, did not touch the rest of our population. To decide such questions as though they involved only a struggle between two individuals is to bury the judicial head in the sands. More and more, we are coming to realize that court decisions cannot be made that way.

Conflicting social interests are contending for supremacy. Whichever way the judge decides advances one of them at the expense of the other. Is it wise then to compel him to act as though the conflict did not exist? Or would it be preferable to supply the judge with all the mental and physical equipment necessary to make this decision realis-

[11] This is Pekelis' view. Jerome Frank seems to feel that everyday cases which never go beyond the trial stage also contain important elements of judicial law-making. If this merely means that the judge has some discretion in dealing with the case before him, there is nothing to argue about. But difficult questions, involving conflicting social interests, are seldom finally decided at the trial level. These cases contain materials which often can be generally applied. The discretion which a trial judge exercises is of the type which cannot be transferred to other cases because it usually deals only with the *facts* of the case he is trying. See FRANK, LAW AND THE MODERN MIND (1930, 1949 printing) and FRANK, COURTS ON TRIAL (1949).

[12] Steele v. Louisville & Nashville R. Co., 323 U.S. 192, 65 S.Ct. 226 (1944). See the discussion of this case on p. 549 infra.

[13] Scott v. Sanford, 19 How. (60 U.S.) 393 (1857).

tically, let him tell us exactly how he has made it and why, then let *us* judge the decision for what it is, the resolution of interests competing with each other for the protection and privileges that society can bestow?[14] How can this be done? Do any two people agree on what measures will serve the general welfare? And when two social interests conflict, can it ever be said that the society really desires that one be preferred over the other?

Pekelis' reply was not a denial of these contentions. It was, rather, an observation coming from his shrewd insight into the American scene. He admitted that on a vast range of public questions there is no agreement concerning the general welfare. He also admitted that it is often not clear which of two competing interests society ought to favor to best achieve its goals. But he pointed out something which is often overlooked.

> "It is only realistic to admit that our society has reached at least an outward agreement on an unprecedented number of issues. To begin with, high infantile mortality, continuous malnutrition of a large percentage of the domestic population, shelter and housing conditions promotive of disease and juvenile delinquency, and even unnecessarily hazardous or degrading conditions of work have no open advocates today."[15]

He went even further than that:

> "It must be noted, furthermore, that the present state of articulated public opinion in the United States is such that a considerable degree of unanimity may be found on a number of issues going much beyond the recognition of elementary needs. For instance, class or race supremacy is openly advocated only exceptionally, and hardly ever from or before the bench. There is also an equally considerable consensus, so far as manifested opinion is concerned, in regard to a minimum degree of protection due to unwary consumers and minor workers. . . ."[16]

Since we are in accord on a number of issues which come before the courts continually, there is an area in which the judge can give effect to society's agreement. The "freedom of contract" which will be

[14] Pekelis did not invent this theory out of whole cloth. It has a long and honorable history, some of the greatest names in law and philosophy having contributed to its development during the past fifty years. Pound, Holmes, Brandeis, and Cardozo have all subscribed to it in one form or another. Radin, Frank, Beutel, Landis and Morris R. Cohen have written prolifically about it. See COHEN AND COHEN, READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY 439-526 (1951).

[15] PEKELIS, LAW AND SOCIAL ACTION 35 (1950).

[16] Id. at 36.

protected by the courts under many circumstances will not stand when a man tries to use it to justify maintaining a nursery school for small children in an unsanitary firetrap. On that, society is agreed, and no court would today oppose that mutual understanding.

Well, there is the theory, and the first question that comes to mind is, "Does it work?" Can judges really decide cases by answering the "welfare question"? Or is this just another illusion along a road we seem always to be traveling in the dark? It would be foolhardy, at this stage of our legal development, to try answering these questions in pure "yes or no" terms. I would merely like to suggest that the opinions of Justice Frank Murphy, who sat on the United States Supreme Court from 1940 to 1949, indicate that such an approach is possible.[17]

It is important to remember who Frank Murphy was, and who he was not. He did not come to the United States Supreme Court from cloistered academic halls; nor did he come from the rarified atmosphere of an important appellate court. Murphy's first judicial experience was in the Detroit Recorder's Court, a minor criminal tribunal. In this obscure position he gained a wide reputation for fairness by expertly handling the explosive trial of a Negro doctor accused of killing a white man. The victim had been a member of a mob which had surrounded the doctor's home and tried to frighten him into moving from the neighborhood.[18]

After being elected Mayor of Detroit, Murphy was faced with the grave problems which the depression brought to this turbulent industrial area. His vigorous attacks on these problems resulted in election to the post of Michigan's Governor. From there he went on to become High Commissioner of the Philippines, Attorney General of the United States, then Justice of the United States Supreme Court.

No ivory tower here. This is the history of a man who for many years had the responsibility of dealing with some of society's worst ailments. No wonder, then, that a thorough appreciation of life's hardest realities is the most striking aspect of Justice Murphy's opinions. It should be no surprise either that this practical idealist found "welfare

[17] Frank, "Justice Murphy, the Goals Attempted," 59 YALE L.J. 1 (1949); Arnold, "Mr. Justice Murphy," 63 HARV. L. REV. 289 (1949). These two articles contain general appraisals of Justice Murphy's work on the Supreme Court. More specific analysis of the court decisions was done for a symposium in memory of the Justice which appeared in 48 MICH. L. REV. 737 (1950). Thurgood Marshall examined and discussed the opinions which Justice Murphy wrote in civil rights cases and Archibald Cox dealt with the labor-case opinions.

[18] An interesting account of the trial of Dr. Sweet appears in STONE, CLARENCE DARROW FOR THE DEFENSE, c. xiii (1941). Darrow was defense attorney in the case. A deadlocked jury caused release of the defendant and he was never re-tried.

jurisprudence" an important aid in his judicial work. Let's look at some of his decisions.

Is a Union a "Legislature"?

Controversies involving racial discrimination presented to Justice Murphy the clearest instance of an evil against which society had set its face. Here was a social interest so high on the scale of democracy's values that against it all competing interests must be struck down. Even the right of a labor union to conduct its affairs without interference by government could not stand when opposed by the right of a human being to be treated fairly no matter what the color of his skin.[19]

> "No statutory interpretation can erase this ugly example of economic cruelty against colored citizens of the United States. Nothing can destroy the fact that the accident of birth has been used as the basis to abuse individual rights by an organization purporting to act in conformity with its Congressional mandate."[20]

In these strong terms, Justice Murphy announced his dissatisfaction with the opinion of Chief Justice Stone, in the famous *Steele* case, although he did agree with the result.

The Brotherhood of Locomotive Firemen acted as bargaining agent for *all* the employees in a particular group because it had been elected representative by a majority of them. Negroes were a large minority in that group, but were not allowed membership in the union. Just the same, the union proceeded to barter away the rights of the Negro employees in return for the railroad's promise to replace them with white workers. Alabama's courts found nothing illegal in this treatment of the Negroes, ruling that the Railway Labor Act[21] gave to the authorized bargaining agent complete power to enter into any kind of contract. The rights of minority groups were not protected by the statute against invasion by the union.[22] A unanimous Supreme Court of the United States disagreed with this view. Chief Justice Stone expressed the prevailing opinion that if a federal law really gave the union such blanket power over all workers in the bargaining unit it would probably be invalid. He compared the authority given to unions by the act with the power of a state legislature under the Constitution. Just as the legislature must govern all constituents with an even hand, not favoring one at the expense of another, so a union clothed with congressional

[19] Steele v. Louisville & Nashville R. Co., 323 U.S. 192, 65 S.Ct. 226 (1944).
[20] Id. at 209.
[21] 44 Stat. L. 577 (1926), 45 U.S.C. (1952) §151.
[22] Steele v. Louisville & Nashville R. Co., 245 Ala. 113, 16 S. (2d) 416 (1944).

authority must not discriminate against any of the employees whom it is supposed to represent. But the Chief Justice also felt that the case could be decided on a narrower ground. The wording of the Railway Labor Act seemed to him clearly to require the bargaining agent to act for the benefit of *all the members of the group,* and to prohibit sacrifice of the rights of some to gain advantages for others. And he capped his decision with a final justification. To allow such discrimination by the union would leave the injured minority with only one effective means of fighting back, the strike. Since the major purpose of the act was to eliminate labor disputes in the railroad industry, Congress could not have intended to leave open such a source of conflict.

There is nothing in Chief Justice Stone's opinion to suggest that *racial* discrimination was a social problem in the United States in 1944. Its reasoning would apply as well if the complaining employees were red-haired men or overweight women. With this aspect of the decision, Justice Murphy felt compelled to express disagreement.

> "The utter disregard for the dignity and the well-being of colored citizens shown by this record is so pronounced as to demand the invocation of constitutional condemnation. To decide the case and to analyze the statute solely upon the basis of legal niceties, while remaining mute and placid as to the obvious and oppressive deprivation of constitutional guarantees, is to make the judicial function something less than it should be."[23]

To Justice Murphy, any act of government which led to racial discrimination was unconstitutional. At the time of the *Steele* decision the United States was at war against enemies who professed to be racially superior to the rest of the people in the world. Outcroppings of such an attitude in this country were also well known. He believed these were important considerations and refused to ignore the most controversial aspect of the case, whether the discrimination by the union raised special questions because it was based on race. He was the only one of the justices who thought so.[24]

> "The Constitution voices its disapproval whenever economic discrimination is applied under authority of law against any race, creed or color. A sound democracy cannot allow such discrimination to go unchallenged. Racism is far too virulent today to permit

[23] Steele v. Louisville & Nashville R. Co., 323 U.S. 192 at 208, 65 S.Ct. 226 (1944).

[24] Many articles have been written for the law reviews concerning the Steele case. Two of the best set this case in its proper context, dealing also with other types of union discrimination against workers in the bargaining unit who are not union members or who belong to other unions. Martin, "Recent Labor Decisions," 3 NAT. B.J. 148 (1945); Dodd, "Discrimination by Labor Unions in Exercise of Statutory Bargaining Powers," 58 HARV. L. REV. 448 (1945).

the slightest refusal, in the light of a Constitution that abhors it, to expose and condemn it wherever it appears in the course of a statutory interpretation."[25]

Is Western Union a "Producer of Goods"?

"Oppressive child labor in any industry is a reversion to an outmoded and degenerate code of economic and social behavior."[26]

That statement expressed the outlook of Justice Murphy on the problem of child labor. It ascribed the highest value to society's efforts to eliminate this sore spot from its body. Five justices of the Supreme Court did not take the same view of the matter.[27]

In the Fair Labor Standards Act,[28] Congress prohibited the "shipment" in interstate commerce of "any goods . . . produced in an establishment" in which a child under sixteen was employed within thirty days of the removal of the goods from the premises. Since this wording does not expressly include the actual transportation of goods, Western Union contended that its messengers were not protected by the statute. Admittedly employing children below the allowable age, the company claimed an exemption because it was not a "producer of goods." The act defined "produce" to mean "produce, manufacture, mine, handle, or in any other manner work on. . . ."

Justice Jackson, for the majority, agreed with Western Union. While finding no difficulty in holding that telegraph messages are "goods" within the law's meaning, he felt that Western Union was not a "producer" in regard to the messages and that it could not be reasonably said that the company "shipped" messages in interstate commerce. He ruled that the term "produce" applied only to those activities which were *preliminary* to placing the goods into commerce and that Western Union's only "handling" involved the *actual transportation.* And he defined "ship" by resorting to "the ordinary speech of the people" because Congress had left it undefined.

Justice Murphy opened his attack by declaring, "In approaching the problem of whether Western Union is a producer of goods shipped in interstate commerce we should not be unmindful of the humanitarian purposes which led Congress to adopt §12(a)."[29] Given the

[25] Steele v. Louisville & Nashville R. Co., 323 U.S. 192 at 209, 65 S.Ct. 226 (1944).
[26] Western Union Telegraph Co. v. Lenroot, 323 U.S. 490 at 510, 65 S.Ct. 335 (1945).
[27] Western Union Telegraph Co. v. Lenroot, 323 U.S. 490, 65 S.Ct. 335 (1945).
[28] 52 Stat. L. 1060 (1938), 29 U.S.C. (1952) §201.
[29] Western Union Telegraph Co. v. Lenroot, 323 U.S. 490 at 510, 65 S.Ct. 335 (1945).

humanitarian purposes of Congress and society's abhorrence of child labor, there was no justification for carving out an exception to benefit the telegraph company.

> ". . . courts should not disregard the legislative motive in interpreting and applying the statutory provisions that were adopted. If the existence of oppressive child labor in a particular instance falls within the obvious intent and spirit of §12(a), we should not be too meticulous and exacting in dealing with the statutory language. To sacrifice social gains for the sake of grammatical perfection is not in keeping with the high traditions of the interpretative process."[30]

He argued that even by Justice Jackson's standard Western Union was a "producer" because of the work it did in preparing the messages for transportation. He pointed to the acceptance of the message from the sender, its marking, its coding, and its transformation into electrical impulses. For him that was sufficient "handling or working on" to make Western Union a "producer," even if all the work actually involved in the transportation were ignored.

What about "shipment" then? If telegraph messages are not "shipped" then Western Union is not subject to the act. As Justice Jackson put it, ". . . if it is common . . . to speak of shipping a telegram or receiving a shipment of telegrams, we do not know of it."[31] But that wasn't good enough for Justice Murphy:

> "As a matter of linguistic purism, this conclusion is not without reasonableness. But proper respect for the legislative intent and the interpretative process does not demand fastidious adherence to linguistic purism. . . . If the verb actually used by Congress may fairly be interpreted to cover the particular situation in a manner not at variance with the intent and spirit of the statute, no sound rule of law forbids such an interpretation."[32]

This split between Murphy and Jackson illustrates the elements which we have been discussing. Jackson looked for specific statutory wording, solved his problems by exact definitions of the meanings of words, disregarded the play of conflicting social interests involved in the case. Those interests were there and Jackson decided in favor of one against the other. But he refused to discuss it.[33] Murphy discussed it, frankly took his stand on one side, and told why he did so. He said:

[30] Ibid.
[31] Id. at 506.
[32] Id. at 512.
[33] "So far as legislative history is concerned, Justice Jackson examines it in detail for the majority and finds that it adds up to zero. Justice Murphy scarcely mentions it. I

> "Such an interpretation and application . . . are not only realistic but are in obvious accord with the statutory policy of eliminating oppressive child labor in industries transporting goods and subjects of commerce across state lines. . . . There is nothing in the statute or in its legislative background to suggest that telegraph companies are exempt. . . . It is indisputable that the evils of oppressive child labor allow no distinction in favor of the employment of telegraph messengers of tender years."[34]

Justice Jackson's opinion does not indicate his thoughts on the evils of child labor. His result suggests he did not think it was a serious enough problem to override the conflicting interest which society has in keeping telegraph companies operating with a minimum of hindrance. Had Congress specifically declared that telegraph companies must not employ children under 16, Justice Jackson would, of course, have enforced that law with vigor. But he did not believe that employment of child labor was a vile enough practice to warrant a broad interpretation of the unclear statute.[35] From our point of view, the most striking thing about Justice Jackson's opinion was what he left out. By failing to discuss the issues which Justice Murphy squarely faced, Justice Jackson hid from public scrutiny, perhaps even from himself, the intellectual process that produced his conclusion.

Justice Murphy declared that society's interest in eradicating child labor was so important that to achieve it he was willing to extend the word of Congress to its outermost limit. He quoted President Roosevelt: "A self-supporting and self-respecting democracy can plead no justification for the existence of child labor."[36] He accepted that as society's judgment and announced that he would go as far as was judicially possible to aid that worthy social purpose.

Is a Company Town "Private Property"?

The right of private individuals to own and control the use of their property is one of the most fundamental elements of our form of

think we may properly say that Justice Jackson's brilliant presentation amply justifies the deliberate neglect of Justice Murphy." So states Radin in "A Case Study in Statutory Interpretation," 33 CALIF. L. REV. 219 at 225 (1945). This is a brilliant analysis of the Western Union case, sharply critical of the reasoning process used by Justice Jackson in coming to his conclusion.

[34] Western Union Telegraph Co. v. Lenroot, 323 U.S. 490 at 512, 65 S.Ct. 335 (1945).

[35] Cox, "Judge Learned Hand and the Interpretation of Statutes," 60 HARV. L. REV. 370 (1947). This article is also severely critical of Justice Jackson's opinion in the Western Union case. Its keynote, however, is the court of appeals decision in the same case which was written by Judge Hand. It was reversed by the Supreme Court, Justice Murphy's dissenting opinion being much closer to Judge Hand's view of the case.

[36] Western Union Telegraph Co. v. Lenroot, 323 U.S. 490 at 510, 65 S.Ct. 335 (1945).

society. There have been times when no other ideal was more jealously guarded and more zealously protected by the government. Today, we recognize that individual use of private property must accommodate itself somewhat to our other social needs. The big question is, how far must that accommodation go? In coming years, lawmakers, judges, and private citizens will all have to make up their minds on how to answer that question. This kind of problem can rarely be handled with abstractions. It arises in concrete situations, requiring difficult decisions on borderline issues. Let's examine a specific case.[37]

A small North Carolina village is owned entirely by the company which operates four cotton mills there. The workers' homes are on company property, as are the stores, the post office, the school, theatre, and the one meeting hall. The hall is operated by a fraternal organization, to which it was given by the cotton mill. Church socials have been held there, Ladies' Aid Society meetings, the school has had a Christmas party there, and the company used it for a safety-training course given for its employees. Anyone who wants to use the meeting room applies to the fraternal organization for permission, and there is no evidence that this permission was ever refused. Then, along comes a CIO union, campaigning among the mill workers in anticipation of a coming National Labor Relations Board election. Wanting to hold a meeting, the union asks the fraternal organization for use of its hall and is given the necessary permission. When the employer hears about this he complains to the fraternal organization and rescinds the permit which the union has already obtained. The National Labor Relations Act[38] guarantees employees the right to engage in concerted activities without interference by their employer. Is this the kind of interference which amounts to an unfair labor practice?

Justice Murphy had no hesitation in saying "yes" when the case came before the Supreme Court. He declared: "It is not 'every interference with property rights that is within the Fifth Amendment. . . . Inconvenience, or even some dislocation of property rights, may be necessary in order to safeguard the right to collective bargaining.' "[39]

Two interests were involved here, the employer's right to use his private property as he saw fit, and the employees' right to organize for collective bargaining. Both interests could not be left standing; one must retire in favor of the other. In the opinion of the majority, as described by Justice Murphy, the employees' rights took precedence.

[37] NLRB v. Stowe Spinning Co., 336 U.S. 226, 69 S.Ct. 541 (1949).
[38] 49 Stat. L. 449 (1935), 29 U.S.C. (1952) §141.
[39] NLRB v. Stowe Spinning Co., 336 U.S. 226 at 232, 69 S.Ct. 541 (1949).

That meant the employer could not deny to the union use of a hall which was freely available to all other organizations. The union must be treated on the same basis as everyone else, no better but no worse. In coming to this conclusion Justice Murphy, as always, was keenly aware of the practical aspects of the situation. He said:

> ". . .union organization in a company town must depend, even more than usual, on a hands-off attitude on the part of management. And it is clear that one of management's chief weapons, in attempting to stifle organization, is the denial of a place to meet. We cannot equate a company-dominated North Carolina mill town with the vast metropolitan centers where a number of halls are available within easy reach of prospective union members. We would be ignoring the obvious were we to hold that a common meeting place in a company town is not an important part of the company's business."[40]

Justice Reed did not look at the matter in that light at all. With Chief Justice Vinson, he dissented from the majority view, believing that the NLRB could not compel the employer to make his meeting hall available to the union.

The Supreme Court had already held that an employer could be required to let a union distribute leaflets on his plant property. That was different, Justice Reed thought, from requiring him to devote property that had no connection with his mill operations—the meeting hall—to the union's use. He agreed that under certain circumstances an employer might have to let the union use his plant for campaigning. But he could not see how other property belonging to the employer could be forced to such use. He said:

> "Employment in a business enterprise gives an employee no rights in the employer's other property, disconnected from that enterprise. As to such property, the employer stands on the same footing as any other property owner."[41]

He went on:

> "Employment furnishes no basis for employee rights to the control of property for union organization when the property is not a part of the premises of the employer, used in his business. . . . Labor unions do not have the same right to utilize the property of an employer not directly a part of the employment facilities, that an employer has. . . . To require the employer to allow labor union meetings in or on property entirely disconnected in space and use

[40] Id. at 229.
[41] Id. at 241.

from the business of the employer and employees is too extravagant an extension of the meaning of the Act for me to believe it is within its language or the purpose of Congress."[42]

Here too the question is squarely faced. One does not lightly set aside the rights of private property, hallowed by a centuries-old tradition, merely to make the job of union organizing an easier one. So well-known is society's interest in the preservation of property that only the strongest considerations can persuade a retreat from protection of that interest. To Justice Reed, the usefulness of labor unions to society, the need of employees to have government protection in their collective bargaining activities, do not yet commend themselves as interests worthy of the strong protective measures approved by a majority of the Court. As between "due process" and section 7 of the Wagner Act, it is collective bargaining which must take a back seat.[43]

Is a Miner a "Government Employee"?

Out of the tangled web which is the case of *United States v. United Mine Workers*[44] comes more evidence of Justice Murphy's desire to face legal issues without hiding behind a protective covering of abstract legalisms.[45] When John L. Lewis and the soft coal miners threatened to strike during 1946, the Department of Justice went into the federal district court in Washington, D.C. and asked for an injunction. The mines were then in the hands of the United States Government, having been seized by the President under the authority of the War Labor Disputes Act.[46] Without notice to the union, the court granted a temporary restraining order lasting nine days and directed that a hearing be held at that time to determine whether a temporary injunction should be issued. Before the hearing could be held, the miners walked out.

Lewis and the union were both tried for contempt, found guilty by Judge Goldsborough, who had issued the original restraining order, and fined $10,000 and $3,500,000, respectively.[47] When the case came before the Supreme Court, the nine justices produced five full-dress opinions and a short statement by Justice Jackson.[48] The judgment of

[42] Id. at 244.

[43] A good discussion of the legal aspects of this case appears in 37 CALIF. L. REV. 144 (1949).

[44] United States v. United Mine Workers, 330 U.S. 258, 67 S.Ct. 677 (1947).

[45] A sober and complete discussion of this controversial case is found in a comment in 45 MICH. L. REV. 469 (1947).

[46] 57 Stat. L. 163 (1943). Popularly known as the Smith-Connally Act, it expired with the other war powers which Congress gave the President during World War II.

[47] United States v. United Mine Workers, (D.C. D.C. 1946) 70 F. Supp. 42.

[48] Chief Justice Vinson delivered the majority opinion, in which he was joined by Justices Reed and Burton. Justice Jackson also approved the majority opinion, except for

the district court was upheld, the Lewis fine was approved and the union was given a chance to get back $2,800,000 by complying with the provisions of the restraining order.

Only two of the many questions discussed in these opinions are relevant to this paper. Chief Justice Vinson (who wrote the main opinion in the case) held that the miners were government employees because the mines had been seized by the President and were being operated by a representative of the Secretary of the Interior. Since they were goverment employees, the Norris-LaGuardia Anti-Injunction Act[49] did not apply and the restraining order was properly issued. Vinson also said, however, that even if the injunction were invalid—even if it should not have been granted—the union was under an obligation to obey it until the order was reversed by a higher court. The proper procedure, he ruled, when a party objects to the terms of an injunction issued against him, is to appeal the matter. The order must be complied with until set aside.

These two questions Justice Murphy faced with typical vigor. He concluded that the miners were not actually government employees and that an invalid court order need not be obeyed in this kind of labor dispute. He declared: "In my opinion, the miners remained private employees despite the temporary gloss of Government possession and operation of the mines; they bear no resemblance whatever to employees of the executive departments, the independent agencies and the other branches of the Government."[50]

The President had seized the mines by executive order and directed the Secretary of the Interior to operate them. This was done through the appointment of a naval officer, Captain Collisson, as Administrator. No other change was made in the operations of the mining companies. Employees were paid by the mine operators, not by the government. Deductions from the miners' pay were those of private employees, not government workers. Production control and supervision of employees remained in the hands of the owners. Profits resulting from the operations went into the pockets of the owners, and taxes were paid just as though the mines were in private hands. There were also strong indications that the government did not consider itself the owner of the mines. When John L. Lewis, the union president, tried to negotiate a change in working conditions with the Secretary of the Interior, he

one point. Justice Frankfurter concurred in the judgment, but disagreed with some of the reasoning. Justices Black and Douglas concurred in part and dissented in part. Justice Murphy dissented. Justice Rutledge also dissented and wrote a separate opinion.

[49] 47 Stat. L. 70 (1932), 29 U.S.C. (1952) §101.

[50] United States v. United Mine Workers, 330 U.S. 258 at 337, 67 S.Ct. 677 (1947).

was told that such talks should be carried on with the mine operators. In making that suggestion, the secretary recognized his own lack of power to bargain over a new collective agreement, and seemingly admitted that the government did not really own the mines.

All of this was proof enough to Justice Murphy that the miners should not be treated the way Civil Service employees would be treated under the same circumstances. He said, "It cannot be denied that this case is one growing out of a labor dispute between the private coal operators and the private miners. That is a matter of common knowledge. . . . [The] strikes and labor disturbances grew out of the relations between the operators and the miners."[51]

The Norris-LaGuardia Act, according to Justice Murphy, was designed to take from the federal courts the power to interfere in private labor disputes. Whether the miners were or were not government employees made no difference; the only question was whether the "labor dispute" was a private one. If the controversy was between private parties, then not even the fact that the federal government had asked for the injunction could overcome the Norris-LaGuardia prohibition. Justice Murphy pointed out that the wording of the statute and the history of the evils which it sought to curb indicated a congressional desire that the federal courts stay out of private labor disputes. There was no exemption for those private controversies in which the government had, for one reason or another, stepped in to ask the restraint. Not even the War Labor Disputes Act, under which the coal mines were seized, suggested in any way that the President would be able to get an injunction against a strike. Having held that the restraining order should not have been issued, Justice Murphy was faced with the solid fact that it had been issued. Should the union have obeyed it until the matter could be appealed?

The majority, by Chief Justice Vinson, ruled that the order should have been obeyed even if it was improperly granted. The Chief Justice held that although the order might have been controversial it was not so "frivolous" that no sensible judge could have issued it. Although there were grounds upon which the order could have been denied, there were also grounds upon which it could have been granted. The parties were obligated to respect the judge's decision until reviewed by a higher court. Justice Murphy disagreed.

> "The issuance of such [temporary restraining] orders prior to the adoption of the Norris-LaGuardia Act had a long and tortured

[51] Id. at 336-337.

history. Time and again strikes were broken merely by the issuance of a temporary restraining order, purporting to maintain the *status quo*. Because of the highly fluid character of labor disputes, the delay involved in testing an order of that nature often resulted in neutralizing the rights of employees to strike and picket."[52]

Since this was the experience which had persuaded Congress to take from the federal courts the power to grant injunctions in labor disputes, then Justice Murphy believed that the Supreme Court should not allow the evil to persist by requiring the union to obey the order pending appeal.

". . . to compel one to obey a void restraining order in a case involving a labor dispute and to require that it be tested on appeal is to sanction the use of the restraining order to break strikes—which was precisely what Congress wanted to avoid."[53]

Is a Plant Guard a "Soldier"?

Soldiers as such do not belong to labor unions and no government would countenance the unionization of its military forces. Loyalty to a labor organization is believed to be incompatible with that complete devotion to a soldier's duty which is expected of every man in the armed forces, as well as with the complete and unquestioned obedience that a soldier must accord his superior officers.

During wartime, the production of materials for the armed services is mainly a military activity and the civilians who participate in it are carefully supervised by representatives of the military forces. This is true not only of the manufacture of guns, tanks and ammunition, but of uniforms, iodine, and typewriters. These ordinarily civilian tasks take on a military flavor, are given the privileges and priorities of "defense work," and are often protected in much the same way from much the same dangers.

Plant protection during World War II started out as a job for the military police, but its tremendous expansion made it undesirable to devote a large military force to a responsibility which could effectively

[52] Id. at 340.

[53] Id. at 341. In full agreement with this thesis is Watt, "The Divine Right of Government by Judiciary," 14 UNIV. CHI. L. REV. 409 (1947). Disheartened by the result of the Mine Workers case, Watt predicted disastrous consequences for the labor movement. Actually, none of the damage which he expected American unions to sustain has materialized. He feared that the government would now be able to break any strike by seizing the company and going after an injunction in the federal courts. Passage of the Taft-Hartley Act, with its "national emergency" provisions, has changed the picture. The War Labor Disputes Act has expired. With its decision in the Steel Seizure case, the Supreme Court seems to have dispelled any possibility of Watt's dire expectations being fulfilled.

be met by civilian watchmen. Still, the military authorities wanted to have a measure of control over these civilian guards. They wanted to be able to reject job applicants on the basis of military considerations, wanted to inflict punishment for dangerous infractions of the rules, and wanted to have general supervision over the way these guard forces operated. The answer was "militarized plant guards," a force of civilians headed by a military officer. These men constituted an auxiliary to the regular military police. They wore uniforms supplied by the company (not army uniforms), swore to uphold the United States Constitution, and agreed to subject themselves to certain types of military discipline.[54] At the time this system was introduced, intensive unionization campaigns were going on in war industries, and employers found that their guards were joining labor organizations. The National Labor Relations Board saw no objection to this and certified more than a hundred such bargaining units during the war years.[55] Protests were submitted by many employers and the question was brought to the Supreme Court for solution.

The opposition to allowing these guards to join unions arose from the feeling that they should be treated like soldiers. Their responsibility to protect war factories was vital to the public welfare, and any possibility of conflicting loyalties should not be permitted to develop. In ruling that an employer need not bargain with a union of militarized guards, the court of appeals declared:

> "Nothing should be permitted which will interfere in any degree or to any extent with the obligation which these guards have with the military. Membership in a union with the right to bargain might, in fact is likely to, do that very thing. To so state is not to cast any reflection upon the patriotism of the guard members. It is merely a recognition of that which is a matter of common knowledge."[56]

While this decision may not impugn the patriotism of the guards, what of the patriotism of the union? The judge has set up the obligations of union membership against the requirements of national security and has found the two incompatible. He finds that it would be dangerous for a nation at war to allow the men guarding its military factories to join a labor union for the purpose of negotiating working

[54] War Department Circular No. 15, dated March 17, 1943, governed the organization of militarized plant guard units, their discipline, obligations, relations to employers and to unions. Its language clearly contemplated that these men would be permitted to join unions in accordance with the National Labor Relations Act, if they so desired.

[55] See NLRB, EIGHTH ANNUAL REPORT 57 (1943).

[56] NLRB v. Atkins & Co., (7th Cir. 1945) 147 F. (2d) 730 at 742.

conditions with their employers. He does not think the United States ought to take this chance, merely on the possibility that the union might turn out to be a responsible institution that would conform its activities to the national interest in winning the war.

Three members of the Supreme Court were so impressed with this argument that they dissented from the majority decision, writing no opinion of their own, but citing the lower court's views.[57] Justice Murphy wrote the majority opinion, explaining his refusal to upset the NLRB order by saying:

> "Here we have the Board's considered and consistent judgment that militarized plant guards may safely be permitted to join unions and bargain collectively and that their military duties and obligations do not suffer thereby. . . . This policy of the Board, moreover, has been confirmed by experience. . . . Under such circumstances, it would be folly on our part to disregard or upset the policy the Board has applied in this case."[58]

Justice Murphy did not think the interests of the United States would necessarily be disregarded by labor unions in pursuit of their own interests. He refused to set the requirements of national security in opposition to the interests of the guards in collective bargaining. Both could exist side by side. Both could be recognized by the government. At least until the union had shown a lack of self-restraint in bargaining for the guards, there was no reason to stamp it irrevocably with the mark of irresponsibility. He said:

> "We cannot assume, moreover, that labor organizations will make demands upon plant guard members or extract concessions from employers so as to decrease the loyalty and efficiency of the guards in performance of their obligations to the employers. There is always that possibility, but it does not qualify as a legal basis for taking away from the guards all their statutory rights. In other words, unionism and collective bargaining are capable of adjustments to accommodate the special functions of plant guards."[59]

As far as loyalty to the employer is concerned, Justice Murphy noted:

> "In guarding the plant and personnel against physical danger, they represent the management's legitimate interest in plant protection. But that function is not necessarily inconsistent with organizing and bargaining with the employer in matters affecting

[57] NLRB v. Atkins & Co., 331 U.S. 398, 67 S.Ct. 1265 (1947).
[58] Id. at 414-415.
[59] Id. at 405.

> their own wages, hours, and working conditions. They do not lose the right to serve themselves in these respects merely because in other respects they represent a separate and independent interest of management."[60]

There is an important lesson to be learned from these provocative cases. Every decision caused a split in the Supreme Court. None of the justices stood in the way of an obvious and compelling solution. Rather, some of them acted as though they had no place to turn. In this type of situation "welfare" jurisprudence can be most helpful. The cases had common characteristics that made them especially appropriate for the "welfare" approach. Each involved a controversial statute which announced important changes in social policy. In every case there were disputes as to the meaning of language and serious doubts about how the statute should be applied. There were also important interests, both public and private, on each side, vying for supremacy in the society's scale of values. Faced with such problems, perhaps the judge has nowhere to go but to his own ideas of what is good for the general welfare. Assuming that the pertinent legislation does not provide clear, unequivocal answers to the questions raised in the litigation, the judge is bound to be impressed by the private and public interests which are ranged against each other.[61]

The Railway Case. Chief Justice Stone gave preference in the *Steele* case[62] to the rule that a statutory bargaining agent must treat all workers in the unit with at least a reasonable amount of equality. Justice Murphy thought it more important to bar government approval of any act which injures a man because of the color of his skin. Both judges were aware of the often-expressed public interest in allowing labor unions to develop unhindered as agencies for collective bargaining. Neither thought that could stand as a reason for allowing the Railroad Brotherhood to continue its discriminatory practices. Other interests were present also. The Railway Labor Act gave the majority of workers in a bargaining unit great power over the dissenting minority. Here, the majority took advantage of that legislative policy to reserve for itself the jobs then held by the minority. What is wrong with that? Nothing, said the Supreme Court of Alabama; but the United States Supreme Court disagreed.

The railroads also had a vital interest in the outcome. In the role of employers, they were accustomed to dealing with the union as bar-

[60] Id. at 404.

[61] See Patterson, "Pound's Theory of Social Interests," in INTERPRETATIONS OF MODERN LEGAL PHILOSOPHIES, Essays in Honor of Roscoe Pound (Sayre, ed.) 558-573 (1947).

[62] Steele v. Louisville & Nashville R. Co., 323 U.S. 192, 65 S.Ct. 226 (1945).

gaining agent for the employees. To do so effectively, the contracts executed by the union must stand up in court. If individual employees can go behind their union's authority and question the validity of these agreements, the employer becomes insecure; he does not know which contract will be upheld and which struck down. Again, the Court did not think this a good enough reason to sanction the discriminatory practices. Several interests were involved, each had received the approval of society in one form or another, yet all could not be given full effect at the same time. Some would have to be sacrificed so that the more important ones could be left standing. That is exactly what was done.

The Western Union Case. A telegraph company is a public utility, one of those corporations whose activities, while closely regulated by federal and state governments, have long been recognized as having a special value to society. That public utility interest was present in the *Western Union* case,[63] together with the undeniable desire of society to stamp out oppressive child labor. Justice Murphy explicitly recognized this conflict and took his stand in favor of eliminating child labor. Justice Jackson refused to *say* that any such conflict existed, but since he decided in favor of Western Union, the result was exactly the same. If he had followed Pekelis' prescription, he would have talked about the social utility of telegraph companies, rather than about the definitions in Webster's dictionary. We would then have had a more statesmanlike exposition of why he decided the case as he did. As it is, his opinion contributes little to the literature of legal method, jurisprudence, or sociology.[64]

The Company Town Case. When both the majority and dissenting justices recognize the existence of competing interests and flatly oppose each other because they differ over which interest is more important, the decision is most enlightening. That is what happened in the *Stowe Spinning Company* case.[65] Justice Murphy held that private property must adjust itself to the necessities of collective bargaining. Justice Reed agreed, but he did not think the adjustment need go so far. He believed that an employer's control over his plant property could be modified to the extent of compelling him to allow distribution of union literature on the premises. He refused to go along, however, with the

[63] Western Union Telegraph Co. v. Lenroot, 323 U.S. 490, 65 S.Ct. 335 (1945).

[64] See Radin, "Statutory Interpretation," 43 HARV. L. REV. 863 (1930), and "A Case Study in Statutory Interpretation," 33 CALIF. L. REV. 219 (1945), and Cox, "Judge Learned Hand and the Interpretation of Statutes," 60 HARV. L. REV. 370 (1947).

[65] NLRB v. Stowe Spinning Co., 336 U.S. 226, 69 S.Ct. 541 (1949).

next step, forcing the employer to rent his meeting hall to the union. The public interest in collective bargaining was strong enough to warrant the first, but not strong enough to justify the second.

The high rating on society's scale of values which Justice Murphy gave to collective bargaining, coupled with the fact that the only available meeting place was employer-owned, resulted in a decision favoring the union. A lesser respect for collective bargaining and an indifference to the fact that the company town had only one meeting hall, resulted in Justice Reed's decision favoring private property rights.

The Mine Workers Case. An instance when society has two conflicting interests it would like to protect, but cannot give them both free play, is illustrated in the John L. Lewis case.[66] Our devotion to free collective bargaining unhampered by government interference or compulsion, often calls forth long and impassioned testimonials. So does the need for governmental power to end nationwide strikes which endanger our economy. Sometimes the speaker pays homage to both ideals in the same speech. But it is not always possible to be loyal to both concepts. The *Mine Workers* case separated the sheep from the goats. Justices of the United States Supreme Court were compelled to make up their minds which aspect of public policy they thought more important. The majority declared its unwillingness to leave the federal government without a weapon to prevent strikes which created a national emergency.[67] Justice Murphy saw no warrant for government intervention in a private controversy between an employer and his employees. Congress' declaration in the Norris-LaGuardia Act, that federal courts must not issue injunctions in private labor disputes, seemed to him the last word on the subject. Nothing had happened since passage of the act to persuade him that the evils at which it was aimed were no longer dangerous. Nor had anything happened to persuade him that strikes such as the coal miners' necessitated special treatment by the Supreme Court.

The Plant Guard Case. It is sometimes possible for the courts to give effective recognition to each of two competing vital interests without impinging upon either. During World War II, many judges and other public officials seemed to feel that militarized plant guards could not be allowed to organize unions without endangering our national

[66] United States v. United Mine Workers, 330 U.S. 258, 67 S.Ct. 677 (1947).

[67] Careful analysis of the facts has convinced two writers that the 1946 coal strike did not constitute a national emergency in an economic or military sense. Bernstein and Lovell, "Are Coal Strikes National Emergencies?" 6 INDUSTRIAL & LABOR RELATIONS REV. 352 (1953).

security. Justice Murphy recognized the existence of two interests, but refused to concede that they could not live peacefully side by side.[68] Had a clear showing been made that our war efforts were being impeded by unions of guards the practice would undoubtedly have been ended immediately.

But the mere articulation of two different interests does not necessarily mean that they are incompatible. They may exist side by side with no trouble at all. The federal government has many offices in Chicago and its representatives function daily there without interfering with the municipal authorities or the state government of Illinois. Rarely is there a dispute and even rarer are the occasions when one governmental unit must bow to the other. This kind of side-by-side accommodation is not always possible. The right of Negroes to fair treatment could not exist together with the right of white workers to take their jobs away from them. The right of Western Union to use children in its operations excludes governmental prohibition of this kind of child labor. The right of employees to organize a union cannot be effective if an employer can bar union meetings in a company-owned town. Society's interest in keeping government out of private labor disputes is not served if courts can prohibit strikes against employers chosen by the president or the attorney general.

Having reached this point, it will, perhaps, now be easier to tell whether Pekelis' suggested guide for the perplexed judge can be of any use. I think it can. I believe that examination of these few cases has demonstrated that Justice Murphy often used the "welfare question" as an aid in deciding the hard problems that came before him. Along the way, we found other judges who did exactly the same thing. We also saw judges who refused this fruitful approach and insisted on looking to the canons of construction, the dictionary, and other profitless sources for help. These men also have much to teach, for while they disclaim loudly any intention to put their own views of social problems into effect, it is usually difficult to tell that they have not done so. I will agree that they often don't *talk* about it, but I wonder whether their silence actually means that these considerations have not influenced their decisions. I doubt it.

Their silence means that it is harder for critics to grapple with them because of the difficulty in pinning down the real reason for the decision. When a judge says that he is construing a statute narrowly because it provides benefits for elderly ladies and he does not think the

[68] NLRB v. Atkins & Co., 331 U.S. 398, 67 S.Ct. 1265 (1947).

government should provide such benefits, we know where he stands and what sort of strong statutory language will persuade him that he must accede to the legislative desire. But when he says the legislature never really intended to provide such benefits, and he leans on the presence or absence of commas to ground his conclusion, he becomes much harder to deal with. Should the legislature then change the punctuation to suit him, he might still find other trifles to prevent attainment of the social objective he opposes.

When controversial social issues come to court it is not the judge who frankly takes his stand on one side or the other whom we must fear. We can deal with him easily. That is the function of the legislature and of public opinion. It is the judge who decides cases in the dark, not knowing or not discussing the vital aspects of the problems before him, that we must watch out for. He can do as he pleases; for we cannot intelligently evaluate his judicial work unless we find out what he really thinks. And if he doesn't tell us, how can we know what he really thinks? We can only surmise from the practical effects of his decisions.

Fortunately, many judges now realize that they must themselves find out why they decide cases as they do, and that they must tell about it in their written opinions. Our judiciary has no more room for medicine men, with their mysterious incantations and supernatural wisdom. Court decisions are today often based on knowledge of sociology, psychology, economics and other social sciences. There is also greater effort to express the philosophical bases of our way of life, and to conform judicial decisions to them. As the judge increases his use of these tools, he finds it harder not to consider the social consequences of the decisions he must make. Acceptance of his role as referee among the competing claims of highly-valued social interests will lead him to acceptance of the broader "welfare" approach to the judicial task. It is an approach which comes highly recommended and promises to give the courts an important share in the future growth of our society.