Statutory Interpretation in America: Dipping into Legislative History, Part II

Reed Dickerson

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Statutory Interpretation in America: Dipping into Legislative History—II*

By Reed Dickerson

Recent Developments

Since 1975 (when The Interpretation and Application of Statutes was published), there have been a number of attempts to clarify the use of legislative history in the judicial handling of statutes. Some have been frontal attacks, but most have been incidental to efforts directed toward broader legislative problems such as the interpretation of statutes generally.

In his second Carpentier lecture at Columbia University, Professor James Willard Hurst recently discussed general trends in the interpretation of statutes. Although in a footnote he later impliedly acknowledged the dichotomy between the cognitive and the creative judicial functions, his delivered text dealt only with “interpretation.” This limited the chance that his audience might sense the relevance of asking whether it should make any difference whether legislative history was being used for purposes of judicial law finding or for purposes of judicial law making. He hints that it does, but only in his observation that American courts regularly require that persons offering “outside” evidence first show that the text, taken by itself, is uncertain. This makes good communication sense only if it can be assumed that the material in question is not part of the proper context of the statute (thus excluding it from the cognitive process) and if it can be assumed that the uncertainty is invincible and not merely apparent. For most legal minds, such a hint is too fragile to inform and persuade.

Although Hurst urges caution in the use of legislative history, he is reluctant to rule it out for purposes of cognition or confine it to confirmation. Like most modern academics, who have been heavily exposed to the precepts of legal realism, he seems overly vulnerable to the argument that, since most courts are doing something, that something defines compelling legal principle.

One significant trend is for the courts to use legislative history mostly to define ulterior legislative purpose rather than to define legislative meaning. Certainly, a court should not allow its cognitive judgment to be

* This is the continuation of the article commencing at p. 76 supra—Editor.
53 See J. Hurst, supra note 51, at 31.
54 See ibid. at supra note 3.
55 ibid. at 53, 55–56.
56 ibid. 54–55.
affected by any extrinsic statement, by whomever uttered, that purports to
give the meaning of the statute and thus to erode the documentary
exclusivity that every American constitution gives to statutes. This is not a
constitutional mandate of literalism, but a constitutional mandate that the
effectiveness of a statute be confined to its text as conditioned by its total
context. One of the most important causes of the prevailing confusion is
the failure to recognize the limits of external context.

Another trend, observed by Hurst, is that "[f]ew rules of competence
limit resort to evidence . . . outside the statute books." But if there are
"sound reasons for caution in looking beyond the statute book for
evidence of the legislature's intention" (including constitutional reasons
not limited to the separation of powers), it might be appropriate to suggest
stiffer rules of competence. Hurst's reasons for caution are sound, but in
the hands of the great bulk of American judges, who remain woefully
ignorant of the realities of the legislative process, such rules need much
stiffening if they are to be effective safeguards.

Professor and long-time state senator Jack Davies, in his recent
"nutshell" book on legislation, after surveying the practical aspects of
legislation and acknowledging the usefulness of background context
supplied by general knowledge (which absolves him of literalism),
concludes that courts should "discourage the use of legislative history."—
". . . Legislative history can raise more questions than it answers.
One legislator cannot speak for the full institution. . . . Legislative
debates, studies, committee reports, and official records are difficult
to find, lengthy, self-contradictory, and of uncertain reliability . . .
[Because the use of legislative history is costly, the] more expensive
technique favors wealthy interests over interests with limited
resources." Having been persuaded by these considerations, Davies found no
occasion in his brief treatise to rely also on constitutional considerations or
the subtleties of communication theory.

On the other hand, Professor John M. Kernochan, in his 1976 Read
Memorial Lecture at Dalhousie University, found it hard to "understand
why the minister whose department sponsored a bill and who pilots it
through the House of Commons is not to be considered a reliable
spokesman . . . . The problem of isolating reliable information in Har-
sard . . . . is surely not insuperable if one locates the responsible
spokesman." I assume that Kernochan, like Davies, is talking about the cognitive
function. In any event, his assertion is very "iffy" here; reliability does not
depend solely on proximity to the bill and moral integrity. Certainly,

57 Ibid. at 53.
58 Ibid. at 54.
60 Ibid. at 255. Davies' misgivings are confirmed in Mangum, "Legislative History in the
61 Kernochan, "Statutory Interpretation: An Outline of Method" (1976) 3 Dalhousie L.J.
333, 351.
competing statements as to what the bill means are almost worthless and for a judge to rely on them is, in effect, to abdicate his own constitutional responsibility to ascertain meaning. In a hectic context in which bills "should be made to pass as razors are made to sell," the will to succeed too often outruns the will not to mislead.

As for the practical availability of legislative materials to the legislative audience, Kernochan says that:

"... The problem of availability would surely be solved by public or private initiative if the [English] rules were changed. In the United States, in the federal courts, there is now a long tradition of resort to so-called internal legislative history materials. ... In sum, the full range of legislative history material is called upon for interpretative aid at the federal level. In using such materials, the courts ... have demonstrated, again and again, a capacity to weigh evidence drawn from that process ...."

But if public or private initiative would solve the availability problem in England, why has the problem not yet been satisfactorily solved for Federal legislative history, where the opportunity to solve has presumably been as long-lived as the tradition of resort that created it? (Or is English initiative superior to our own?) Although physical availability has recently improved with the growth in number and holdings of depositary libraries, and the mechanical burdens of research have been greatly lightened, for example, by the privately published research aids of the Congressional Information Service, practical availability to the great bulk of the legislative audience is still effectively stifled by the burgeoning complexities and the economics of research.

But suppose that the existing kinds of legislative history could be and were made adequately available. In view of "Murphy's law" that no bulletin board or parking lot is ever large enough, coupled with the fact that today's extrinsic evidences of legislative attitudes are at best sporadic and fragmentary, would not this new availability result largely in

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62 R. Dickerson, supra note 3, at 155 (footnote omitted).
63 Kernochan, supra note 61, at 351 (footnotes omitted).
64 See R. Dickerson, supra note 3, at 147–154. Since 1970, Congressional Information Service, Inc., has privately published a service that reproduces in microfiche all congressional reports, hearings, committee prints, and other legislative documents except the Congressional Record. It provides indexes by subject, name of author or witness, official or popular name, bill number, and public law number. The service is available in almost all academic law libraries, most universities, and large public libraries, and in many court or law-firm libraries. The index is available also through computerized bibliographic services such as DIALOG and ORBIT.

On the other hand, the service does not reach pre-1970 Federal materials or any state materials. It is expensive to own and time-consuming to use (committee working papers alone aggregate more than 850,000 pages a year; CIS 1981 General Abstracts xi). The aggregate extra expense makes use economically feasible for the practitioner only in controversies involving large sums of money or matters of great importance. Also, what does the conscientious legal advisor rely on between the date of enactment and CIS's date of publication? And should the government be able to rely on a private system that it neither owns nor controls to disseminate assumedly binding knowledge respecting the laws that it enacts?
increasing the judicial appetite for legislative materials? What about executive sessions? What about relevant corridor or backroom negotiations? Given the courts' and lawyers' already staggering workloads of litigation, could even the courts' more modest appetite ever be satisfied?

Even if Kernochan's dreams of availability were realizable, note that both major modern institutional studies of legislative history, California's and England-Scotland's, resulted in suggestions, not for opening the floodgates, but for drafting specially prepared statements of legislative purpose or intent. California's study group rejected using draftsmen's statements, but recommended testing beefed-up committee reports. Britain's commissioners recommended tentative preparation of explanatory materials on a selective basis, to be taken into account if the statute referred to the material in question.

Most surprising is Kernochan's assertion that the Supreme Court has shown its capacity to evaluate legislative history. My own reading of Supreme Court cases tells me that beyond a gradual trend to loosen restrictions the Supreme Court has no coherent philosophy. This should surprise no one who is privy to the long standing deficiencies in legal education regarding legislation and the legislative process. Most courts simply have no realistic grasp of how legislation is put together. Confirmation of their inadequacies appears in recent studies of the United States Supreme Court and of California's Supreme Court.

The clinching argument for Kernochan is that the Supreme Court shows no discernible disposition to retreat from its current faith in legislative history as providing "significant insights into legislative intent," a faith "tested by experience." If there is faith here, it is an amorphous faith unsupported by a comprehensive and coherent philosophy. Moreover, the Supreme Court is not likely to develop such a philosophy so long as it remains deficient in its understanding of the legislative process and continues to scramble general communication theory with its almost standardless judicial law making. How Kernochan can conclude that it has tested and vindicated what adds up to a non-theory is hard to see. Even in "realist" jurisprudence, doctrinal confusion is hardly vindicated simply because it is deeply entrenched.

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65 Final Report of the Sub-Committee on Legislative Intent of the Assembly Committee on Rules, Vol. 28, No. 1, Assembly Interim Committee Reports 30-33 (1961-1963) (hereinafter cited as "Final Report").
66 The Law Commission and the Scottish Law Commission, the Interpretation of Statutes 38-43 (1972) (hereinafter cited as "Commission").
67 Final Report, supra note 65, at 30-33.
68 Ibid. 26-30.
69 Commission, supra note 66, at 42, 50, 51 (app. A, cl. 1(1)(e)). Incorporation by reference makes the material functionally a part of the statute, but presumably not of compelling force.
70 See Kernochan, supra note 61, at 351-353 (referring to the capacity of the Federal courts in general).
71 See Wald, "Some Observations on the Use of Legislative History in the 1981 Supreme Court Term" (1983) 68 Iowa L. Rev. 195; Comment, infra note 94; Smith, infra note 98.
72 Kernochan, supra note 61, at 352. But see Wald, supra note 71, at 214 ("I am left with the sense . . . that consistent and uniform rules for statutory construction and use of legislative materials are not being followed today").
Finally, Kernochan brushes aside the practical burdens that the pressure to consult legislative history poses for the counselor not yet confronted with specific litigation. We should not curtail reliance, he implies, until "a more extensive investigation of the practical experience with the use of such material" has been made. But the matter needs no formal sociological study, because counsel for even a substantial enterprise obviously cannot evaluate the sweep of legislative histories of the many new and old statutes that affect that enterprise as those histories might bear on a myriad of plausible problems yet to arise. The problem is formidable enough even if the meaning of the statute is determined only by the enacted text as conditioned by the shared background of general knowledge and tacit assumptions that constitute its external context.

It is refreshing to read the Rhodes-White-Goldman investigation of legislative history, conducted from a Florida point of view, by authors who show a surprisingly detailed understanding of the realities of state statute making. Their general thesis is that the constitutional separation of powers requires a conscientious search for legislative intent, which includes investigating legislative history and other extrinsic materials in instances where the circumstances disclose relevant uncertainty. Finding most of Florida’s kinds of legislative history of questionable value, they urge caution in its use by the courts. To this end they offer criteria for sifting. Finally, they offer elaborate suggestions for (1) requiring beefed-up committee reports; (2) recording and retaining the records of committee hearings and floor debates; and (3) requiring sponsors’ statements of intent.

Unfortunately, the authors’ grasp of legislative procedure outruns their grasp of constitutional limitations and the basic principles of communication. The result is a loosely argued legal rationale yielding unconvincing conclusions. Their most serious deficiency is their failure to appreciate the importance of knowing whether legislative history is being used to find legislative meaning or to supplement it. Second, they work with a simplistic concept of the “plain meaning” rule that fails to observe the important difference between measuring “plainness” by the statute alone and measuring it by the statute-in-context, where context includes extrinsic materials but not necessarily legislative history.

In their argument favoring recourse to extrinsic aids, Rhodes, White, and Goldman brush off reliance on intrinsic aids as not representing a search for “meaning,” because it involves only applying “the proper maxim” and then beholding the legislative intent. As communication

73 Kernochan, supra note 61, at 352 n. 78.
75 Ibid. at 383.
76 Ibid. at 389–402 (the authors also discuss the use of extrinsic materials generally).
77 Ibid. at 403–404.
78 Ibid. at 405–407.
79 Ibid. 384–385.
80 See supra text accompanying notes 24–25.
81 Rhodes, White & Goldman. supra note 74, at 385.
theory, this will surprise people used to relying also on syntax and internal context. The authors say that “it seems illogical . . . to rely on [the canons] exclusively when direct evidence of legislative intent [presumably legislative history] is within reach.”

In any event, junking the canons of interpretation does not necessarily lead to relying on legislative history.

Rhodes, White, and Goldman are not overwhelmed by the argument that practical unavailability to the legislative audience rules out recourse to legislative history. “[W]hen basic rights are at issue, the courts may construe a statute prospectively.”

This is not as easy as it sounds. Because whatever meaning law finding uncovers necessarily attached at enactment, the theory that allows deferred effective dates for “interpretations” presumes instances in which the court is making new law either by assigning a meaning where no legislative or court-attributed meaning previously existed or by replacing an erroneous judicial interpretation with a presumably correct one.

In the latter situation, a look at legislative history may not be useless. But to use this device during the cognitive phase risks eroding the constitutional exclusiveness of the statutory vehicle.

Accepting the realistic notion of vicarious legislative intent, Rhodes, White, and Goldman, citing G. Folsom, claim that its reach extends to validating committee reports as authoritative statements. Vicarious intent certainly encompasses legislative intent as expressed in the statute. But it can rarely encompass legislative intent as expressed in the report in situations where it is not merely confirmatory, because normal legislative talk is about “bills,” not “reports.”

As for ulterior purposes, individual legislators naturally advert to their own purposes and, since these are presumably adequately served by the statutory expression of legislative intent, there is no occasion to be concerned with the fact that the sponsors and others may have had (and collateral) different ulterior purposes. Their normal irrelevance thus makes them an unlikely object of adoption by legislators only loosely acquainted with the proposed legislation. Rhodes, White, and Goldman’s claim carries more plausibility where the statement in question accompanies the recommendations of the initiating organization.

Rhodes, White, and Goldman’s general philosophy is summarized in their statement that the “preponderance of case law dismisses attempts to limit the evidence which the court may consider, although the weight accorded such evidence varies from case to case.”

On the basis of this, they weigh the respective values of broad categories of legislative history, without regard, however, for whether the constituent statements convey intended meaning or ulterior purpose.

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82 Ibid.
83 Rhodes, White & Goldman, supra note 74, at 388 (footnote omitted).
84 R. Dickerson, supra note 5, at 255-261.
85 Rhodes, White & Goldman, supra note 74, at 390.
86 See ibid. at 389.
What about criteria of selection? "Certainly, one may assume that judges will exercise reasoned judgment in relying on these materials." But, in view of the well documented pitfalls here, one may wonder whether the authors’ faith has been vindicated. There is much evidence that it has not.

Where materials are used only for confirmatory purposes, there is little to complain about. As for "debates reflecting a common agreement among legislators of the meaning of ambiguous language," there is something to complain about if the ambiguity is only apparent and it is resolved differently by total context.

The difficulty posed by loosely disciplined judicial freedom to rely on extrinsic indications of legislative intent is not only that these materials are relatively unavailable to the legislative audience but also that inadequate standards prevail for determining what materials of "legislative history" may be consulted and that inadequate standards prevail for evaluating them. It is not enough to tell the audience that the courts are going to consult legislative history, because the keys for unlocking meaning on the basis of such materials have never been reliably determined and disseminated. This is not another instance of variations in case law. We deal here with extra-legal matters inherent in the going system of communication, which every constitution impliedly adopts. Nor is it only a matter of separation of powers. The non-judicial legislative audience must be taken into account. Realizing the problem, Rhodes, White, and Goldman undertake to formulate usable standards for "evaluating the probative force of extrinsic aids." Their first standard is "contemporaneity." "Materials developed before and during the process of consideration are given greater weight than later efforts to explain the intended meaning." I would think so. First of all, under no theory of communication could post-enactment statements be considered part of context, because there is no way that either legislature or audience could have taken them into account during the process of enactment. (Even for confirmatory purposes, they grow progressively weaker with the passage of time.) The same result is reached under a concept of statutory context that recognizes the element of "taking account of," which means joint reliance by author and audience. Similarly, statements made before enactment normally weaken with the passage of time.

The second standard is "credibility." "The more explanatory and analytical and less contrived the extrinsic aid, the greater the weight it will be accorded." I buy "credibility" as synonymous with "reliability." As for the supporting statement, should we read it as a prediction or as a proposed subsidiary standard? I can’t evaluate the former and I don’t see how the

87 Ibid. at 396 (referring specifically to committee hearings).
88 Ibid. at 398 (footnote omitted).
89 Ibid. at 403.
90 Ibid.
91 Ibid. at 403.
latter is in any way helpful. Is the more detailed and structurally more complicated likely to be more reliable? I would have thought that the authors would have talked, instead, about the probabilities of accuracy and bias under the circumstances and whether a statement made sense internally and harmonized with other, reliable information. And how could a court know whether a statement was “contrived” without delving into inaccessible motives and suppressed understandings? The supporting assertions that “reports of committees are generally regarded with respect by the courts” and that floor “debates . . . have been excluded as too unreliable in many jurisdictions” seem more consistent with wholesale acceptance or rejection than with the case-by-case approach that they seem to advocate.

Rhodes, White, and Goldman’s third standard is “proximity.” “The closer the source of the aid to the essence of legislative action, the more persuasive the aid is viewed by the courts.”

The spacial metaphor may be aesthetically appealing, but it seems undesirably static for a functional relationship. As for the supporting assertion, is this, again, a prediction or a proposed standard? If the latter, how does a court define and locate “legislative essence”? Is this not an amorphous concept more part of the problem than part of its solution? One also wonders whether the authors meant the essence of legislation in the abstract, as they seem to say, or the essence of the legislation in question.

The fourth standard is “context.” This would seem to be the correct standard. It becomes clear, however, that the authors are not talking about the total context of the statute but rather about the internal context of the legislative history taken as a whole. “The weight given a particular aid will vary depending on other factors in the legislative history of the statute such as consensus and availability.”

If we are going to rely on relevant, presumably reliable legislative history, it makes sense to read it as a whole. However, this in no way bears on the problem posed by limitations on the scope of the context of the statute.

In later applying these criteria to California legislative history, student writer Walter Kendall Hurst interprets “contemporaneity” as helping determine whether the extrinsic aid “actually plays a part in the thinking process of the legislators during the enactment process.” If this is true, this criterion is helpful in applying the broader requirement that, to be part of the context of the statute, material must have been “taken account of” by the legislature and its audience as conveying part of the legislative message. The same may be said of the requirement of “proximity,” which does for the spatial aspects what the standard of contemporaneity does for the temporal.

After examining the judicial use of the various kinds of legislative

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92 Ibid. at 403–404.
93 Ibid. at 404.
history available in California, Hurst concludes, citing as an example *People v. Tanner*, reliance on "a plethora of extrinsic aids" (including a press release and letters), that the California courts "need... a rational and [an] objective means of evaluating the relative values of the multitude of potential extrinsic aids modernly available." He urges case-by-case treatment using Rhodes, White, and Goldman's standards.

On the basis of those two exercises, I am not persuaded that the four proposed criteria just considered provide an adequate set of guidelines for handling legislative history.

Steven E. Smith, who, without attempting to formulate a theory of statutory interpretation, follows the California tendency to identify the search for legislative intent with the investigation of legislative history, seems to conclude that the California courts are becoming too lax in their reliance on extrinsic materials in the interpretation of statutes. He is particularly offended by the courts' recent reliance on oral testimony by legislators or authors, letters of legislators quoted in law journals, and authorized statements of intent prepared and published after enactment, in instances where the material so referred to recounted what went on during consideration of the bill. In other words, California courts are accepting these evidences as ad hoc publication of legislative deliberations and giving them the weight Federal courts give to officially published congressional committee hearings.

Although California courts refuse to allow a witness to state his own opinion of what a statute means, the California Supreme Court recently allowed the introduction of a legislator-author's letter that recited his personal opinion as having been "argued to that effect in obtaining the bill's passage," it having been printed, after enactment, in legislative journals not normally referred to for such purposes. Such thinking bodes ill for the future of statutory interpretation in California.

To curtail excesses in this limited area, Smith recommends that a court consider statements by a legislator only if they are made in sworn testimony subject to cross-examination, the opposing party has been informed in advance, and the role of the legislator in writing, introducing, or securing passage of the bill has been ascertained. With these and other precautions, Smith considers statements by legislators, if used "with great caution," helpful in filling gaps in state legislative history. Availability to the legislative audience is simply ignored.

95 24 Cal. 3d 514, 596 P.2d 328, 156 Cal. Rptr. 450 (1979).
96 Comment, *supra* note 94, at 213.
3  *Ibid.* at 298–299
Judge Richard A. Posner has made an interesting evaluation of the impact of economic forces on the development, constitutionality, and interpretation of legislation, of which only the last concerns us here. Preliminarily, he observes that “the meaning of a statute is not fixed until the courts have interpreted the statute. Judicial interpretation of statutes is thus an intrinsic part of a complete economic theory of legislation.”4 This is reminiscent of Professor John Chipman Gray’s notion that a statute is not law until the courts breathe life into it.5 This notion overlooks the fact that the great bulk of statutory meaning gets enacted and acted on without help from the courts.6 Gray’s fallacy was a common result of subsisting on a diet of case law. I cannot evaluate Posner’s position, because it is not clear what he means by “fixed.”

In any event, I question his later statement that courts “do not speculate on the motives of the legislators in enacting the statute. . . . [They] do not have the research tools. . . .”7 (Presumably, “motives” means ulterior purposes). This may be partly true with respect to the legislative impact of interest groups, on which Posner was focusing, where the persuasive purposes (the “real” ones) have gone underground. But it can hardly be true of the ulterior legislative purposes often recited in, or inferable from, statutory text or revealed by common knowledge or legislative history. How else could some of the currently accepted “purpose” theories of statutory interpretation have developed?

More persuasive is his statement that “however conscientiously the judge tries to follow the legislature’s will, he will be limited to the statutory text and to other public materials.”8 Unfortunately, he seems to imply that legislative history qualifies as “public materials” and otherwise meets the requirements of context. “Public” in theory? Arguably. “Public” in practice? Highly doubtful.

For Posner, who confronts only the cognitive function, the more significant question is whether courts should write off legislative history on the ground that “legislators vote on the statutory language rather than on the legislative history.”9 He believes that they should not write off legislative history, in view of “a considerable amount of ‘log rolling’—that is, vote trading. . . . Log rolling implies that legislators often vote without regard to their personal convictions.”10 Because such a legislator assents to a “deal” rather than the statute, and because “[t]he terms of the deal presumably are stated accurately in the committee reports and in the floor comments of the sponsors,”11 he implies that it is proper for the court to look at such materials in determining meaning.

If it is, should it not make a difference whether the log rolling was

6 See J. Hurst, supra note 51, at 31.
7 Posner, supra note 4 (p. 150) at 272 (footnote omitted).
8 Ibid. at 273.
9 Ibid. at 274.
10 Ibid. at 275.
11 Ibid.
pervasive or incidental? If it should, how could a court that did not have "the research tools that [it needs] to discover the motives behind legislation" get at legislative facts that inevitably lurk below the surface?

I am more bothered by an apparent non sequitur. That log rolling has occurred does not mean that the legislators involved were not voting, in a very real sense, their personal convictions. All it means is that each participant has treated the other's bill as a means rather than as an end. He believes that under the circumstances his legislative values will best be served by voting for a bill that he might otherwise oppose or be indifferent to, after he has determined that its enactment will not exact too great a price. His legislative intent may be vicarious, but no more so than in a non-log rolling situation in which a legislator votes for a bill because a trusted colleague has assured him that it is "a good bill." The main lesson to be drawn from log rolling is that there is an almost unlimited range of potential ulterior reasons for intending that a bill be enacted. However, even wide differences in ulterior purpose do not necessarily mean differences in legislative intent. Besides, the likelihood that legislative history will disclose the nature of the "deal" is slim, because this kind of legislative maneuvering normally has low visibility.

In his attack on the plain meaning rule, which he identifies with literalism, Professor Arthur W. Murphy argues that one of the benefits of eliminating the rule would be to "force the courts to rationalize the use of legislative history." Indeed, "[a]bandonment of the plain meaning ritual might be a first step toward development of a coherent approach to statutory interpretation generally."

But any notion that flight from the rule leads inevitably into legislative history necessarily ignores the existence and role of external context. External context is not limited to legislative history and indeed probably doesn't even include it. For one thing, a modified version of the plain meaning rule, and one that makes a good deal of sense, centers, not on a literal reading of the statutory text, but on a reading of the statutory text taken in total context. But even under Murphy's more traditional statement of the plain meaning rule, there is plenty among the rich resources of internal statutory context to generate uncertainties not revealed by a literal reading of the text.

Incidentally, Murphy makes a distinction that corresponds closely, if not identically, to that between the cognitive and the creative functions of courts.

"... [T]he courts should recognise... that frequently there is no reliable evidence of intent, even in the broad sense of purpose, to guide them, and that their role changes as the signal grows

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12 Ibid. at 272.
13 Murphy, "Old Maxims Never Die: The 'Plain Meaning Rule' and Statutory Interpretation in the 'Modern Federal Courts'" (1975) 75 Colum. L. Rev. 1299.
14 Ibid. at 1315.
15 Ibid. at 1316.
16 See e.g. Hutton v. Phillips 45 Del. 156. 70 A.2d 15 (Super. Ct. 1949), discussed in R. Dickerson, supra note 3 (p. 76), at 231–232.
weaker... The relationship of legislature and court cannot be solely one of command. In large areas it must be one of delegation.... Substantively, this is solid. My only quibble is that the courts’ law making power comes, not only by implied delegation from the legislature, but also from the applicable constitution as one aspect of the separation of powers. My only substantial objection is that Murphy, like Posner, has not fully recognized the nature and force of external context.

Another article worth mentioning is Sean Donahue’s plea for “a semiotic interpretation of statutes,” in which he rejects legislative history as an aid to cognition on the basis of the general thesis of The Interpretation and Application of Statutes, outlined above. His main mission is to urge, as an alternative aid to cognition, the adoption of Professor Elmer A. Driedger’s principle that the reader of a statute “must try to reconstruct, from the words of the Act, the draftsman’s final legislative scheme. In other words, he must reverse the drafting process.” This he proposes to do with the help of Noam Chomsky’s rules of generative and transformational grammar, tree diagrams, Jerrold Katz’s projection rules, and various other aspects of linguistics or semiotics that I am unqualified to comment on. The important point is that there are escape routes from the evils of literalism other than the path of legislative history.

Extending and Improving Legislative History

Earlier I predicted that making legislative history more available would result largely in increasing the judicial appetite for it. This is portended by frequent requests for recording more of the legislative process, including stating in state committee reports the reasons for the actions taken, the recording of state committee proceedings and floor debates, and Rhodes, White, and Goldman’s recommendations for statements of legislative explanation and intent, the annotation of floor debates, and filing all “reports, memoranda, fact sheets, and other such material which seeks to analyse, explain, ‘sell’ or defend legislation.”

So much for quantity. As for quality, we have as an example Smith’s

17 Murphy, supra note 13 (p. 151) at 1317.
18 Donahue, supra note 12 (p. 78).
19 See R. Dickerson, supra note 3. (p. 76).
20 See, supra notes 18–26 (pp. 78–80) and accompanying text.
22 Ibid. at 216–229.
23 Samuels, supra note 25 (p. 80), at 90–102, makes a number of solid points, but their relevance may be diluted by differences in England’s constitutional separation of powers.
24 See supra text accompanying notes 64–65.
25 Rhodes, White & Goldman, supra note 74, at 405–07.
26 Ibid. at 406.
27 Ibid.
recommendations for legitimating courtroom testimony by individuals participating in the legislative process.  

Ironically, such “improvements,” by their very bulk and complexity, tend to undercut rather than advance efforts to bring legislative history into the context of the statute. Even the computerization of legislative history is an inadequate answer to nonavailability, because it tends to widen the already wide gap between the well-heeled litigant and the financially ill-favoured one. Have we not already priced much of justice out of the market?

On the other hand, most advocates of using legislative history who seriously investigate the practicalities of its development and use (after rejecting the approach of improving statutory text) conclude that most of it is unreliable and the rest of it is of so little use that it becomes desirable to improve or replace it. This feeling usually culminates in a recommendation to create accompanying statements of legislative intent or statements of ulterior purpose.

The former, of course, must be rejected as competing with the statute. As for legislative history generally, Professor Kenneth S. Abraham makes a telling point: “Reliance on legislative records . . . present[s] the same problem as reliance on the statutory text itself. Legislative records are also text and do not come to the reader already interpreted.”

Suppose that we somehow surmount the difficulties of composition and produce a comprehensible purpose clause. In such a case, it is common, on further reflection, to conclude that it makes better sense to include the usefully expressible in the statute itself, bringing us full circle to the better-drafting approach whose rejection we assumed at the outset.

The final irony is that studies of general purpose clauses have shown that most of them wind up as pious incantations of little practical value because what little value they have is usually inferable from the working text. Indeed, the draftsmen who consolidated title 49 (part only) of the United States Code, in their bill restating Federal transportation laws, dropped most existing purpose clauses as superfluous and, I am informed, no one complained.

Although a general purpose clause is occasionally useful, the most useful clauses are those introducing particular sentences, which offer the advantage of focused specificity.

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28 Smith, supra note 98, at 298–299; see supra text accompanying note 3 (p. 149).
29 J. Davies, supra note 59, at 255.
30 See, e.g., Rhodes, White & Goldman, supra note 74, at 405–407.
32 “A statement of intent has a paradoxical quality: the more it attains the status of an objective footprint on the trail of legislative enactment, the more it becomes a mere restatement of the statute properly included in the statute itself.” Final Report, supra note 65, at 32.
35 See Renton, supra note 43 (p. 84), at 10–11 The Preparation of Legislation, Cmnd. 6053, at 63, 150 (1975) (similar conclusions reached by a committee of which Lord Renton was chairman).
Conclusion

The cruel fact is that there is no interpretative cure that will relieve the courts and the legislative audience of the burden of sweating out the communicative burdens imposed by inadequate draftsmanship or uncontrollable political obfuscation. Would not our academic efforts be better addressed, therefore, to the dialectic of legal drafting? In the meantime, let's confine our scavenging among the flimsy materials of legislative history to its occasional weak confirmatory use and its possible suggestiveness during the courts' creative efforts.

Finally, let me mention an intensely practical consideration: Ultimately, we must face up to the fact that all but a small percentage of new law is promulgated, not by legislatures or courts, but by administrative agencies exercising rule-making power (which the British more aptly call "delegated legislation"). If legislative history is part of external context and thus vital to understanding statutes, must not "regulatory history" be vital to understanding the quasi-statutes that confront us as administrative regulations? Think about it.

Postscript

What relevance does this analysis have for parliamentary systems, especially for those without written constitutions? Because I have done little scholarly research in this area, I will comment cautiously, tentatively, and very briefly.

My modest acquaintance with English practices suggests that, except for two limitations rooted in American constitutions (legislative supremacy and the exclusiveness of the statutory vehicle), much of American experience in the field of statutory interpretation is broadly relevant to the debates about legislative history as reflected in recent issues of the Statute Law Review.

Although I surmise that the English doctrine of separation of powers between legislature and courts would not necessarily prevent Parliament from delegating significant law making power to the courts even to amend statutes (such as Professor Davies has suggested) or from adopting vehicles other than statutes to deliver its mandates or authorizations, it

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36 "No interpretative device can relieve the courts of their ultimate responsibility for considering the different contexts in which the words of a provision might be read, and in making a choice between the different meanings which emerge from that consideration." Commission, supra note 66, at 42.

37 I mean "dialectic" in the classical sense of the art of objectively ascertaining "truth," which Plato differentiated from "rhetoric" (the art of persuasion). The Phaedrus 260, 265, 266, 277 in the Dialogues of Plato (Jowett transl., 3rd ed.), as reprinted at p. 233 of vol. 1 of the Random House edition, 1957; the page numbers first referred to are those in the margins. Dialectic apparently includes conceptualization, definition, and "division by classes." For a helpful summary, see R. Weaver, The Ethics of Rhetoric (1953) 15 et seq.

38 See R. Dickerson, supra note 3 (p. 76), at 7-9.

39 See text accompanying note 6 (p. 77) supra.

has so far done neither and I suspect that English courts have at least tacitly assumed a theoretical separation of legislative and judicial powers roughly approximating our own.

As a participant in the memorable seminar on statutory interpretation at All Souls College, Oxford, on May 20–21, 1966, I have been much reassured, until recently, that no serious effort has been made to open the doors of Hansard, except for confirmatory purposes. I now perceive a dangerous chipping away at England’s generally defensible barriers to legislative history. The temptation to chip is strong, because traditional excesses of literalism have left modern English jurisprudents with guilt feelings that they are eager to assuage, in many cases by rushing into the arms of the apparently more “liberal” (and therefore jurisprudentially more fashionable) excesses of the American reliance on Federal legislative history. Here, I need only reaffirm a point made several times in the article: Literalism is better avoided through understanding the workings of external context than by opening wide the almost inexhaustible Pandora’s box of legislative history. British judges are not necessarily insensitive to external context, and they should more forthrightly acknowledge its efficacy.

Lord Scarman made a good point when he said, “The common law is delightful, but it is now of marginal importance only.” If so, the courts should be all the more scrupulous about safeguarding constitutionally expressed legislative will. To this end, they should be more adequately faithful to the extra-legal principles of communication. Although English

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41 E.g. see Sacks, “Towards Discovering Parliamentary Intent” [1982] Stat. L. R. 143. How serious this chipping away is depends on the extent, if any, to which English judges are relying on legislative history without first establishing the existence of an otherwise unresolvable uncertainty of meaning or a delegation of law-making power to supplement the statutory scheme.

In her impressive analysis of legislative history, Sacks finds that, while “Hansard failed to provide definitive conclusions,” it helped locate the statutory “mischief.” Ibid. at 159–60. She pinpoints the ultimate trouble as Parliament’s failure to communicate to the legislative audience, owing not so much to bad drafting as to the need for a “substantial overhaul of the whole legislative system,” the main contributions of which would be “to include a statement of intent in every act” and to supplement each bill “by very detailed explanatory memoranda as it proceeds through the Houses of Parliament.” Ibid. at 158–59. What she does not explain is how any modern legislative system can be reformed with respect to the availability of time, personnel, political opportunity, and individual incentive to produce such assumedly adequate repositories of legislative meaning.

42 E.g. see text accompanying notes supra 79–80, 13–16 (p. 151).

43 See Williams, “The Meaning of Literal Interpretation” (1981) 131 New L.J. 1128–1129, 1149–1151; R. Cross supra note 28 (p. 81), at 44–52, 122 et seq. quoting (at p. 48) Viscount Simonds in A.G. v. Prince Ernest Augustus of Hanover [1957] A.C. 436, at 461 (“... words ... cannot be read in isolation: their colour and content are derived from their context. ... I use ‘context’ in its widest sense. ...”), Lord Denning in Escoigne Properties, Ltd. v. Inland Revenue Commissioners [1958] A.C. 549, at 566 is more specific: In interpreting statutes, courts should “take judicial notice of the previous state of the law and of other matters generally known to well-informed people.” But nowhere in English legal literature have I found adequate recognition and analysis of the vast category of shared tacit assumptions that make up the bulk of external context.


45 This would seem to include only the text of the official statutory vehicle as conditioned by total context.
courts have preened themselves on guarding legislative expression, even to the point of pretending never to make law in the context of statutes, they have in fact made law not only by the fiction of "deeming" but also by treating the principles of legal communication as if they were matters of case law rather than extra-legal principles of independent validity.

I suggest also that English jurisprudence would gain much in consistency and clarity if it acknowledged the legitimacy of a solid strain of judicial law making in resolving uncertainties or supplementing statutes. This would remove much of the pressure to bastardize fundamental principles of communication to achieve equitable results. This, in turn, would allow English courts to articulate more candidly and persuasively the principles of cognition, especially those relating to the nature and extent of external context.

A broader benefit would be to help eliminate the largely futile debates between the adherents of the "plain meaning" or "golden rule" approach and the adherents of the "purposive" approach by making clear that these approaches appropriately clarified, are not only valuable but complementary rather than competitive. When integrated into a unified philosophy of statutory interpretation, these independently inadequate approaches should disappear from view, with great benefit to all.

Although legislative theory is much broader than legislative history, the latter cannot be clarified without clarifying the former. In this light, I humbly suggest that a perusal of American sources such as I have cited here, may offer valuable light on what now appears to be lacking in England's legislative jurisprudence.

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46 Some inclination to do this appears in Sacks, supra note 41 (p. 155), at 148, and in R. Cross, supra note 28, at 141 (in case of "real doubt," a judge should be able to look at pre-parliamentary materials "as a pointer to the meaning which he should attach to the particular provision" (emphasis added)).


48 Undisciplined modesty prevents me from recommending that the English reader start with The Interpretation and Application of Statutes, supra note 3 (p. 76).