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Statutory Interpretation: A Peek into the Mind and Will of a Legislature

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THE QUESTION

The literature of statutory interpretation is rich in references to the “intent” or “purpose” of the legislature, terms suggesting that a legislature may have subjective attitudes and drives such as those possessed by a human being. Recognizing, of course, that even an organization that is composed of human beings is not itself a human being, we must then ask what adjustments, if any, should be made in legal theories, respecting the reading and application of statutes, that assume that a legislature is a thinking, motivated organism. If such an assumption is fictional, the risk that attends treating fiction as fact may be substantial, especially if the fiction is unnecessary. Because of the practical consequences of making a wrong assumption here, it may be worth taking a closer look at “legislative intent”, and “legislative purpose.”

PART I: LEGISLATIVE INTENT

“[T]he psychic transference of the thought of an artificial body must stagger the most advanced of the ghost hunters . . . .”

Introduction

One of the most fundamental, and at the same time elusive, concepts in the interpretation and application of statutes is that of legislative intent.

The appeal of the concept is strong. In the division of responsibilities represented by the constitutional separation of powers, the legislature calls the main policy turns and the courts must respect its pronouncements. In such a relationship, it would seem clear that so far as the legislature has expressed itself by statute, the courts should try to

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determine as accurately as possible what the legislature intended to be done.

Unfortunately, this objective is not easily realized, because people are not always successful in communicating their thoughts. Difficulties of this kind are familiar in all aspects of human experience, and no parade of examples is needed to document the fact. And yet, these difficulties do not signify that communication is impossible.

All this seems to be supported by common sense and personal experience. On the other hand, is there not reason to suspect that "common sense" is not always reliable? Scientists tell us, for example, that the "solidity" that we experience in objects such as tables and typewriters is not a characteristic that nuclear physicists experience when they examine the materials from which such objects are made. And so, they tell us, we cannot always take for granted what seems obvious to the eye, ear, or touch. Many students of legislation have come to a similar conclusion for "legislative intent."

The Radin Onslaught

More than four decades ago, Professor Radin wrote one of the most devastating analyses of legislative intent ever made. Its impact is still felt. Briefly, he says that it is unrealistic to talk about legislative intent because the notion of "the law maker" is fictional; there is no such person. Nor is it realistic to talk about the intent of the heterogeneous collectivity known as "the legislature." In most cases, only one or two persons drafted the bill, many persons voted against it, and those who voted for it may have entertained differing ideas and beliefs. Even if the participating legislators had the same intent, we have no means of knowing it except "by the external utterances or behavior of these hundreds of men." Even if a unanimous legislative intent were knowable, it would be powerless to bind the courts, because the legislators' function is not to impose their respective wills, but to "pass statutes." Even if legislative intent had binding force, it could hardly control the final interpretation in advance, because the legislature could not have

2 Stebbing, "Furniture of the Earth," in PHILOSOPHY OF SCIENCE 69, 73 (A. Danto & S. Morgenbesser eds. 1960). The fallacy of this point is, of course, that it denies meaning to a well-established word ("solid"), whereas the significant problem is simply to redescribe what the word customarily refers to. Id. at 74. See also A. Ross, ON LAW AND JUSTICE 114 (1959).

3 Radin, Statutory Interpretation, 43 HARV. L. REV. 863 (1930) [hereinafter cited as Radin].

4 Id. at 870.

5 Id. at 871.
intended to cover a particular factual situation that did not yet exist. Finally, legislative intent is irrelevant under any rule of interpretation that limits the interpreter to the text of the statute.6

The folly of any attempt to conjure up a legislative intent has been asserted so often that many respectable scholars refuse to recognize the concept.7 So deep is their antipathy that the very phrase "legislative intent" has become a legislative impropriety that they feel necessary to avoid. Even those who let the expression pass their lips are careful to protect their professional respectability by pointing out that they use it to refer, instead, to some objective expression or the more acceptable concept of legislative purpose.8 Because so many professional commentators apparently agree, it is strange that the concept of a subjective legislative intent keeps cropping up. If it is truly a ghost, we should banish it once and for all.

What Is "Intent"?

In the present context, "intent" refers usually to the actual intent of some human being, or group of human beings, respecting what he or they intended to say. It reflects the user's expectation that the reader or hearer will take the language as referring to what the user had in mind. It is, therefore, the specific message that the user intended to convey.

"Intent" is also used in the sense of the intent objectively manifested by the language used. Because language has meaning independent of the actual intent of the user, the meaning actually carried may imply an intent that differs from the user's actual intent. It will be useful, therefore, to distinguish actual subjective intent from manifest intent.

Actual intent, which is necessarily a conscious activity, must be distinguished also from what Professor Fuller has called "tacit legislative assumptions," the underlying propositions that the user of language takes for granted without taking express account of them and, perhaps, without even being aware of them.9 These assumptions, in

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6 Id. at 870-72.
9 The absent-minded professor stepping from his office into the hall as he reads a book "assumes" that the floor of the hall will be there to receive him. His
turn, have their objective counterparts in whatever may be fairly inferred from the language actually used. Such an inference may be one that the user neither intended nor took for granted.

With these distinctions in mind, we may now inquire whether actual subjective intent "exists" and, if so, whether it is relevant to and useful in the interpretation of statutes.

Professor MacCallum, in his penetrating analysis of legislative intent, points out that a legislator may have many intents with respect to a statute. He lists as possibilities the intent to enact a statute, the intent to enact this statute, the intent to enact the particular words in question, the intent to enact their meaning, the intent to enact his understanding of their meaning, the intent to further some ulterior purpose, and the intent to further his own legislative career. For present purposes, only these are immediately relevant: the intent to enact this statute, the intent to enact these words, the intent to enact their meaning, and the intent to enact the legislator's understanding of their meaning.

Because the legislator in question voted for it, the intent to enact this statute may be taken for granted. Also, it is hard to see any significance in an intent to enact words apart from their meaning. Two significant intents remain: the intent to enact the meaning of these words (as normally read) and the intent to enact them as the legislator interprets them.

Because the significant intent is that of a person who is familiar with the text and supports it, it is suggested that the two intents coalesce psychologically into a single intent: the intent to enact these words as the legislator understands them, coupled with the tacit assumption that his understanding is the same as that of a typical member of the legislative audience. To assume differently is to assume that the purpose is to deceive or confuse (which, fortunately, is the rare exception).

Even if reference to "legislative intent" in the subjective sense is sometimes questionable, little objection can be found to the expression "manifest intent" (which by definition is objectively determinable),

conduct is conditioned and directed by this assumption, even though the possibility that the floor has been removed does not "occur" to him, that is, is not present in his conscious mental processes.


11 For a discussion of ulterior purpose, see text accompanying notes 61 & 62 infra.
except that it appears to be a mere synonym for "meaning to the typical reader." To avoid possible confusion, it may be preferable to confine the term "legislative intent" to actual or supposed subjective intent, and to use the term "meaning" to designate what is suggested by the relevant language of the statute when read in its proper context.

There is also a possible difference between the intent to achieve an immediate result by means of a statute (what the authors intend to do) and the accompanying intent to express that result in the statute (what the authors intend to say). Here, again, the two intents coalesce into an intent to convey a particular idea, coupled with the tacit assumption that what the authors intend to say reflects adequately what they intend to immediately accomplish.

The Specific Arguments

Radin's first point is that there is no single person whom we can call "the legislator" and whose mind we can successfully investigate to discover the legislative intent behind a statute. The point is indisputable. However, it does not say that there is no such thing as legislative intent; it says only that we cannot find it in the mind of some person comparable to the author of a private communication.

The second point is that it is futile to look for legislative intent in the minds of a large and heterogeneous group such as a legislature. What about those who voted against the bill? This poses no problem under majority rule, where once the statute has been enacted the views of the minority are for the most part irrelevant. What about those who voted for the bill but did not read it or did not read the particular provision in question? What is their legislative intent? Again, the answer seems plain: they intended to adopt or acquiesce in either (1) the intent manifested by the bill and the other objective indicia of intent, which is directly determinable, or (2) the actual intent of those conversant with the bill, which is not. Because such a derivative intent can only support what must be independently determined, its content has only subordinate

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12 Radin at 870.
13 Id.
14 In the enactment of statutes there is delegation, too, with respect to sponsorship and draftsmanship . . . . The legislature expects that statutes will be drafted by others, not only by its [own] arms . . . . but also by agencies and individuals outside the legislature. In such situations the intent, purpose, and draftsmanship of others is adopted as its own by the legislature. On this theory there is no statute without a legislative intent or purpose. It is a glib superficiality to suggest otherwise. Breitel, The Courts and Lawmaking, in Legal Institutions Today and Tomorrow 1, 27 (M. Paulsen ed. 1959).
interest. (If valid, Radin's legislative misgivings might lead us also to question the "judicial intent" of a nine-man court.)

This narrows the search to the actual intent of the particular legislators who undertook to sponsor, mold, and understand the bill. In a few cases, the significant legislative intent might be that merely of the draftsman whose handiwork the legislature adopted. Although this would be unusual for an entire bill, the draftsman often includes individual provisions to which no legislator pays particular attention even though several may have carefully scrutinized the bill as a whole. Here, it would seem appropriate to say that the legislative intent of the participating legislators is to adopt or acquiesce in the legislative intent manifested by the bill when viewed in its proper legislative setting or to adopt or acquiesce in the actual intent of the draftsman.

However, an adoption approach suffices only when the intent adopted is that of an individual author. Where there is a group of authors, the problem of institutional intent is simply transferred from the legislature as a whole to the group as a whole.

The usual case is that in which the statute or provision was developed or scrutinized by a handful of legislators operating as a subcommittee of a standing committee. Even here, says Radin, there may be frequent differences of opinion or understanding. For an actual legislative intent that we may attribute by adoption or acquiescence first to those who voted for the bill, second to the legislature as a whole, and ultimately to the chief executive who signed it, whose intent do we seek? Is this not an insuperable difficulty?

But to talk of actual "legislative intent" even here is not entirely fatuous. Among such a group there can be a general consensus, even though the views of the participants vary in many details. Variant views have not deterred legislative and quasi-legislative bodies from sharing general objectives and from using their intent to accomplish these objectives as a basis for future operations. That a general consensus is a consensus and nothing more, leaving unresolved particular issues on which the participants disagree, does not mean that the consensus is not operating in the area where it exists. The error seems to be in assuming that, if there is an ascertainable legislative intent, it necessarily resolves the question at hand, and conversely that, if it does not resolve

16 "It is surely not necessary for persons to agree in all cases in order for them to agree in some cases." MacCallum, Legislative Intent, 75 YALE L.J. 754, 770 (1966) (emphasis in original).
the question at hand, it must not have existed.

Moreover, in ascertaining the message that the language used was intended to convey, the intentions and opinions of some actively participating legislators are usually more significant than those of others. Thus, the expressions of the sponsor of the bill normally reveal a legislative intent more significant than that revealed by those of a more casual legislative adherent. In this context, the significant legislative intent may well be the actual intent of the former.

If this analysis is correct, the mere multiplicity of legislators is insufficient reason for ruling out the possibility of an actual legislative intent. At most it blurs the already difficult problem of determining the actual intent of particular individuals.

The possibility of an effective general consensus suggests the further possibility of a real (not fictitious) corporate legislative intent consisting, not of the shared intent of a group of improbably like-minded legislators, but of the composite thrust of many individual intents, no one of which need wholly coincide with the composite. Such an institutional intent is best likened to the resultant of a set of vectors. Although even an organic group, as such, has no separate psyche, its activities display the characteristics of intentional behavior guided by an aggregate motivation that is useful to recognize and take into account. Such a group intent differs from the constituent individual intents; it is significant; and, through reasonable inference, it can be broadly identified. If there is something approaching an institutional state of mind, why not recognize it in a legislature?

For this concept, the term “legislative intent” is apt, because it is one that usage has already firmly attached. Asserting that legislative intent does not exist because a legislature, as an abstraction, cannot.

17 “[C]ollective intent’ in the light of modern psychology is not as unrealistic a concept as it is made out to be by jurists . . . .” Silving, A Plea for a Law of Interpretation, 98 U. PA. L. Rev. 499, 510 (1950), citing Sigmund Freud as recognizing “the reality of psychological experiences of groups or masses.” Id. n.39. See also MacCallum, supra note 16, at 763-66.

Work with groups has shown that they have characteristics and exhibit features that differ from the aggregate of the characteristics and features of the individual members of the group. See R. Brown, Social Psychology ch. 13 (1965) ; L. Doob, Social Psychology 219 (1952). For example, when individuals are presented with a problem, their individual solutions are “less risky” than those proposed by a group made up of the same individuals. The conclusion has been drawn that this “shift of the risk” is solely a function of the existence of groups. Wallach, Kagan, & Bem, Group Influence on Individual Risk Taking, 65 J. Abnorm. & Soc. Psy. 75 (1962). See also Sherif, Group Influence upon the Formation of Norms and Attitudes, in Readings in Social Psychology 77 (T. Newcomb & E. Hartley eds. 1947).

18 “[L]egislatures are enough like men in important respects to be counted as having intentions.” MacCallum, supra note 16, at 765-66.
intend anything, is like asserting that there is no such thing as ptomaine poisoning because food ptomaines are not in themselves poisonous. Whatever its origin, a word means what custom uses it to refer to.\textsuperscript{19} Here, fortunately, usage remains close to semantic origins, because legislative intent is ultimately rooted in individual intents.

This leads us to Radin’s third point: even if there were perfect unanimity of understanding and intent, we could discover that intent only through the utterances of hundreds of men.\textsuperscript{20} But why a wealth of evidences of intent would make the problem harder rather than easier is not clear. If we assume complete agreement, it should be necessary only to determine the intent of a single legislator. With the utterances of others as a cross-check, we could more easily select the most reliable and revealing utterances. The factual supposition is, of course, fanciful.

Because the mere multiplicity of utterances does not seem to pose a serious problem, Radin’s main point may have been, instead, the impossibility of knowing even an individual’s actual intent. We have, of course, no means of peering into an individual’s consciousness. Unfortunately, the argument proves too much: communication itself is impossible, inside and outside the law. It is interesting, indeed, to speculate on Radin’s own “legislative intent.” By his apparent standards, it cannot be inferred from the language of his article. On the other hand, it is comforting to know that despite this baffling problem, the philosophers of language still presume to communicate. Wittgenstein, for one, apparently does not find this a serious problem.\textsuperscript{21} And so, Radin’s logical tour de force can claim the same kind of practical success as the well-known, “irrefutable” proof that bumblebees cannot fly.\textsuperscript{22}

Radin’s fourth point is that, even if there were an ascertainable legislative intent, it would be powerless to bind the court, because the function of legislators is not to “impose their will” but to “pass statutes.”\textsuperscript{23} The underlying assumption here overlooks the point made in Burke’s speech to the Bristol electors that—as a matter of both in-fact expectations and sound political principle—legislators are sent to “impose their will,” not according to personal whim, but by exercising rational choice, where it is impractical to act by town meetings.\textsuperscript{24}

\textsuperscript{19} See note 2 supra.
\textsuperscript{20} See Radin at 870.
\textsuperscript{22} See B. Stillson, Wings: Insects, Birds, Men 54 (1954).
\textsuperscript{23} Radin at 871.
\textsuperscript{24} 2 E. Burke, Works 89, 96 (7th ed. 1881).
More important, Radin seems to say that, although the court should look at the language of the statute, it may treat as nonexistent any actual legislative intent that it expresses. Such a view of legislation suggests that statutes stand no higher than the finger painting allegedly done in the late 1950's by a Baltimore chimpanzee. What devastating discouragement it would heap on the legislative draftsman, who works under the illusion that he is somehow helping the legislature to communicate to the public. Indeed, it is fascinating to contemplate a legislative function that could produce statutes without reflecting the will of the participating legislators. As Lord Russell said in another connection, "This is one of those views which are so absurd that only very learned men could possibly adopt them." 2

Radin's fifth point is that legislative intent, even if determinable, cannot relate to a specific factual situation that, being nonexistent when the intention was formed, could not have been specifically foreseen. 26 It overlooks the elementary distinction between the connotations of words, which, being general, may express the general intent of the utterer, and their specific denotations, which, not being limited to denotations in existence at the time of the utterance, inevitably include denotations that not only were not then in existence but could not have been specifically envisioned. 27 Even a particular subclass of events is not ex-

25 B. Russell, My Philosophical Development 148 (1959). The theory under attack may not have originated wholly with Radin. Cf. Lenhoff, On Interpretative Theories: A Comparative Study in Legislation, 27 Texas L. Rev. 312, 326 (1949), discussing Kohler's views. But what does he assert? That there is no such thing as legislative intent? Or merely (as with Holmes) that legislative intent, so far as it is unrevealed by statutory meaning in its fullest and most sophisticated sense, may be disregarded?

It is to Radin's credit that 12 years later, while sticking to his main guns, he made a limited concession to the subjectivity of legislative purpose as revealed by legislative history. Radin, A Short Way with Statutes, 56 Harv. L. Rev. 388, 411 (1942).

26 Radin at 870–71. According to Professor Patterson, the theory that legislative intent is a myth is based on the "psychological theory of the meanings of symbols." E. Patterson, Jurisprudence: Men and Ideas of the Law 202 (1953). Under this theory,

[a] term is an effective means of communication if it causes the utteree to have in mind the same referent that the utterer had in mind.

. . . [It is] inadequate to explain the logical function of legal symbols, their ability to enable us to make inferences or applications to referents which the person or persons uttering them did not "have in mind." Id. at 27–28 (footnote omitted). Professor Fuller calls this the "pointer theory of meaning." L. Fuller, The Morality of Law 84 (rev. ed. 1969). Accepting the pointer theory seems to be an occupational hazard of case-hardened lawyers. See, e.g., S. Merrin, Law and the Legal System 224 (1973). See also Jones, Statutory Doubts and Legislative Intention, 40 Colum. L. Rev. 957, 972 (1940).

27 E. Patterson, supra note 26, at 203; 2A C.D. Sands, [Sutherland] Statutes and Statutory Construction § 49.02 (4th ed. 1973) [hereinafter cited as Sutherland].
cluded from a broad legislative intent merely because the legislator did not specifically advert to it. Thus, a legislature's inability to anticipate the development of transistors would not necessarily exclude them from the more inclusive intended category of electronic devices.

The failure to distinguish general connotations from specific denotations, a problem which has also plagued other writers, may be due in part to the view that interpretation, with which it is apparently assumed any concept of legislative intention or meaning must be coextensive, necessarily includes application, with its immediate problem of specific denotation. Radin's fifth point also falsely implies that the draftsman of a statute would, if he could, advert to specific future factual situations. Although legislation is usually prompted by specific past situations, legislative draftsmen, almost inevitably address their words to classes of events. It is not only impossible for them to envision the specifics of particular future events, but wholly unnecessary. In any event, to deny that the legislator's utterance of general conditions on future behavior is a proper part of the legislative function is to deny that guidance and the establishment of workable frames of reference on which reasonable expectations can be built are among the functions of the legal order.

Radin's sixth and final point is that the traditional view that looks for subjective legislative intent is undercut by the equally traditional view that the court may not go beyond the plain words of the statute and thus needs no help from any separate concept of legislative intent. But while some of his premises may be true, Radin seems to rely on two that are both unannounced and false: first, that the words of the statute are unrelated to the subjective legislative intent that lies behind it; and second, that any supposed legislative intent stands apart from the statute and competes with it. Moreover, he ignores the fact that the "plain meaning" approach, however formulated, is at least partly a separation-of-powers device to remind judges of their prime responsibility to policy set by another branch of government.

In the meantime, the expression "legislative intent" remains professionally déclassé among many law professors and judges. Supporting this position is the undeniable fact that it has often been used, as Dean Landis pointed out, to conceal judicial lawmaking. That the concept

28 MacCallum, supra note 16, at 772.
29 This point is discussed at some length in ch. 3 of the author's forthcoming book, THE INTERPRETATION AND APPLICATION OF STATUTES.
has been abused does not, however, deny its importance as a fundamental presupposition of the legislative process.

That the concept of legislative intent is much more alive than the currently limited use of its normal label might suggest is revealed by the extent to which those who purport to shun it may be found resorting to euphemisms to describe it. Indeed, experience suggests that we can hardly get along without it.³¹ An example is the protest of Mr. Justice Frankfurter, long an avowed nonbeliever in subjective legislative intent,³² that the majority of the Supreme Court in a 1958 tax case failed to take adequate account of the conference report. “Our problem,” he said, “is not what do ordinary English words mean, but what did Congress mean them to mean.”³³ Even Radin, in the article in which he partly recanted on the uses of legislative history, acknowledged the existence of legislative subjectivity when he said that the legislature may “foreclose any attempt by the administration and judiciary to displace what the legislature regards as the more important of the purposes to be achieved.”³⁴ If hundreds of men can subjectively “regard” something, it may not strain credulity to conclude that they could also “intend” it.

Despite occasional protestations to the contrary, the typical lawyer or judge continues to refer to legislative intent, even though it remains a matter of inference and conjecture.³⁵ So long as the concept is used with reasonable restraint, the art of statutory interpretation is undoubtedly the better for it.

More than that, the concept is indispensable. The postulation of some actual, though not directly knowable, legislative intent underlies the very idea of a legislative process.³⁶ If legislative intent in the subjective sense does not exist in at least some degree, the legislative pro-

³¹ This goes especially for the scavengers of legislative history. See Jones, Statutory Doubts and Legislative Intention, 40 COLUM. L. REV. 957, 968 (1940). See also Horack, The Disintegration of Statutory Construction, 24 IND. L.J. 335, 340-41 (1949).
³² Frankfurter, supra note 8, at 528.
³³ Commissioner of Internal Revenue v. Acker, 361 U.S. 87, 95 (1958) (emphasis added).
³⁴ Radin, A Short Way with Statutes, 56 HARV. L. REV. 388, 412 (1942) (emphasis added). And if a legislature is incapable of “intending,” how is it that a statute can “strive to attain”? Id. at 408.
³⁵ SUTHERLAND § 45.05.
³⁶ Landis, supra note 30, at 887. If legislative intent is looked upon as a common agreement on the purpose of an enactment and a general understanding of the kind of situation at which it is aimed, to deny the existence of a legislative intention is to deny the existence of a legislative func-

cess is blatant nonsense unworthy of serious investigation. Even if there were no actual legislative intent, judicial deference to the constitutional separation of powers would require the courts to act as if there were, because the concept is necessary to put courts in an appropriately deferential frame of mind. This alone would be enough to moot the general issue of its "existence."

Nor should we be deterred from postulating subjective intent by the baffling problem finding the most practicable, most reliable, and fairest constitutional means of inferring it. Because in drawing inferences of meaning the human mind is limited to objective manifestations of intent, the problem is to choose the most appropriate means to that end. That none is completely reliable does not indicate that the job is impossible or that the attempt must be fruitless. Under our system of constitutional government, the court has no choice; it must do its best. That it may often fail only increases the legislature's incentive to minimize the chances of misreading by making its legislative message as clear as possible.

If this analysis is sound, it is reasonable to talk generally about actual subjective legislative intent, so long as we realize that its scope is limited and our access to it is at best imperfect. Otherwise, we reduce the legislative process to absurdity and expose statutory law to the risk that the social views of the court will displace the constitutionally expressed social views of the legislature.

The real danger in the concept of subjective legislative intent is that too much is often claimed for it. Its limitations are discussed in the next section.

Besides putting the court in the proper deferential frame of mind, the concept of actual legislative intent furnishes the general criteria of relevance and reliability necessary to determining what specific elements in the statute and its context should be taken into account and the respective weights that they should be given. On what other basis, for example, could a court properly evaluate extrinsic materials?

The Limitations of Legislative Intent

That there is some actual and reasonably inferable legislative intent behind every statute does not mean that there is always, or even often, a specific legislative intent with respect to the particular issue in question.

37 "[A] fiction, however weak it may prove to be upon logical analysis, is created from sheer necessity." MacDonald, The Position of Statutory Construction in Present Day Law Practice, 3 Vand. L. Rev. 369, 371-72 (1950).
38 Jones, Extrinsic Aids in the Federal Courts, 25 Iowa L. Rev. 737, 742 (1940);
or, if there is only a general relevant intent, that it resolves the issue. Acting through a few legislators, a legislature, even while conscious of the broad legislative problem, usually adverts to some of its specific aspects without adverting to all. That the courts often deal with matters with respect to which specific legislative intent is either nonexistent or imperfectly revealed may explain why many persons distrust the general concept itself.

Moreover, actual intent, whether specific or general, normally cannot keep abreast of expressed intent (meaning). An author inevitably encompasses in what he says more than he had specifically in mind and often encompasses even more than he had generally in mind. Thus, to this limited extent we can agree with Kohler that "the idea contained in [the written text] has a life of its own independent of the person who thinks or expresses it." The fact was noted in *Chapman v. Brown,* a products liability case. On the other hand, the limiting force of context exemplified in *Church of the Holy Trinity v. United States* fortifies the courts against the risk that this "life of its own" will carry the statute too far.

At the same time, we must read statutes as if actual intent and manifest intent coincided, because in the long run we can approximate actual intent more reliably under that assumption than under any other. Short of extrasensory perception, there appears to be no alternative. This compels the interpreter to presume in all cases what he knows to be true only in most. The interpreter must, therefore, assume that the actual intended meaning coincides with the manifest intended meaning until the user clarifies his message by restating it, whereupon the same kind of problem is presented in a new, and presumably clearer, form.

One reason for restraint in pursuing legislative intent is that, once the reliable manifestations of the intent behind a statute have been ex-

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39 "I cannot believe that any of us would say that the 'meaning' of an utterance is exhausted by the specific content of the utterer's mind at the moment." L. Hand, *The Bill of Rights* 18-19 (1958). See also E. Patterson, *Jurisprudence: Men and Ideas of the Law* 203 (1953); MacCallum, *supra* note 16, at 772-74.


41 *Id.* at 195.

42 198 F. Supp. 78, 118 (D. Hawaii 1961) ("those who drafted this law may not have fully realized the extent of the exception expressly recognized by this section . . .").

43 143 U.S. 457, 459 (1892).

44 It is the very nature of language to reflect prevailing usage.
amined and weighed, it is idle to speculate on the sweep of actual intent in the specific instance. Although it is necessary to assume a general legislative intent to give direction and significance to statutory interpretation, a court's bases for inferring what is presumed to be the particular intent respecting the issue before it are necessarily limited to the statute and appropriate extrinsic materials. Any residual inconsistency between manifest intent and actual intent remains one for unverifiable speculation. Lawyers, who are no more capable than philosophers or psychologists in this respect, should therefore limit themselves to these significant questions: What legislative materials are entitled to what weight? What inferences of actual intent can most plausibly be drawn from these materials?

Some courts have asserted that where legislative meaning is uncertain, legislative intent is useful in removing the uncertainty. But, if "intent" means actual specific subjective intent, it can never be helpful, because it is never directly knowable. Once we assume that the statute viewed with other reliable indicia of intent leaves a significant, unresolved uncertainty, we have by hypothesis exhausted the only objective evidence from which any specific actual intent can reliably be inferred. Actual intent as such is no more available at this point to resolve the uncertainty than it was in the first instance. There is nothing left except searching out external manifestations of intent of doubtful reliability.

To say that in cases of uncertainty legislative intent is helpful in ascertaining statutory meaning is to put the matter exactly backwards, if "legislative intent" means actual subjective intent. Rather, statutory meaning is helpful in ascertaining subjective legislative intent. Indeed, there is no other way to get at such intent. The main problem is to determine what expressions of meaning are appropriate to look at.

On the other hand, if "legislative intent" means manifest intent, there is a limited sense in which it may sometimes help to resolve a particular uncertainty of meaning. If the statute is plainly intended to deal with all of what appears to be a unified problem, some of whose aspects lie outside a literal reading of the statute, and that, if not dealt with in

45 "Even assuming the existence in any case of an actual legislative intention different from any sensible textual meaning, it is pure speculation to attempt to say what it is." De Sloovere, *Textual Interpretation of Statutes*, 11 N.Y.U.L.Q. REV. 538, 541 (1934). Competing inferences from other sources suffer from the same inherent uncertainty.

46 See, e.g., Saxson v. Georgia Ass'n of Indep. Ins. Agents, 399 F.2d 1010, 1015 (5th Cir. 1968). The converse of this is the notion that "[i]t is only when the language of the statute or ordinance is ambiguous that the courts should search for legislative intent." Ott v. Johnson, — Ind. —, 319 N.E.2d 622, 624 (1974).
its other aspects, would provide a means of undermining what the statute clearly tries to accomplish, and if the words of the statute are capable of bearing a meaning that covers these additional aspects, there is presumably a legislative purpose to deal with the whole problem and not merely a less manageable part of it. It can also be presumed that the words were intended to carry a meaning coextensive with that purpose. This, indeed, was the gist of Heydon's Case.47

However, what the tireless pursuers of legislative intent have in effect been saying is that, where some evidences of intent (usually the statute) do not clear up the uncertainty, other evidences (usually legislative history) may. The practical danger in pursuing actual legislative intent is the temptation to pursue it relentlessly, under the misapprehension that if the interpreter looks at enough evidence, actual intent will sooner or later become directly knowable.48 Thus he is tempted to press beyond the reliable and otherwise appropriate evidences of intent to those that are so unreliable or otherwise inappropriate that, even though relevant, they should be rejected. This is the problem that haunts the scavengers of legislative history. No matter how far he wanders, the searcher always ends with having to infer specific intent from objective writings of varying reliability and accessibility.49

47 3 Co. 7a, 76 Eng. Rep. 637 (Ex. 1584).
48 See, e.g., Saxon v. Georgia Ass'n of Indep. Ins. Agents, 399 F.2d 1010, 1015 (5th Cir. 1968); id. at 1019 (Thornberry, J., concurring specially).
For purposes of cognition, there is also the problem of constitutionality. The only legally effective way to express the legislative will is to enact a statute, and a court should not subvert this principle by treating as coequal with the statute statements such as those found in legislative hearings or even committee reports, or by treating as part of proper legislative context materials that fall outside it. At best, the legislative intent that can be reliably inferred from materials falling outside proper context is appropriate only for its confirmatory value. For purposes of judicial creation, on the other hand, examining reliable materials that fall outside proper context may be helpful.

The practical issue, therefore, is not whether to infer subjective intent or not, but how to select and evaluate the available evidence. This is the significant problem of "legislative intent," and it is unfortunate that it has been obscured by misgivings over its "existence."

**Objective Versus Subjective Interpretation**

It is common to classify approaches to interpreting statutes as either "objective" or "subjective." This dichotomy is usually explained in terms of whether the pursuer of meaning is preoccupied with the statute itself (an objective legal writing) or with the actual, and therefore subjective, intent of the legislature. On the other hand, if we look at actions rather than claims, we find that the judicial working distinction is, instead, between disregarding legislative history and taking it into account. That the latter distinction has nothing to do with whether the approach is objective or subjective becomes clear when we realize that the objective writings that comprise legislative history are no closer to actual, subjective states of mind than the objective writings that comprise statutes. Indeed, in relevance and reliability, they may be even

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60 The ascertainment (i.e., discovery) of meaning; interpretation in the authentic sense.

61 "[T]he constitutional power granted to Congress to legislate is granted only if it is exercised in the form of voting on specific statutes." Radin, *A Case Study in Statutory Interpretation: Western Union Co. v. Lenroot*, 33 Calif. L. Rev. 218, 223 (1945). And see E. Crawford, *The Construction of Statutes* 58-59 (1940); 1 Sutherland § 1.02 (1972).

62 Either (1) judicial lawmakering in supplementation of a statute through the assignment of meaning, or (2) judicial lawmakering by analogy with the statute.


64 "The difference depends on the data that are taken into consideration in the interpretation." A. Ross, *On Law and Justice* 121-22 (1959).

65 See note 49 supra.
farther removed.

The same confusion exists among those who, although foregoing any distinction between "objective" and "subjective," nevertheless identify the search for legislative intent with the examination of legislative history. For example, the California Assembly's special 1962 task group, although called the "Subcommittee on Legislative Intent," concerned itself almost entirely with analyzing legislative history. This preoccupation seemed to imply that an interpreter who is dedicated to discovering legislative intent cannot successfully pursue it without consulting at least some legislative history. Ironically, such an approach means consulting interpretative materials, which, although identified with legislative meaning, are for the most part unreliable, or purposive materials, which, although more reliable, relate only indirectly to intended meaning.

Apart from constitutional considerations, belief in the existence and significance of legislative intent involves no commitment to examining any specific kind of evidence. It involves only a commitment to ascertaining intent by inference from an examination of appropriate text and context. There is certainly no constitutional obligation to consult inappropriate evidence.

Appropriateness has two aspects. The factual aspect involves fidelity to normal principles of communication, which are presupposed by the constitutional system. The constitutional aspect involves the prescription that only a statute can carry the direct force of legislative law. Other factors are excluded except so far as they qualify as proper context.

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56 Final Report of the Subcommittee on Legislative Intent of the Assembly Committee on Rules, 28 Assembly Interim Committee Reports 1961-1963, No. 1, California Legislature. "[I]ntention is a residuary clause intended to gather up whatever other aids there may be to interpretation beside the particular words and the dictionary." O.W. Holmes, letter quoted in Frankfurter, Some Reflections on the Reading of Statutes, 47 COLUM. L. REV. 527, 538 (1947).

57 Courts cannot permit the legislative process, and all the other processes which depend on the integrity of language, to be subverted by the misuse of words.


58 See Radin, A Case Study in Statutory Interpretation: Western Union Co. v. Lenzroot, 33 CALIF. L. REV. 218, 223 (1945); see also E. Crawford, THE CONSTRUCTION OF STATUTES 58-59 (1940); 1 SUTHERLAND § 1.02 (1972).

Although the United States Constitution is not express on the point, the limitation appears to be nailed down, through negative implication, by the enactment procedure prescribed by article I, section 7. As for the states, about half their constitutions provide, in effect, that "no law may be enacted except by bill," and the same limitation seems to inhere, by negative implication, in the enactment procedure prescribed by the others.
Thus, an honest and persistent search for the corporate intent of the legislature is a search for legislative intent only as it has been constitutionally expressed. There is no inconsistency between seeking legislative intent and refusing to look for it in places that are constitutionally off-limits.69

*Summary*

If this analysis is correct, we may assume (1) that behind every statute and the implications that it generates there is an actual, but not wholly determinable, legislative intent that provides its impetus and significance; (2) that the best working approximation of this actual intent is the intent that it is most plausible to infer from the appropriate objective manifestation of intent, which is, in the case of cognition, the statute as read in its proper context and, in the case of creation, the statute as read in its proper context supplemented by other relevant and reliable extrinsic evidence; (3) that, although there are frequent deviations of manifest intent from actual intent, there is no known way to measure these deviations; (4) that manifest intent, in addition to deviating to an unknowable extent from actual intent, often conveys meaning to the typical reader that transcends to an unknowable extent what the legislature generally intended; and (5) that, despite this, there is no practical alternative to assuming that the manifest intent is the actual intent, until new appropriate evidence is available or the legislature enacts a corrective amendment.

From this analysis, we may also assume that the most important function of the concept of subjective legislative intent is to put the judge or other interpreter in a proper, deferential frame of mind vis-à-vis the legislature. Its second most important function is to help the inter-

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69 "The courts have no institutional obligation to enforce the words of committeemen, if the words are not found in the statutory text." Bishin, The Law Finders: An Essay in Statutory Interpretation, 38 S. Cal. L. Rev. 1, 16 (1965).

[T]hese policies of clear statement may on occasion operate to defeat the actual, consciously held intention of particular legislators, or of the members of the legislature generally. . . . [I]n other words, they constitute conditions of the effectual exercise of legislative power. But the requirement should be thought of as constitutionally imposed.

Hart & Sacks at 1412-13. "[L]egislative intention established by extrinsic aids is irrelevant unless reasonably consistent with the words of the enactment. . . . Certainly it is not true in practice that legislative intention is given effect wherever possible." Nutting, supra note 49, at 609-10. In addition, provided that the interpretation is reasonable, . . . taking a manifestation which in itself is an expression of intention and applying to its interpretation a standard other than one which is purely subjective . . . may have a tendency to encourage careful and precise drafting on the part of the legislature.

Id. at 613-14.
preter select and weigh the many elements of statutory language and legislative context by giving him a general criterion of reliability. On the other hand, it is useless for clearing up statutory uncertainties that remain after the appropriate manifestations of intent have been exhausted.

PART II: LEGISLATIVE PURPOSE

"[T]he 'policy' of a statute should be drawn out of its terms, as nourished by their proper environment, and not, like nitrogen, out of the air." 60

Relation to Legislative Intent; Terminology

Whereas the concept of “legislative intent” is in disfavor with many writers, that of “legislative purpose” enjoys not only favor but pre-eminence. 61 For most, it is the touchstone of statutory interpretation. It is important, therefore, to distinguish it from legislative intent and examine it in some detail.

In their widest senses the two concepts overlap. Thus, if it may be said that when a legislature took particular action it had a range of ever-widening purposes, beginning at the inner extreme with the specific purpose of taking that action and ending at the outer extreme with the very general purpose of helping to advance the total public good, the former is coextensive with the legislative intent to effectuate the specific purpose. 62 The important fact is that lawyers tend to identify the immediate legislative purpose with “legislative intent” and to reserve the term “legislative purpose” for any broader or remote (“ulterior”) legislative purpose.

Thus, in general legal usage the word “intent” coincides with the particular immediate purpose that the statute intended to directly ex-


61 “Though the intention of the legislature is a fiction, the purpose or object of the legislation is very real. . . . Though real, it is not always easily discoverable . . . .” Corry, Administrative Law and the Interpretation of Statutes, 1 U. Toronto L.J. 286, 292 (1936). See also MacDonald, The Position of Statutory Construction in Present Day Law Practice, 3 Vand. L. Rev. 369, 372 (1950); Radin, A Short Way with Statutes, 56 Harv. L. Rev. 388, 398, 400 n.20; Thomas, Statutory Construction when Legislation Is Viewed as a Legal Institution, 3 Harv. J. Legis. 191, 201, 204 (1966); Witherspoon, Administrative Discretion to Determine Statutory Meaning: “The Middle Road”: I, 40 Texas L. Rev. 751, 789–805 (1962). “Legislative purposes also include those at work in the field of law to which the statute belongs.” Id. at 826. This is an aspect of general legislative context that needs further study.

62 See Cox, Judge Learned Hand and the Interpretation of Statutes, 60 Harv. L. Rev. 370, 371 (1947); Landis, supra note 30, at 888.
press and immediately accomplish, whereas the word "purpose" refers primarily to an ulterior purpose that the legislature intends the statute to accomplish or help to accomplish. Although some ulterior purposes, like the immediate purpose, tend to be fully served by the statute in the sense that compliance with its working provisions will fully carry them out, most ulterior purposes are broad enough that they can be only partly served by such compliance.

Even with these qualifications the concept of "purpose" presents no wholly new element, because, if revealed to the legislative audience, it is part of the proper context of the statute, which must be considered in ascertaining its meaning. Indeed, as an integrating factor it is often the most important part of that context. Here, we will discuss only the extent to which legislative purpose exists, how it is to be determined, and how it is related to the ascertainment of meaning.

The distinction between immediate legislative purpose and ulterior legislative purpose is both valid and useful (only ulterior purpose can be part of context). Although there is some question whether marking that distinction with the words "intent" and "purpose" does not tend to obscure their close affinity, the following analysis will honor semantic convention by using "purpose" for the most part as including only ulterior purpose.

**Limitations of Legislative Purpose**

The basic problems of legislative purpose are similar to those of legislative intent. Does the legislature have an actual legislative purpose when it enacts a statute? Is that purpose useful in clearing up uncertainties of meaning? If so, how can we reliably find out what it is?

Again, we must distinguish between the subjective and the objective; that is, between the purpose that the legislature (or at least some legislators) actually had in mind and the purpose, if any, that is revealed by the statute and the other evidence that a court may properly consider. Wherever subjectivity poses a problem of ascertaining legislative intent, it poses a problem of ascertaining legislative purpose.

So far as legislative purpose (in the literal sense) coincides with legislative intent, answers have already been given. So far as it consists (in its narrower legal sense) of ulterior purposes, the answer to the question whether subjective legislative purpose exists is that there is often a real consensus among those most closely responsible for the bill on a purpose that the bill is designed to help achieve.

63 See part I of this article.
There may even be a congeries of purposes. For example, the legislative intent to lower the minimum age at which men may contract marriage may reflect the purposes of removing a discrepancy between men's majority for marriage purposes in that jurisdiction and their comparable status in another; of removing a discrepancy between men's majority for marriage purposes and their majority for voting purposes; and of removing a discrepancy between the rights of men and those of women. It may also include the broader and more remote purposes of achieving a better balanced social system and of attracting political support for its proponents. There may be other purposes. That these purposes may not comprise a neat and logical hierarchy reflects, as Professor Lenhoff has suggested, "the compromising nature of the democratic process."

Moreover, legislative purposes may or may not be shared. As between individual legislators, they may even be inconsistent. In such a case, it is hard to say which is "the" legislative purpose.

The reasons for supposing an actual consensus on legislative purpose are sometimes stronger, but usually weaker, than they are on legislative intent. True, it is sometimes easier for a group of persons subjectively to share the same general purpose than it is for them subjectively to have a neat and logical hierarchy reflects, as Professor Lenhoff has suggested, "the compromising nature of the democratic process."

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More often is to learn about the general purposes of legislators than to learn about the specific intentions of legislators." MacCallum, supra note 16, at 780. Cf. Professor Jones' statement:

A statute as a statement of purpose is limited in its generality by the actual and possibly conflicting purposes of the legislature. This is not very different from saying that the words of a statute express the legislature's optimum reconciliation in general terms of its positive desires and negative aversions.


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to share the same intent. But, although this might make the supposition of an actual legislative purpose more palatable to some of the skeptics of subjective legislative intent, there are countervailing considerations.

The disciplines of the legislative process are directed more to attaining agreement on the specific action to be taken in a bill than to attaining agreement on its legislative purposes, even when these purposes have been memorialized in the bill itself. Even those who are closest to the bill are likely to focus more sharply on the specific action taken in the bill than on any general statements of purpose. Other legislators, whose knowledge of the bill tends to be general only, are likely to have their own notions of the purposes that it will serve and not so likely, therefore, to adopt the states of mind of others. Indeed, even those who are closely familiar with the specific terms of the bill may agree on the same specific action for a variety of reasons. As a result, there is likely to be less actual agreement on specific ultimate objectives than there is on the action taken in the bill itself. This may explain why most formal statements of purpose in bills or committee reports tend to be innocuous generalities designed to offend the least number of people, a fact that destroys most of their usefulness for resolving specific uncertainties of meaning. As a general result, there are likely to be fewer reliable evidences of legislative purpose than there are to be of legislative intent. Indeed, there may be no discernible ulterior legislative purpose at all. As Professor Radin has pointed out, a statute may have no discoverable purpose beyond what the statute itself expressly reveals and immediately effectuates.

This is not to say that actual legislative purpose does not usually

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68 "[W]henever a law is adopted, all that is really agreed upon is the words." Kohler, Judicial Interpretation of Enacted Law, in Science of Legal Method 187, 196 (1921).


Nashville & K. R.R. Co. v. Davis, 78 S.W. 1050 (Tenn. 1902), involved the question whether geese were covered by a statute requiring train engineers to take evasive action when an "animal or obstruction" appeared on the track. In view of the doubt that a goose could be either an "animal" or an "obstruction," the purposes of the statute were a critical factor. If its purpose was merely to protect animals or their owners, the question whether the kind of animal in question was an obstruction was irrelevant, but the question whether or not it was a wild animal could be important. If its purpose was merely to protect passengers and employees operating a train or to protect the operators of railroads and their property, the risk that a goose or geese might derail or otherwise damage a train likewise would be important. The court decided the case on the assumption that the statute was directed only to "obstructions." Yet, the question remains: what were its purposes and how were they ascertained?

71 Radin, A Short Way with Statutes, 56 Harv. L. Rev. 388, 423 (1942).
exist, or that there is no reliable basis for inferring it. Rather, it says that the elements that have made the concept of subjective legislative intent unacceptable to many exist in many cases to an even greater degree for subjective legislative purpose. In the face of these considerations, it is ironic that the amorphous and elusive "legislative intent" has been spurned by many in favor of the even more amorphous and elusive "legislative purpose."

We come now to the general question of how subjective legislative purpose is to be determined.

Ascertainment of Legislative Purpose

Whether we search for actual legislative purpose or for actual legislative intent, we can only infer it from external materials. Unfortunately, in the ascertainment of legislative purpose it cannot always be assumed that there is in fact such a purpose or, if there is, that there is reliable evidence of it. For most state legislatures, there is only the statute and the backdrop of proper context. The statute normally includes no preamble or purpose clause, and there is little recorded legislative history. Even where they exist, there is no assurance that either will be relevant.

As with legislative intent, the danger in presuming an actual legislative purpose beyond what is expressly or impliedly revealed is that the interpreter will either attribute to the statute a purpose of his own contriving or search for actual purpose so relentlessly that he goes beyond the limits of the appropriate available evidence. Because the reliable indicia of any purpose are more likely to be found beyond the mere words of the statute, the temptation to scavenge among the materials of legislative history is at least as great here as it is for legislative intent.

If this analysis is sound, merely to switch from "intent" in the sense of immediate legislative purpose to "purpose" in the sense of broader or ulterior legislative purpose solves few of the problems that have been supposed to make the concept of legislative intent unworkable and untenable. Instead, the limitations and pitfalls increase. If the concept of subjective legislative intent is inappropriate, that of subjective legislative purpose is a fortiori inappropriate. Thus, the use of legislative purpose should be considered as an application, on a broader and less reliable front, of principles that apply with sharper focus, greater intensity, and greater reliability to the kind of legislative purpose that is identified with "legislative intent."
Nor can we avoid the problem of reliable inference by pursuing objective statements or other evidences of purpose in disregard of the likelihood that they reflect actual legislative states of mind. Otherwise, we would have no adequate guide to the relevant and reliable manifestations to which a search for legislative purpose should be limited.

That the subjective aspects of legislative purpose tend to be more diffuse and elusive than those of the immediate purpose voiced by the statute itself is not critical, because in both instances they are inferable from objective evidence. The significant difference is that, however necessary, inferences of actual legislative purpose that make up manifest legislative purpose can in general be drawn with less confidence than those of actual legislative intent.

Judicial Bootstrap Pulling

Because the need to draw inferences of legislative purpose is less compelling and because the reliability of such inferences tends to be less, the danger of inventing fictitious and fanciful legislative purposes is correspondingly greater. This does not mean that the concept of a legislative, as distinct from a general social or judicial, purpose must be repudiated. It means only that the objective of discovering a real legislative purpose must be pursued with greater caution.

In Johnson v. United States, the Court of Appeals for the First Circuit had to decide whether Rev. Stat. 1874 § 860, which provided that: "No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding . . . shall be given in evidence . . . against him . . . in any criminal proceeding," applied to a schedule in bankruptcy. Although Judge Holmes found that such a schedule fell outside the words of the statute, he found that it came within its purpose, which he said "was to prevent the required steps of the written procedure in court preliminary to trial from being used against the party for whom they were filed."

Where did Holmes find that purpose? The statute included no statement of purpose, and the usual kind of legislative history was either unavailable or not consulted. All he had to go on, beyond the words of the statute, was the general material of proper context. Most helpful was the Bankruptcy Act, in the light of which the schedule in bankruptcy was seen as generally analogous to a pleading. As with legislative intent, the manifest purpose is presumed to be the actual purpose.

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72 163 F. 30 (1st Cir. 1908).
73 Act of June 20, 1874, 18 Stat. (pt. 1) 162, since repealed.
74 163 F. at 32.
Because the specific formulation of purpose was Holmes's, how could he be reasonably sure that he was stating a purpose that Congress would recognize as its own? Or was he merely creating a sensible policy, well served by the clear elements of the statute, that he could thereafter use to interpret more broadly what was otherwise narrow language? Although the result was probably sensible and fair, can it be supported as something cognitively discoverable from the statute and its proper context? Or was it in significant aspects a judicial purpose that Holmes himself assigned to the statute? So far as it may have been the latter, the result must be sustained, not as the ascertainment of statutory meaning, but as an act of judicial lawmaking.

As a result, the concept of a legislative purpose, despite its frequent usefulness, provides a strong temptation to perform the bootstrap operation of formulating a "legislative purpose" with one eye on the situation to which it is to be applied. While this is an appropriate way to pour the foundation for a judicial rule of law, it is of doubtful propriety and candor when the result is supposedly controlled by the independent purposes of the legislature.

Although Judge Hand has described interpretation as the "proliferation of purpose," Justice Frankfurter notes that in the hands of "judges intellectually less disciplined than Judge Hand . . . it might justify interpretations by judicial libertines, not merely judicial libertarians." On a later occasion, he added that judicial construction ought "to stick close to what the legislature says and not draw prodigally upon unfurnished purposes or directions." There is reason to believe that Justice Frankfurter's fears have often been realized.

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75 Quoted in Frankfurter, Some Reflections on the Reading of Statutes, 47 COLO. L. REV. 527, 529 (1947).
76 Id.
77 Frankfurter, Foreword, A Symposium on Statutory Construction, 3 VAND. L. REV. 365, 367 (1950). In an apparent attempt to minimize the pitfalls of seeking actual, subjective legislative purpose, Hart and Sacks use the more objective-sounding expression "purpose which ought to be attributed to a statute." HART & SACKS at 1414. Read literally, this suggests that they may be supporting the assignment, in some cases, of a legislative purpose that is insupportable on any theory of cognition. If so, the approach might be rationalized as a legitimate aspect of judicial lawmaking if it is used to effectuate the most satisfactory accommodation with the rest of the legal order. However, the fact that the authors use their concept as a tool for "inferring purpose" suggests that they are talking about cognition, not creation. This, of course, presupposes a search for actual purpose.
78 There is a danger that this emphasis on the purpose of the enactment itself might overshadow the generic purposes of legislation, which is after all designed for communication to the public at large. Thus where the terms of a statute are allowed to deviate repeatedly and significantly from their meaning in common parlance, public trust and confidence in written enactments might be hurt.
Legislative Purpose as an Aid to Interpretation

On the usefulness of legislative purpose to legislative interpretation, Professor Llewellyn has said, "If a statute is to make sense, it must be read in the light of some assumed purpose. A statute merely declaring a rule, with no purpose or objective, is nonsense."\(^7\)\(^9\) Professors Hart and Sacks have inquired whether it is not true that "[t]he meaning of a statute is never plain unless it fits with some intelligible purpose."\(^8\)

If, as each quoted statement suggests, "purpose" is used in its usual legal sense of ulterior purpose, such statements are simply not true, because, as Professor Radin has pointed out, a statute may have no discoverable purpose.\(^8\)\(^1\) Here the meaning of the statute and its revealed legislative intent are the same thing. Nor are they necessarily obscure. That the court can, on its own initiative, view the evidence of legislative intent in the light of a judicial purpose does not imply that the legislature shared that purpose. Nor is the necessity of postulating a legislative purpose implied in the fact that for most statutes it is reasonable to suppose that the legislature in fact had a purpose ulterior to its legislative intent.

If, instead, such statements refer only to the immediate purpose embedded in legislative intent, they dissolve into tautology. A statute whose only discoverable purpose is that fully realized by the statute itself is no more or less intelligible than the revelation of immediate purpose that constitutes its meaning. The statements are therefore true, but only by definition. Their main value is that they imply that all commands, prohibitions, and other legislative communications are purposive acts that should be approached as such, thus putting the court and other readers in a deferential frame of mind.

Llewellyn's statement goes beyond tautology to self-contradiction, because no statute is 100 percent gibberish and every statute necessarily implies the minimum purpose of accomplishing what it purports to say. A statute without even the purpose of enacting the legal rule that it prescribes (whatever that may be assumed to be) could hardly be imagined. That what the statute says may lack clarity of meaning and thus clarity

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\(^7\) Llewellyn, Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed, 3 VAND. L. REV. 395, 400 (1950). Fuller, Positivism and Fidelity to Law—A Reply to Professor Hart, 71 HARV. L. REV. 630, 664 (1958): "[I]s it really ever possible to interpret a word in a statute without knowing the aim of the statute?"

\(^8\) HART & SACKS at 1157.

\(^9\) See note 71 supra & text accompanying.
of purpose does not necessarily reduce it to "nonsense."

For legislative purposes, Professor Lenhoff's statement seems more satisfactory: "The purpose of a statute is certainly an excellent guide for the discovery of the legislative intent." This asserts, not the necessity of such a purpose, but its utility if it exists.

Immediate purpose, on the other hand, is ordinarily useless for determining legislative intent because, being coextensive with legislative intent, it is merely another way of describing the problem. However, as pointed out in the preceding part, there is a sense in which impliedly revealed immediate purpose is occasionally helpful, and this is undoubtedly what Llewellyn and Hart and Sacks were driving at. This is the case in which proper context strongly suggests that the actual legislative intent was modestly broader or narrower than what the literal meaning of the statute directly supports.

On this basis, the statements of Llewellyn and of Hart and Sacks might have been more accurate had they read,

> Every statute represents an attempt to accomplish an immediate legislative purpose, presumably an intelligible one. The purpose is coextensive with the legislative intent and, so far as it is discoverable from the statute and its proper context, it corresponds also to its legislative meaning.

However, the usefulness of a particular legislative purpose for unlocking legislative intent (and thus legislative meaning) normally exists only when it is truly ulterior, because, with the exception noted, it can illumine only what is not identical with it. Unfortunately, the broader the legislative purpose, the less likely that it will illumine the specific problems raised by the text. The value of an express purpose is that it reduces judicial speculation.

Once legislative purpose has been reliably ascertained, the only remaining problem is to determine the extent to which the language used in the statute can sustain a meaning that not only is coextensive or consistent with that purpose but appears to be the most plausible one under the circumstances.

**Drafting Policy**

This analysis may suggest that good draftsmanship calls for the

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82 A. Lenhoff, Comments, Cases and Other Materials on Legislation 630 (1949). See also note 70 supra.
83 See cases cited note 47 supra.
84 One aspect of legislative purpose is that it makes relevant the probable effect of the statute. E. Crawford, The Construction of Statutes 286–90 (1940).
inclusion of a general purpose clause in every statute. Although this is the practice of some draftsmen, there is usually no need in a very specific statute to include a formal purpose clause. There are, however, exceptional instances in which there are significant pervasive doubts that cannot be resolved in the specific working provisions and in which, therefore, a broad statement of purpose may be helpful to the courts. These are the unusual cases in which the general thrust of even a well-drawn statute may not be apparent on its face. But if the draftsman includes such a clause, he must be careful not to create, by the omission of other legislative purposes, the misleading impression that they were not also relevant.

Because general statements of purpose serve best as antidotes to inadequate draftsmanship, the draftsman who doubts his own draftsmanship would do better to omit any such statement, because the deficiencies of draftsmanship that infect the working provisions of the bill are likely also to infect its statement of purpose. Instead, he should let the court draw its own conclusions about legislative purpose from the evidences provided by the working provisions and context of the statute. If, on the other hand, he is sure of his draftsmanship, he is assuming a condition in which a general purpose clause would not normally be needed.

A general legislative purpose clause may be helpful, however, where a very general statute in effect delegates lawmaking power to the courts.

Much more effective for the general run of statutes is the piecemeal approach, under which specific purposes are respectively prefixed, as needed, to particular commands, authorizations, or prohibitions ("For the purpose of . . . , the contractor shall . . .").

Discrepancies Between Purpose and Intent

Suppose that manifest legislative purpose is broader than, or even

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65 See Cox, Judge Learned Hand and the Interpretation of Statutes, 60 Harv. L. Rev. 370, 378 (1947). Despite the many adherents of formal purpose clauses, they are rarely helpful. R. Dickerson, Legislative Drafting 107-08 (1954); Professionalizing Legislative Drafting—The Federal Experience 51, 94, 154 (R. Dickerson ed. 1973).

66 If the Bill is done properly, one does not ordinarily need a purpose clause. Let me soften that statement somewhat. The best way to do it in most cases is to fragment your purpose clause and simply say at the beginning of specific sentences, where it is helpful, "To accomplish so-and-so, the Secretary shall" and so on, or "For the purposes of such-and-such," etc. These fragmented statements of specific purpose are preferable, because they are focused on specific uncertainties. For example, you might say, "To help reduce population growth, we prescribe as follows."

R. Dickerson, testimony before the Committee on the Preparation of Legislation (Renton Committee), United Kingdom, Dec. 12, 1973, at 7-8 (unpublished transcript on file with author).
conflicts with, manifest legislative intent. Which should presumably prevail? Much modern writing suggests the former.\textsuperscript{87}

I suggest, instead, that the latter should normally prevail. For one thing, there is little basis in experience for assuming that a legislative purpose has been precisely and comprehensively articulated. Even if it has, a legislative affirmation of purpose does not guarantee that it has in fact been achieved in the working provisions of the statute; the aspiration may remain at least partly unrealized.\textsuperscript{88} Its authors may even have recognized and accepted the fact.

A statement of legislative purpose cannot be read as decreeing whatever is necessary to achieve it beyond what can be sustained by the specific working provisions of the statute when read in the context of the legislative purpose.\textsuperscript{89} “This is what we are trying ultimately (or generally) to accomplish with the help of this act” is certainly not the same as “This is what we have in fact decreed in this act.”

Suppose this statute: “Section 1. The purpose of this act is to protect the public health. Section 2. No person may dump loose garbage in the street.” This statute does not apply to the contamination of drinking fountains, even though that kind of contamination frustrates the legislative purpose declared by section 1; the legislature was not trying in this statute to take every step necessary to protect the public health. Indeed, it is the essence of a broader legislative purpose that it will not be wholly fulfilled by the statute in question even if its working provisions are fully complied with.

On the other hand, the statement of broader ulterior purpose in section 1 might help resolve doubts of meaning that would otherwise arise in section 2. For example, section 1 might help the court decide whether the statute applied to refuse whose threat to health had otherwise been neutralized. Thus, it might supply the contextual basis for an implied exception or other limitation. Even here, the purpose clause would not necessarily control, because (1) legislatures often intentionally accept discrepancies between working provisions and ulterior purposes in situations where the precise matching of specific mandates to the

\textsuperscript{87} E.g., Frankfurter, supra note 75.

\textsuperscript{88} “[A] most sensible starting point certainly is from the question ‘what did the author mean.’ We may perhaps conclude that he did not accomplish what he intended to accomplish.” MacDonald, The Position of Statutory Construction in Present Day Law Practice, 3 Vand. L. Rev. 369, 372 (1950).

\textsuperscript{89} “To let general words draw nourishment from their purpose is one thing. To draw on some unexpressed spirit outside the bounds of the normal meaning of words is quite another.” Addison v. Holly Hill Fruit Prods., Inc., 322 U.S. 607, 617 (1944) (Frankfurter, J.).
general legislative aspirations is not administratively feasible, and (2) the intention to tolerate such discrepancies is not likely to be recited in the purpose clause. A court should not automatically assume, therefore, that a purpose clause precisely and comprehensively records the actual legislative intent of the statute.

Sometimes a specific working provision conflicts squarely with the express statement of a legislative purpose under circumstances in which it can be reliably inferred that the legislature intended such conflicts to be resolved in favor of the specific working provision. For example, in the codification of military laws culminating in the enactment of title 10, (Armed Forces) of the United States Code, the codifiers made a clear-cut error in section 1333(3) through a cross reference that was improperly limited to section 1332(a)(1). So written, section 1333(3) unequivocally excluded, for the purposes of computing the retired pay of nonregular members, service performed after July 1, 1949. In thus changing pre-existing law, the section failed to fulfill the legislative aspiration announced in section 49(a) of the Act: "In sections 1—48 of this Act, it is the legislative purpose to restate, without substantive change, the law replaced by those sections on the effective date of this Act." The question immediately arose whether section 1333(3) of title 10, which was enacted by section 1 of the Act, or section 49(a) of the same Act controlled. The question was submitted to the Comptroller General.

Under the view, now widely held, that purpose is the touchstone of interpretation, it would be easy to conclude that section 49(a) controlled. Such an interpretation would turn a mere legislative aspiration into a guarantee of success.

Such a result, unfortunately, would be doctrinally unsound and practically catastrophic. The contrary result may be defended on the ground that section 49(a) did not exhaust the general purposes of the Act, because it failed to state that the Act's central purpose was not only to restate pre-existing law accurately but also to enact a statutory codification law that could be relied on, at least where uncertainty of meaning did not arise. Not to preserve the reliability of the clear language used (which included preserving the integrity of the codifiers' clear-cut errors) would have destroyed the effectiveness of the codification act and frustrated its central purpose, which was to establish a code whose clear language could be relied on.

Such an interpretation would have had the same effect as section 2(a) of the Act of June 30, 1926, ch. 712,\footnote{44 Stat. (pt. 1) 1.} "An Act to consolidate, codify, and set forth the general and permanent laws of the United States in force December seventh, one thousand nine hundred and twenty-five," the act that established the United States Code. This section provided:

The matter set forth in the Code . . . shall establish prima facie the laws of the United States, general and permanent in their nature, in force on the 7th day of December, 1925; but nothing in this Act shall be construed as repealing or amending any such law, or as enacting as new law any matter contained in the Code. In case of any inconsistency arising through omission or otherwise between the provisions of any section of this Code and the corresponding portion of legislation heretofore enacted effect shall be given for all purposes whatsoever to such enactments.\footnote{Id., quoted in 1 United States Code at lxxix.}

The practical effect of this provision was to reduce the Act to the equivalent of a mere editorial compilation (however official), instead of an effective code. Not even its clearest provisions could be fully relied on.

During the preparation of title 10, one participant even suggested the inclusion of a saving clause that would have said, in effect: "Any substantive error that has been made in this codification is hereby corrected."\footnote{36 Comp. Gen. 498 (1957).} This was summarily rejected, because such a provision would have had the same devastating effect as section 2(a) of the 1926 Act.

Did the Comptroller General read section 49(a) as overriding the clear mandate of section 1333(3)? Fortunately, he did not.

The lesson is clear. Although specific working provisions, which carry the legislative freight, should always be read in light of the total legislative context, including the limitations implied by any manifest ulterior or other general legislative purpose, the latter should not be treated as a definitive, overriding pronouncement.

Summary

If this analysis is correct, the following conclusions would seem warranted:

(1) The necessity of assuming some actual subjective purpose includes only the necessity of assuming an immediate purpose exhausted by
the statute. This purpose is best identified by the term "legislative intent." Being coextensive with the problem of intended meaning, this concept normally furnishes, not a solution to, but a more helpful statement of the problem.

(2) Beyond the immediate legislative purpose that is identified with legislative intent, an ulterior legislative purpose, while normal, need not be assumed in every instance; actual consensus is less likely to exist in this area. If a legislative purpose is in fact discoverable from the statute and its proper context, it may or may not be useful in resolving uncertainties of meaning, if any, that would otherwise exist.

(3) Subjective purpose, not being directly knowable, can be ascertained only by inference from the external manifestations of purpose. These include the statute and the elements of proper context. The necessity of relying on inference raises problems of relevance and comparative reliability for which the concept of subjective purpose provides an invaluable guide. However, for purposes of cognition it does not warrant resorting to inappropriate manifestations of purpose or attributing to the statute meaning that the words of the statute taken in their proper context are incapable of bearing.

(4) The manifestations of legislative intent are normally fuller and more reliable than those of any broader or more remote legislative purpose.

(5) The manifestation of a legislative purpose does not imply that the working provisions of the statute were adopted as perfect instruments of that purpose. Therefore, if there is a discrepancy between manifest ulterior purpose and the working provisions, it does not necessarily follow that the working provisions were intended to be read as not containing the discrepancy.

(6) If neither legislative intent nor legislative purpose can be reliably inferred from the statute when read in its proper context, the court may attribute to the statute a purpose that supports the "meaning" that is most consistent with the clear elements of the statute and its related laws. This constitutes an act of judicial lawmaking.