LEGISLATIVE INTENT*

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INTRODUCTION

Appeals to legislative intent are a commonplace part of our judicial process. Nevertheless there are many unresolved disputes about the existence and discoverability of legislative intent. In 1930, Max Radin argued that the presence of genuine legislative intent in connection with a statute is at best a rare circumstance and that, in any event, the legislative intent could not be discovered from the records of the legislative proceedings.[1] This argument drew an immediate response from James Landis. Landis distinguished between two senses of "intent"—"intent" as "intended meaning" and "intent" as "purpose." He maintained that legislative intent in the first sense (and apparently in the second also) is an ordinary although not invariable feature of legislative processes. Furthermore, he contended that this feature, when present, is clearly discoverable in the records of the legislative proceedings.[2]

The Radin-Landis dispute has had a curious history. Since 1930, treatises and articles on statutory interpretation have often mentioned the dispute and have sometimes taken sides. But commentators siding with Radin, although abandoning talk about legislative intent, proceed to talk freely about the "legislative purposes," "policies," and "objectives" of statutes. Because it is not obvious that these expressions refer to anything different from legislative intent,[3] one would expect careful discussion of where the differences lie. In particular, one would expect

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1. Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930). Radin also denied the relevance of appeals to legislative intent. This article, however, is only concerned with the prior questions of the existence and discoverability of legislative intent. For earlier criticisms of the notion of legislative intent, see SEDGWICK, THE INTERPRETATION AND CONSTRUCTION OF STATUTORY AND CONSTITUTIONAL LAW 327-28 (2d ed. 1874); Bruncken, *Interpretation of Written Law*, 25 YALE L.J. 129 (1915); KOCOUREK, AN INTRODUCTION TO THE SCIENCE OF LAW 201 (1930).

2. Landis, *A Note on "Statutory Interpretation,"* 43 HARV. L. REV. 886 (1930).

3. As Johnstone remarks, "purpose" often seems simply another name for intent. Johnstone, *An Evaluation of the Rules of Statutory Interpretation*, 3 KANS. L. REV. 1, 15 (1954). See also Bruncken, *supra* note 1, at 134.

to find a showing that arguments leading to the rejection of talk about legislative intent have no force against these new expressions. But no such showing is to be found in the leading discussions of the matter—including those by Willis,[4] Frankfurter,[5] Corry[6] and Radin himself.[7]

On the other hand, commentators siding with Landis have done so on the basis of inadequate arguments. For example, we find Radin falsely accused of assuming "that the legislative intent is the sum of the total intents of the individual members of the legislature."[8] This is accompanied by the mysterious assertion that the intention of the legislature is "not a collection of subjective wishes, hopes and prejudices of individuals, but rather the objective footprints left on the trail of legislative enactment."[9] Such a statement is mysterious because it appears to mistake what could at most be *evidence* of intent for intent itself. It is surely in need of further elucidation and support if it is to show Radin wrong.

Again, we find unsupported assumptions that statutes would be wholly meaningless in the absence of anything identifiable as legislative intent,[10] and that the meaning assigned to them "must be one intended by the law-makers or the law-makers do not legislate."[11] Such remarks raise interesting issues, but, as will be seen below, the arguments supporting them cannot stand.

These claims and counterclaims are fully representative of the curious career of the Radin-Landis dispute. Writers siding with Radin apparently find it impossible to reject every trace of what he rejected. Writers siding with Landis have done so on the basis of inadequate (although sometimes interesting) arguments. Clearly the issues raised by the dispute have not yet been satisfactorily resolved, and are still in need of careful discussion.

I

The most obvious difficulty with the notion of legislative intent concerns the relationship between the intent of a collegiate legislature

4. Willis, *Statute Interpretation in a Nutshell*, 16 CAN. BAR. REV. 1 (1938).

5. Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527 (1947).

6. Corry, *Administrative Law and the Interpretation of Statutes*, 1 U. TORONTO L.J. 286 (1936). See also Corry, *The Use of Legislative History in the Interpretation of Statutes*, 32 CAN. BAR REV. 624 (1954).

7. Radin, *A Short way With Statutes*, 56 HARV. L. REV. 388 (1942).

8. See 2 SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION 322 (3d ed. 1943). For what Radin actually says see Radin, *supra* note 1, at 870.

9. *Ibid.*

10. *Cf.* CRAWFORD, THE CONSTRUCTION OF STATUTES 255 (1940).

11. *Id.* at 256.

and the intentions of the several legislators. Many difficulties would remain, however, if a legislature had only one authoritative member. We would profit, therefore, by asking what it could mean to speak of the legislative intent of a single legislator.

The fundamental question "what was the legislator's intent" subsumes a number of more specific questions:

1. Was his intent to enact a statute—*i.e.*, was the "enacting" performance not, perchance, done accidentally, inadvertently or by mistake?
2. Was his intent to enact *this* statute—*i.e.*, was this the *document* (the draft) he thought he was endorsing?
3. Was his intent to enact *this* statute—*i.e.*, are the *words* in this document precisely those he supposed to be there when he enacted it as a statute?
4. Was his intent to enact *this* statute—*i.e.*, do these words *mean* precisely what he supposed them to mean when he endorsed their use in the statute?
5. How did *he* intend these words to be understood?
6. What was his intent in enacting the statute—*i.e.*, what did he intend the enactment of the statute to achieve?
7. What was his intent in enacting the statute—*i.e.*, what did he intend the enactment of the statute to achieve *in terms of his own career*?[12]

Failure to distinguish between these more specific questions is responsible for much of the confusion in debates about the existence, discoverability and relevance of legislative intent. It is therefore important to examine closely the relationships between the more troublesome of these questions.

A. *The Aims of the Legislator:* the distinction between
6. What did he intend enactment of the statute to achieve? and
7. What did he intend enactment to achieve in terms of his own career?

These questions distinguish between two kinds of reasons the legis-

12. Witherspoon, *Administrative Discretion to Determine Statutory Meaning: "The Middle Road": I*, 40 TEXAS L. REV. 751, 796-800 (1962), distinguishes twenty-two "forms or configurations of legislative purpose that may be discovered at work in any particular legislative process productive of a statute." He does not attempt to order his list as I have, but I believe that it all lies somewhere within the range of my Nos. 3-6. Some of the entries are further specifications of what I have distinguished; but some of them also appear to conflate matters I wish to keep distinct; *e.g.*, his Nos. 5-8 each could cover what I wish to distinguish above in (4) and (5).

lator may have for enacting a statute—reasons looking to the effects of enactment upon the legal system, and reasons looking to the effects of enactment on his own career.[13] This distinction is crucial to any discussion of the relevance of legislative intent, since judges and administrators are unlikely to regard as significant the legislator's concern with his own career. The distinction is also important when one is discussing the existence and discoverability of legislative intent. To say there was no intent at all, for example, might mean that the enactment was motiveless, *e.g.*, inadvertent or accidental. On the other hand, it might mean that no intent of the relevant sort was present, that the legislator had only his personal career in mind when enacting the statute. Furthermore, depending on the records available, one kind of intent might be discoverable while the other is not. Thus the two must be kept distinct.

B. *Intent as Intended Meaning and Intent as Purpose:* the distinction between

6. What did he intend the enactment of the statute to achieve? and
5. How did *he* intend these words to be understood?

Landis notes the way the distinction between intent as (intended) meaning and intent as purpose becomes obscured when he says:

> Purpose and meaning commonly react upon each other. Their exact differentiation would require an extended philosophical essay. . . . [T]he Distinction . . . is a nice one.[14]

Even though the distinction may be a "nice one," no lengthy essay is needed to underscore the importance of distinguishing questions about the purposes of specific legislators from general questions about the meanings of statutory words. The major source of confusion has been the belief that we must always guide our understanding of statutory words by an understanding of legislative purposes, as though we could not understand the words without prior knowledge of the purposes.[15] This belief is most readily countered with the reminder that our primary source of "evidence" of specific legislative purposes in connection with

13. *Cf.* Radin, *supra* note 1, p. 873. See de Sloovère, *Preliminary Questions in Statutory Interpretation,* 9 N.Y.U.L. REV. 407, 415 (1932), where his remark about "individual and combined motives" encourages, if it does not actually constitute, a conflation of the questions.

14. See Note, *A Note on "Statutory Interpretation,"* 43 HARV. L. REV. 886, 888 (1930).

15. *Cf.* CRAWFORD, *op. cit. supra* note 10, at 255-56; 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); Witherspoon, *supra* note 12, at 765.

a statute generally lies in the words of the statute itself, and that these words could not provide such evidence if their meanings were not determined independently of consideration of the purposes in question.[16]

Confusion about the interplay between purpose and meaning has become so embedded in discussions of statutory interpretation that a more extended argument may be desirable. In particular, it may be helpful to show that the distinction between purpose and meaning exists even when the considerable concessions suggested by question 5 are made in the direction of establishing a connection between the purpose of a legislator and the meaning of what he says in a statute. Suppose we stipulate (i) that a legislator's words always mean precisely what he thinks they mean, and (ii) that the purposes in question concern the career of the statute rather than the career of the legislator. The first stipulation seems to go as far as possible in the direction of a tight connection between statutory meaning and the intentions or purposes of the legislator. The second stipulation restricts the purposes in question to those most generally thought to enter legitimately into issues of statutory interpretation. Even with these stipulations, however, one may show that persons normally need not be aware of legislative purposes in order to understand legislative words.

Although the problem is an "interpreter's" problem, it will be helpful to consider the matter first from the point of view of the legislator, and on the simplifying assumption that he is the author of the statutes he enacts.[17] He is typically interested in enacting a piece of legislation because he wants to effect certain changes in the society. The words he uses are the instruments by means of which he expects or hopes to effect these changes. What gives him this expectation or this hope is his belief that he can anticipate how others (*e.g.*, judges and administrators) will understand these words. The words would be useless to him if he could not anticipate how they would be understood by these other persons. Insofar as this concern for how his words will be understood is a concern about the "meaning" of his words, this "meaning" must thus generally be determinable independently of consideration of his purposes; for, until he forms opinions about the "meaning" of the words, he cannot consider whether they will serve his purpose.

16. *Cf.* E. A. DREIDGER, THE COMPOSITION OF LEGISLATION 159 (1957). It is true that we sometimes allow our understanding of legislative purposes to shed light on puzzling passages in a statute. But we could not even attempt this if we did not believe we already understood most of the words in the statute.

17. Complications introduced by the presence of draftsmen who are not themselves legislators will be considered later in connection with the intentions of collegiate bodies such as modern legislatures.

The legislator can attempt to assure that his words will be correctly understood in various ways, *e.g.*, by stipulation. But if he stipulates he must use other words about which he will have the same general concern. Ultimately, he must recognize that with the bulk of his words he cannot create but only can utilize the conventions in the light of which his words will be understood.[18] The legislator will be interested primarily in the conventions of statutory interpretation—that is, in the current conventional approaches by judges, administrators, lawyers and citizens to the understanding of statutes. Although these conventions will not guarantee specific results, they are all that he has to work with.

Consider the matter now from the point of view of the interpreters of statutes. Maintaining a perspective favorable to the association of legislative purpose with statutory meaning, suppose that the interpreters declare themselves bound by what the legislator wanted at the time the statute was enacted. Suppose, in particular, that, rather than raising any questions about how the legislator *ought* to have expected his words to be understood, the interpreters assume that their only legitimate task is the discovery of the legislator's actual expectations.

Difficulties arise immediately. There may be a lack of fit between how the legislator expected the words of the statute to be understood, and what he hoped to achieve by means of the statute. That is, the statute itself, or some constituent parts of it, may have been poorly chosen instruments for the achievement of his goals—not in the sense that the words were not understood as he expected them to be, but rather in the sense that, even when the words *were* understood as he expected, behavior in accordance with this understanding did not produce the results he thought it would produce. There are, in short,

18. Of course, one convention of statutory interpretation might permit or require that one's understanding of statutory language be guided by consideration of the legislator's purpose. *Cf.*, 2 SUTHERLAND, *op. cit. supra* note 8, at 315. Such a convention would invite the legislator to attempt to lay down a trail of his "purposes" for others to follow; hence the use, in jurisdictions where legislators believe that interpreters of statutes will seek and heed such "evidence," of statutory preambles, carefully manufactured "legislative histories," etc. The only feature of note about this convention is that it offers the legislator an opportunity to influence rather than merely to anticipate how his statutory words will be understood. In this respect, it is analogous to conventions for stipulation and for formal definition. Nevertheless, the "trail" he is able to lay down, both within and outside of the statute, will be primarily if not exclusively a verbal one. As with stipulations, if the legislator believes he can influence the understanding of his statutory words, it is only because he has certain expectations about how certain other words will be understood. These expectations also must be formed independently of consideration of his purposes, because until he has the expectations he can have no notion of whether these other words will serve his purposes.

at least *two* distinct ways in which things could go wrong from the legislator's point of view: (1) people might not understand the words of the statute in the way he thought they would, or (2) the behavior of people who understand the words as he thought they would and who act truly in accordance with this understanding, might not produce the results that the legislator anticipated. In the first case, the legislator would have made a mistake in predicting how his words would be understood; in the second case, he would have made a mistake in predicting what would happen if people behaved in certain ways.[19] The difference between the two kinds of mistakes is obscured for the "interpreter," and his view of statutory interpretation is consequently muddied, if he supposes that an understanding of the legislator's "purposes" is either a sufficient or normally necessary guide to how the legislator expected the words of the statute to be understood.

As the legislator may simply have misjudged the effectiveness of the statutory scheme in achieving the purported purpose, a resolve to interpret the words of the statute so that the statute *will be* an effective instrument for the achievement of the purpose would be simply a refusal to consider the possibility of this kind of legislative misjudgment. The importance of this observation lies in the fact that, where such legislative misjudgment has actually occurred, the method of interpretation under consideration may not produce an understanding of the words of the statute corresponding to that which the legislator expected —the very understanding that figured in his deliberate choice of those words. In the end, there may be nothing *wrong* with this; the legislator may be delighted with a method of interpretation which hides his own misjudgment. But are the interpreters really being faithful to the "intentions" of the legislator when they interpret his words differently from what he had expected?[20] At the very least, this problem should be brought into the open and faced squarely—something that has not been done and is not likely to be done so long as intent as "meaning" and intent as purpose are conflated.

One may wonder how intended legislative meaning could possibly

19. The distinction between the two is clear enough even though there may be a large shadowy area between them where the legislator's expectations were not well-formed, and where even he might not be able to say whether, on the one hand, his words had not been understood as he expected, or rather, on the other hand, that he had proposed in the statute an ineffective way of achieving what he wished to achieve. See HAGERSTROM, INQUIRIES INTO THE NATURE OF LAW AND MORALS 79-81 (Broad trans. 1953).

20. Hagerstrom apparently thinks that the whole "intention" theory founders on just this issue. See HAGERSTROM, *op. cit. supra* note 19, at 99-101. And for people who come down on different sides of the question, see 2 AUSTIN, LECTURES ON JURISPRUDENCE 628-30 (5th ed. 1885); and Witherspoon, *supra* note 12, at 831-32.

be discovered *without* appeal to knowledge of legislative purpose. The answer is that discovery depends primarily upon our awareness of the linguistic conventions the legislator looked to in forming his expectations about how his words would be understood. Awareness of these conventions will provide us with good (although not infallible) grounds for believing we know what his expectations were. Moreover, there is no great problem in attaining this awareness. We know perfectly well how to tell whether a man speaks the same language we do, and how to tell whether we can speak his language. Our capacity to do this provides us with a generally adequate basis for determining when the legislator and we are both familiar with the linguistic conventions in the light of which various understandings of his words will be formed, and for determining whether we can understand these conventions in the same ways. Further, if we are the specific audience to whom his remarks are directed, we are merely asking ourselves what our own linguistic conventions are, and how well he might have understood them. The fact that statutory language ordinarily serves us quite well in this respect indicates that we are able to use the same linguistic conventions as the legislator and to know that we are doing so.

In sum, for us as well as for the legislator, practical understanding of his language is ordinarily founded on a grasp of the linguistic conventions utilized, rather than a grasp of his specific purposes in enacting the statute. This explains both how his words can serve us as evidence of his purposes, and why there is ordinarily no need to search for his purposes in order to understand what he meant.

C. *Can the Legislator Misunderstand His Own Words?* the distinction between

4. Do these words *mean* precisely what he supposed them to mean when he endorsed their use in the statute? and
5. How did *he* intend these words to be understood?

Question (4) pinpoints, as question (5) does not, the possibility that the *legislator* has misunderstood the words he used in a statutory document. Reading some discussions on statutory interpretation, one would think it impossible for a legislator to misunderstand what he has written or endorsed.[21] In these discussions, the entire burden of understanding or misunderstanding the statute seemingly is placed upon others—the judge, the lawyer, the citizen. The effective slogan of these discussions might well be that the words of the statute mean what their author-

21. *Cf.* CRAWFORD, *op. cit. supra* note 10, at 245; 2 SUTHERLAND, *op. cit. supra* note 8, at 315-16.

endorser (the legislator) intended them to mean. But, as we have seen, words in statutes are of use both to legislators and to others because they have acquired significance through the growth or stipulation of conventions regarding their use. Indeed, we could not recognize something *as* a word, rather than as merely a contour (or range of contours) of sounds or a certain form (or range of forms) of scribblings if we were not aware that sounds and scribblings with such contours and forms have a significance, function, or value resulting from the growth or stipulation of such conventions. *Our* belief that we can understand what a man says, and *his* belief that he will be understood, mutually depend upon the recognition, acceptance, and utilization of such conventions. Furthermore, as we have also noted, even when such conventions are stipulated by a speaker, the stipulations ultimately rely upon words whose meanings are not stipulated but are assumed to be already understood in the light of existing conventions. It follows that if a speaker is not understood as he expected to be, this may be because *he* misunderstood or because some member of his audience misunderstood linguistic conventions of which they should have been aware.

Of course, having recognized that a legislator might possibly misunderstand the conventions determining the commonly accepted significance of the words he uses, we might for some reason wish to give more importance to his (mistaken) beliefs about the significance of his words than to their actual significance—that is, we might feel bound more by what he *meant* to say than by what, on any ordinary view, he *did* say. We could remind ourselves of this with the slogan that the words in statutory documents mean what the legislators intended them to mean, and could regard as always authoritative, even when mistaken, the beliefs of legislators as to how their words would be understood, and, in particular, their beliefs as to the commonly accepted significance of their words.

The adoption of such a policy, however, would lead to practical and conceptual problems. The legislator's audience (judges, lawyers, administrators, citizens) would have to ignore what the legislator said (the commonly accepted significance of his words) and take upon itself the responsibility of seeking out what the legislator meant (what he expected them to understand). A serious attempt to fulfill this responsibility would, to say the least, require complex and tedious investigation.[22] Furthermore, if we insist that the audience is responsible for

22. Judges and commentators, in protesting the seemingly overwhelming importance given to "legislative intent" in statutory interpretation have sometimes been in part protecting against the placement of this responsibility on the interpreters of statutes. See,

what the legislator meant rather than for what he said, we must concede that either (a) the statute consists of the string of words actually on the rolls, in which case that statute (*i.e.*, that string of words) is not binding, or (b) the statute is binding but consists of a different string of words from that on the rolls.

Perhaps this analysis merely reveals that we are in a quandary when it comes to interpreting statutes. With statutes, some peculiar authority attaches to what the legislator *says* (for that is virtually all that most persons may have to go by), and some authority may attach also to what the legislator is *trying* to say (after all, under the separation-of-powers doctrine we have in some way obligated ourselves to submit to his wishes on certain matters).[23] But at least we need a formulation of the issues that allows us to see the quandary for what it is. Wholehearted acceptance of the slogan that statutory words mean what the legislator intended them to mean would make this insight impossible.

We have seen that appeals to the legislative intent of even a single legislator are attended by numerous difficulties and sources of confusion. But we have not yet approached the major problem about legislative intent. Judges and administrators appeal to the intent of entire *collegiate* legislatures. Many commentators believe that such appeals are futile—that it is senseless to speak of the intent of a collegiate legislature. Our examination of the intent of the single legislator is a prologue to this central controversy.

II

A. *Introduction to the Skeptical Arguments*

Does it make any sense at all to talk about the intentions of a collegiate legislature? Radin says:

> A legislature certainly has no intention whatever in connection with words which some two or three men drafted, which a considerable number rejected, and in regard to which many of the approving majority might have had, and often demonstrably did have, different ideas and beliefs.[24]

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e.g., Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 395-96 (1951) (concurring opinion of Jackson, J.); McBoyle v. United States, 283 U.S. 25, 27 (1931); Quarles, *Some Statutory Construction Problems and Approaches in Criminal Law*, 3 VAND. L. REV. 531 (1950).

23. Crawford approaches the problem when he says "And the meaning must be one intended by the law-makers or the law-makers do not legislate." CRAWFORD, *op. cit. supra* note 10, at 256. See also Frankfurter, *Forward to a Symposium on Statutory Construction*, 3 VAND. L. REV. 365, 366 (1950); R. H. Jackson, *The Meaning of Statutes: What Congress Says or What the Court Says*, 34 A.B.A.J. 535, 537-8 (1948).

24. Radin, *supra* note 1, at 870.

Stronger views have been taken. Kocourek's argument to the effect that such intentions "never existed" is based upon an unsupported assertion that: "Legislation is a group activity and it is impossible to conceive a group mind or cerebration."[25] Willis says flatly and without argument: "A composite body can hardly have a single intent."[26] More recently D. J. Payne also appears to dismiss the possibility when he says: "[T]he legislature, being a composite body, cannot have a single state of mind and so cannot have a single intention."[27]

Concerning at least the latter three views, there are two issues to be sorted out: (a) the extent to which they are based on the notion that two or more men cannot have the same intention, and (b) the extent to which they are based on the notion that a group of men is incapable of having an intention. Kocourek's remark appears to raise the second of these issues; Payne's, despite appearances, raises the first.

Although we shall deal with Payne's arguments more fully below, consider for a moment the supposition in (a). *Is* it possible for two or more men to "have a single intention"? Anyone wishing to deny the possibility must tell us why we cannot truthfully say in the simple case of two men rolling a log toward the river bank with the purpose of floating it down the river that there is at least one intention both these men have—*viz.*, to get the log to the river so that they can float it down the river. It would be unhelpful to reply that one man's intention cannot be identical with another man's because each is his own and not the other's. There is no reason to confine ourselves to counting intentions *only* in this way. Further, if we did so confine ourselves, the central claim that two men cannot have the same intention would turn out to be merely a disguised tautology.

B. *The Deeper Roots of Skepticism*

The claim in (b) raises much more difficult issues. Should we agree that legislatures, being *groups* of men, cannot have intentions? One possible argument here might be: legislatures are not men; only men can have intentions; therefore, legislatures cannot have intentions.[28]

25. KOCOUREK, *op. cit. supra* note 1, at 201.

26. Willis, *supra* note 4, at 3.

27. Payne, *The Intention of the Legislature in the Interpretation of Statutes*, 9 CURRENT LEGAL PROBLEMS 96, 97-8 (1956). I say "appears to" because despite the above statement and several others equally strong, Payne also seems to endorse Gray's view that the intention of the legislature, far from being always non-existent, is often perfectly obvious. *Id.* at 101-02. It also turns out, as we shall see below, that Payne's arguments don't support a conclusion as strong as that quoted in the text above.

28. But of course this argument will founder on the shoals of debate about whether things other than men, *e.g.*, animals, have intentions.

Kocourek makes a more specific claim that there are necessary conditions for having intentions—conditions absent in the case of legislatures. His candidates are mind and "cerebration."[29] But it is clear that the temptation to name these as necessary conditions lies only in thinking of them as preconditions for purposive behavior and for deliberation—two more immediate preconditions for having intentions. When one moves directly to a consideration of whether legislatures are capable of purposive behavior and deliberation, the reply that they are seems neither false nor (without further argument) only figurative. We do, after all, speak quite freely and precisely about legislatures deliberating, and this, aside from our talk about their debating, investigating, etc., implies a capacity for purposive behavior. Of course, if someone tried to elucidate such talk without any reference whatever to the deliberating, investigating, debating, etc. of officers, members, agents, or employees of the legislature, we might find this mysterious or unacceptable. But no one has proposed eliminating these references, and the point remains that we have clear notions of what it means to say that a *legislature* is doing these things and we know that legislatures sometimes do them. Thus, a protest that legislatures do not ever do them, or, perhaps, do not "literally" do them, is not prima facie intelligible.

But the skeptic may argue that when he claims that a capacity to deliberate is a necessary condition for having intentions, he is not thinking of the deliberating in which legislatures are conventionally said to engage; rather, he is thinking of the deliberating engaged in by individual men. Though the former normally requires at least some cases of the latter, the two are not sufficiently alike for him.

The skeptic may feel that the notion of intention and the allied notions of deliberation, etc. are stretched "too far" when applied to legislatures. Although no one can say precisely how far is "too far," the line of reply to the skeptic is clear. Legislatures are not men, and if only men clearly have intentions, then one's arguments must cultivate analogies between legislatures and men—the point being to argue that legislatures are enough like men in important respects to be counted

Perhaps, however, the arguer means to say that talk about the intentions of legislatures involves a category mistake or a "fallacy of composition." Men have intentions, but legislatures are *associations* of men, etc. As it stands, the principle of the argument would have to be this: from the fact that X is a collection of Y's, it follows that predicates applicable to Y's (taken distributively) are *therefore* inapplicable to X. There are apparent counterexamples to the principle—*e.g.*, Jones, the left tackle, is heavier this year than last; the team of which he is a member is also heavier this year than last. Responses to such counterexamples will hardly avoid raising the complex issues discussed below.

29. See text accompanying note 25 *supra*.

as having intentions. Such arguments cannot lead to a *discovery* that legislatures might, after all, have intentions. Rather, the arguments can at most persuade us that it would not, under certain circumstances, be unreasonable to attribute intentions to legislatures—because the expression "intention of the legislature" could still have practicable and reasonable applications without moving from what many people now understand it to mean, and *also* without moving too far from what they understand such an expression as "intention of Jones" to mean. This is a long road, requiring travel through considerable detail about legislative procedures and the practices of judges, administrators, etc. Furthermore, it is a road that does not lead to neat and decisive results. Perhaps, however, this road can be avoided, and the skeptics challenged in another manner.

C. *The Importance of Legal and Linguistic Conventions*

There have long been arguments about the extent to which any organization or association (*e.g.*, a company, corporation, club, union, team, etc., as well as a legislature) can, not being a man, nevertheless behave like or be treated as a man. The view that some can is buttressed by modern law, which treats certain types of organizations and associations in ways that could be variously described as (i) treating them *for certain purposes* as (or as though they were) men, and (ii) treating them *in certain respects* as (or as though they were) men. Furthermore, in everyday speech we sometimes speak of them in ways suggesting the appropriateness of such treatment, and suggesting furthermore the appropriateness of ascribing intentions to them—*e.g.*, we speak of them as *competing* with each other, *attempting* this, *succeeding* in that. The prevailing tendency in most of these cases has been to accept the talk,[30] but, when pressed, to attempt to "translate" it into talk about the intentions or behavior of various members, employees, officers, agents, or trustees of the organization or association in question. The claim is

30. The acceptance with respect to corporations has sometimes been justified by an appeal notably absent in discussions of legislative intent—viz., by arguing that the extent to which corporations may reasonably be treated in this way is simply a matter of public policy. Thus, for example, against the claim that corporations, *unlike* men, are solely creatures of law and hence incapable of illegal intent, one might argue that *as a matter of public policy* it would be better to treat corporation as *like* men in this respect; this would bring corporate assets and perhaps even corporate officers within easier reach of sanctions against behavior contrary to the public interest. In contrast to this approach, the dispute concerning legislative intent has almost universally been treated as though it were a factual and not a policy issue. The leading question has not been, "what is to be gained by treating legislatures as capable of intent?" Rather it has been "Are legislatures capable of intent?"

then common (at least in the Fiction, Bracket, and Purpose Theories of the nature of corporate personality)[31] that the "translation" provides the truth behind claims about the organizations which, if taken literally, would simply be fictions.

The skeptic thinks that statements of the form—"The intention of the legislature is X"—are "fictional" or at best "figurative," and that they cannot be true if taken "literally." But he would be careless to assert this in the absence of any clear understanding of the "literal" significance of the statements. Since these statements have been made for several centuries without special stipulation as to their meaning, what plausible account of their present "literal" significance would show them to be fictional or figurative? The considerations involved can perhaps be made clearer by an examination of talk about the *activities* of legislatures. Why should we agree that claims such as—"the legislature enacted a sales tax bill in 1961"—must, when taken literally, be fictions or only "figurative" even though there are perfectly well-established legal criteria for determining what can count as an act of the legislature? It is true that in order for a legislature to have acted, it is necessary that certain men have acted. But (i) it would be a mistake to say that the legislature's having acted was nothing more than these men having acted.[32] And (ii) there is nothing fictional about the legal significance of the criteria for determining whether the legislature acted.

In view of well-established legal criteria for telling when legislatures have acted, and in view of the obvious truth that these criteria are often satisfied, it seems futilely dogmatic to insist without special excuse that statements about legislatures having acted can never be *literally* true. Such statements may sometimes be false, but their *sense* when taken "literally" is surely a matter of which conventions are well-established in, or have been stipulated for, the relevant linguistic community. The question now is whether there are any such conventions with respect to legislative intentions, and if so, how well-established are they?

It is important to be clear about what is being asked. We are not asking whether legislatures are conventionally supposed to have intentions; nor are we asking whether there is "evidence" that is conventionally supposed to be good evidence of the presence of such intentions. Rather, we are asking whether there are any generally accepted conventions

31. *Cf.* PATON, A TEXTBOOK OF JURISPRUDENCE 365-376 (3d ed. Derham 1964).

32. It would miss the role of rules in determining which of the activities of these men could count as activities of the legislature. See H. L. A. Hart's discussion of this point with respect to corporations in HART, DEFINITION AND THEORY IN JURISPRUDENCE 21-24 (1953).

concerning *what it would be like for a legislature to have an intention* —*i.e.*, concerning the conditions that actually would constitute a case of a legislature's having an intention.

The importance of keeping these questions distinct is shown by the recent, and otherwise highly rewarding, discussion of similar problems by Witherspoon.[33] Witherspoon seems to consider the matter of legislative purpose from a standpoint much like the above. But he does not focus the issue sharply enough; as a result he moves too far too fast. He points to the undeniable fact that courts, administrative agencies, legislators, scholars and practitioners talk in terms of legislative purpose; he concludes that, given such firmly established practices, there are such things as legislative purposes.[34] This is an error; one could, if allowed to select the appropriate linguistic communities, use the same kind of argument to prove the existence of Santa Claus, Zeus, and dragons. The fact that people talk about certain things as though they existed does not warrant the conclusion that these things exist. Nor does the fact that people conventionally appeal to certain kinds of data as good evidence for the existence of something, warrant the conclusion that these data are indeed good evidence for the existence of that thing. The crucial task is to discover generally accepted conventions concerning *what it would be like* for a legislature to have an intention or a purpose. Only then (barring objections of the types sketched in Section B above) can one go on in an intelligent way to discuss whether there ever are such things, and to discuss what should be accepted as good evidence of them.

What are the facts, then? It is obvious that there is considerable disagreement within the legal community as to whether legislatures ever have intentions. There is also disagreement as to what would be adequate evidence of the presence of such intentions. But is there any appreciable disagreement on *what it would be like* for a legislature to have an intention? The answer to this question appears initially to be "no." With the exception of Kocourek and Bruncken,[35] we have found no author reluctant to agree that a legislature should be admitted to have an intention vis-à-vis a statute if each and every member of the legislature had that intention.[36] Furthermore, we have found very few

33. Witherspoon, *supra* note 12, at 756-58, 790-91.

34. *Id.* at 789-91.

35. Bruncken's acceptance of the unanimity and majority models of legislative intent is clearly a concession he makes for the sake of further argument. See Bruncken, *supra* note 1, at 130.

36. There may be difficulties with this if it is taken straightforwardly, but these difficulties have not troubled the skeptics. For example, a legislature can enact a bill into

authors showing any unwillingness to accept an even weaker condition —namely, that a legislature should be acknowledged to have an intention vis-à-vis a statute in case each of the majority who voted for the statute had that intention.[37] Virtually all the persons who have discussed the issue of legislative intent seem to *assume* that the fulfillment of this last condition is sufficient to support claims about the intention of a legislature. No one, as far as we have been able to discover, thinks it necessary even to *argue* the point. All the hullaballoo has been about whether that many legislators ever do share any significant intentions vis-à-vis a statute, and whether, if they do, we can ever know of it.

This apparent agreement should be approached cautiously. Perhaps it is only a product of the confidence of many skeptics that they need not go so far as to quetsion it because they can show that the majority of legislators never share intentions. It is therefore desirable initially to see whether such confidence is misplaced, or whether it is indeed unnecessary to investigate the (provisional?) agreement. We shall consider this by way of a detailed examination of the arguments used by Payne to support his skeptical position. His arguments are not only the most substantial yet to be offered on the subject, but they also share crucial claims with the bulk of commentators, both pro and con, on this problem. One caveat: Payne thinks of legislative intent more or less in terms of our question No. 5—*i.e.*, in terms of how the legislature intended the (general) words of a statute to be understood. Perhaps he would extend the argument to include other items on our list, but this is uncertain.

D. *The Futility of the Common Skeptical Arguments*

Payne accepts without question the common view that the intentions of a legislature relative to a statute must be identified with the intentions of those legislators who voted for the bill, and further that the intentions of the legislature are the intentions those legislators share.

law; a legislator (that is, a member of a legislative assembly) cannot. He can only vote for the bill in the hope that it will be enacted into law. Thus, for example, a legislator can at most intend by his vote to help enact the legislation with a view to what it would, if enacted, achieve. The achievement of the latter is what the legislature might be said to intend; a contribution to the achievement of the latter might be what the legislator intends. In what follows, I shall suppose such shifts to be understood.

37. Of course, Kocourek would be unwilling. Brundken considers it a concession. Bruncken, *supra* note 1, at 130. Radin did not come down decisively either way. Radin, *supra* note 1, at 870. Corry shows a decided reluctance to accept it. Corry, *The Use of Legislative History in the Interpretation of Statutes*, 32 CAN. BAR REV. 624, 625-26 (1954). However, he did not show this reluctance earlier. Corry, *Administrative Law and the Interpretation of Statutes*, 1 U. TORONTO L.J. 286, 290 (1936).

But he claims that the legislature cannot have a single state of mind.

> Context does much to fix the extension of a general word, but even the fullest consideration of context generally leaves an uncertain fringe of meaning, and it is this uncertain fringe of meaning which gives rise to so many problems of statutory interpretation. For example, is linoleum "furniture"? . . . It is impossible to decide such questions by reference to the intention of the legislature since the mental images of the various members of the legislature who vote for a bill containing such a general word will exhibit the same imprecision and lack of agreement as found in the common usage of the word. This would be true even if every member of the legislature voting for the bill reflected at length on the extension of the particular general word, *for reflection would not necessarily entail agreement.*[38]

What Payne says here seems quite sensible, but the italicized portion shows his error. He has tried to move from saying that reflection does not entail agreement to saying that, even with reflection, agreement is impossible. This move is illegitimate, and consequently he has not shown that there *cannot* be a single state of mind (agreement).

Notice next that his claim about the unlikelihood or impossibility of a single state of mind is indeterminate. This is revealed by his concentration in the above passage upon borderline or "fringe areas" of the extensions of general words. The question which should be asked about his claim is—a single state of mind pertaining to what? The whole extension of the word? Or only some part of that extension? It is surely not necessary for persons to agree in *all* cases in order for them to agree in *some* cases. What Payne has done here (and does elsewhere in his essay)[39] is to claim that there cannot *ever* be agreement, although he demonstrates only that there cannot *always* be agreement. But surely, if agreement among the legislators is a prerequisite of legislative intent, a person who wishes to claim that there is legislative intent in this or that specific case is not bound to claim that there is always intent in every case. It is true that some persons may have committed themselves to the view that there is *always* intent of the sort Payne is discussing;[40] his argument might shake them. But he is very far from having shown that there cannot sometimes be such intent, or even that there cannot often be such intent.

Consider next his supposition, shared without argument by Radin, Jones, de Sloovère, and perhaps Landis, that in order for several

38. Payne, *supra* note 27, at 98 (emphasis added).

39. *Id.* at 101-02.

40. Perhaps such a view is implied by Crawford and Llewellyn. See note 15, *supra*.

legislators to have the same intention relative to the understanding of a general word in a statute, it is necessary for them to have had the same "mental images," at least relative to the instant case.[41] Payne argues:

> How can it be said that [the legislator] has any intention in respect of a particular covered by the general word which did not occur to his mind... ? [I]t would, I suggest, be a strange use of language to say that the user of such a general word "intends" it to apply to a particular that never occurred to his mind.[42]

Payne has only the vestige of a good point here. The behavior of a man who took Payne seriously could be extraordinary. Suppose that, needing a large number of ashtrays for an impending meeting in a building unfamiliar to me, I ask my assistant to scout around and bring back all the ashtrays he can find in the building. He comes back empty-handed, saying the following: "I found a good many ashtrays, but naturally wanted to bring back only those you intended me to bring back. So, as I picked up each one, I asked myself—did he intend me to bring this ashtray back? Upon doing this, I realized in each case that it would certainly be a strange use of language to say that you 'intended' me to bring back that ashtray, as it was virtually certain that the thought of that ashtray had never occurred to you—after all, you had never even been in this building before. In the end, therefore, I found it most sensible to return without any."

Clearly, such behavior would be idiotic. But it is also true that my assistant could have erred at the opposite extreme. Suppose he had ripped built-in ashtrays off the walls of the building, snatched ashtrays from persons using them and removed a hundred thousand ashtrays from a storage room. In each of these situations I might protest that I

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41. See Radin, *supra* note 1, at 869-70. Landis is chary of this kind of talk, but his discussion of "determinates" implies a similar view. Landis, *A Note on "Statutory Interpretation,"* 43 HARV. L. REV. 886, 889 (1930). For other examples of the view in question, see Jones, *Statutory Doubts and Legislative Intention*, 40 COLUM. L. REV. 957, 967 (1940); and de Sloovère, *Extrinsic Aids in the Interpretation of Statutes*, 88 U. PA. L. REV. 527, 533-38 (1940). Perhaps Frankfurter would also be sympathetic to this view; see Frankfurter, *supra* note 5.

42. Payne, *supra* note 27, at 101. But he also says later:

> A statute is a formal document intended to warrant the conduct of judges and officials, and if any intention can fairly be ascribed to the legislature, it is that the statute should be applied to situations not present to the mind of its members. *Id.* at 105.

The whole challenge lies, if one is to make sense of Payne's arguments, in understanding how the claims in these two sets of remarks are related to each other; but he does not enlighten us here. Perhaps he is moving toward the agency theory discussed below.

had not intended him to do that, and that he should have known better than to think I did. The ground for the latter claim, however, would not be that he should have realized that the thought of those particular ashtrays had never occurred to me; after all, he was already virtually certain of this. Rather, the ground would be that, given the circumstances, he should have understood that I did not need a hundred thousand ashtrays and that my interest in having ashtrays was not so pressing as to require him to rip them off walls, etc. It is true that I might say that the thought never occurred to me that there were any built-in ashtrays in the building; or, the thought never occurred to me that he would snatch ashtrays out of people's hands. Thus, I might react against the claim that I had intended *x* by making statements roughly in the form: "the thought of such a thing as *x* never occurred to me." But the point of this remark is not merely that the thought of such a thing as *x* had not occurred to me; there is also a clear suggestion that *if* such a thought had occurred to me I would have *excepted* such things as *x*.[43] Without this further suggestion, my remark would surely seem pointless.

The mere fact that the thought of such a thing as *x* hadn't occurred to me does not imply anything about what I did or did not intend. It follows that in our ashtray case the thought of this or that kind of ashtray, or the thought of getting ashtrays in this or that kind of circumstance, need not have occurred to me in order for me to have intended that my assistant get such ashtrays or get ashtrays under such circumstances. Payne, Radin and any others who have discussed legislative intent in terms of "mental images," "mental pictures," and "the contents of the mind of the legislator" have been fundamentally wrong in certain important respects. If, as the above discussion shows, a legislator voting for a bill need not actually have thought of each and every particular that he can reasonably be said to have intended the words of the bill to cover, nor thought of each and every *type* of particular, then the mere fact that two legislators have not thought

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43. Note also that the key phrase is not that which Payne's remarks suggest: for, "such a thing as X" refers to a *type* of particular rather than to a particular. (Furthermore, some of the types referred to were types of circumstances rather than types of ashtrays.)

Radin, and by implication Landis, may have had this in mind when discussing the "determinate" as the issue in litigation. They may, that is, have been referring to issue-types. More likely, they may have been counting issues in such a way that one and the same issue could appear in many cases. But if they were doing either, then Radin's talk about "mental images" and "pictures" becomes inappropriate, as Payne rightly recognizes and argues. See Payne, *supra* note 27, at 99; see also Radin, *supra* note 1, at 869; Landis, *supra* note 2, at 887.

of the same particulars or of particulars of the same types in connection with some general word in a bill shows neither that they disagreed nor that they agreed in their intention to have those particulars or particulars of those types covered by the bill. Of course, what a legislator did think of does make a difference. But what he did not think of does not make a difference *unless* he would have excepted it had he thought of it.

But how are we to *know* whether he would have excepted it? Supposing that we cannot interview him (or that, if we did, he and we might find it difficult to distinguish between his intention *then* and his decision *now*), would not we always be uncertain? Hagerstrom, in the course of arguing against certain appeals to the intention of the legislator, thinks so.[44] In an interesting discussion of the "unprovided-for case," he concludes that in reality the decisive factor is only the degree to which the *interpreter's feelings of value* are shocked. If, for example, my assistant, while out gathering ashtrays for me, were to be shocked by the idea of snatching ashtrays from people currently using them, he will impute to me an intention not to have him do that, even though I had made no mention of such a case but had merely said "bring back all the ashtrays you can find."

But such results are not inevitable. My assistant may react differently. He may be a very crude fellow, or one who places a much greater importance on having ashtrays for the meeting than I do. In either case, *he* might not be disturbed at all by the thought of snatching ashtrays from people; but, knowing me, he might think: "That silly old fool *would* be shocked by this, so I'd better not do it." We can also imagine the reverse—that is, a case where the assistant *is* shocked, but, realizing that I would not be, steels himself to the task.

Imputed intentions may require a fair degree of intimacy with the person whose intentions are being considered. Even then, there may be circumstances in which the imputations would be highly uncertain. These two considerations are important—especially in dealing with the intentions of legislators vis-à-vis circumstances that, so far as we can tell, they did not contemplate or foresee. The interpreter of a statute may be remote in time, place, social stratum or background from many or all of the legislators who had a hand in enacting the statute. There may only be a small range of cases in which he can reasonably impute to them approval or disapproval of various outcomes.

44. HAGERSTROM, *op. cit. supra* note 19, at 82-83. For other discussions of this point see HART & SACKS, THE LEGAL PROCESS 97-98 (Tent. ed. 1958); and Witherspoon, *supra* note 12, at 776-82.

But there will surely be such a range, provided that the interpreter is not completely ignorant of the beliefs and attitudes of these men. The *frequency* with which such imputations may be made depends upon the cases that arise; there may be many or few cases within the range of reasonable imputation.[45]

What, however, of cases where the uncontemplated and unforeseen things, circumstances, or types thereof are such that the legislator would not unhesitatingly have designated them by the general words he used? To return to the ashtray example, suppose that when I asked my assistant to bring back all the ashtrays he could find, it never occurred to me that he might run across some items that were for me not clearly ashtrays, but were enough like ashtrays to have made me hesitate over them.[46] If he ran across such items, neither he nor I might be clear about whether I had intended him to bring them back. Insofar as I was not certain whether they *were* ashtrays, I could not be certain that I had intended him to bring them back; insofar as I was not certain they *were not* ashtrays, I could not be certain that I had not intended him to bring them back. Thus, the question of whether I would have excepted them if I had thought of them may have no decisive answer.

A common move at this point is to claim that I had no intentions whatever in connection with such cases.[47] This is misleading. The occurrence of such a case may be an occasion for abandoning reliance upon what was intended; but the abandonment should not be justified by denying that one had any intentions at all in connection with the case; it should be justified simply by pointing out that the applicability of one's intentions to the instant case is not clear, and that appeal to intentions therefore does not afford guidance in the case. The undecidability is not due to limitations on our tools of investigation (*e.g.*, that we do not have total recall); rather it is due both to the fact that there are limitations on the preciseness of the intentions a person can have, and to the fact that new experience can challenge the rationale of old classifications. But it is misleading in such circumstances to

45. Perhaps it is worth pointing out that the imputation spoken of here is not what Cohen calls "legisputation." Cohen, *Judicial "Legisputation" and the Dimensions of Legislative Meaning*, 36 IND. L.J. 414, 418 (1961). While it agrees with "legisputation" in referring to probable legislative meaning, it concerns meaning at the time of enactment and not what the legislature would have thought if it had "the awareness of the problems that hindsight now permits." See also, Bruncken, *supra* note 1, at 135; Curtis, *A Better Theory of Legal Interpretations*, 3 VAND. L. REV. 407, 412 (1950).

46. As most everyone recognizes, this is the type of circumstance faced by the Court in McBoyle v. United States, 283 U.S. 25 (1930).

47. *Cf.* Gray's oft-quoted remark in THE NATURE AND SOURCES OF LAW 173 (2d ed. 1921).

claim that we had no intentions whatsoever. This claim suggests something quite false—that there is no connection between the circumstances and our intentions—whereas, the whole problem lies in the fact that there is a connection but one which is not clear enough to afford us guidance when we appeal to the intentions.

It is now timely to reconsider the crucial assumption on which all the arguments and counterarguments were based—the agreement that an intention vis-à-vis a bill shared by all the legislators in the majority voting for the bill would count as an intention of the legislature. As previously noted, one might argue that this agreement has only been provisional. One might claim that Radin, Payne and other skeptics stop here only because they believe they can, even on this assumption, show the impossibility of such a thing as an intention of a legislature.[48] But the examination of Payne's arguments shows the skeptical arguments to be insufficient. Thus, we are forced to confront the agreement in question, and consider its status. Is it only provisional? *Would* most or all of the skeptics retreat to some position behind it? What would this position be?

E. *The Path of Further Argument*

The skeptic might argue that the widespread agreement about the conditions under which a legislature can have an intention was *unreasonable*. His grounds could be any or all of the following:

1. That not even the majority condition is taken seriously by a significant section of the legal community (*viz.*, judges and administrators)—that even though legislative intent is possible and its occurrence not in every respect infrequent, conventional appeals to it are clearly fictional in the sense of being based upon wholly inadequate evidence of its presence.
2. That no other models of legislative intent could find serious support in legislative, judicial and administrative practices.
3. That all models in the end make the obviously unsound move of treating legislatures as human beings.
4. That, in view of the difficulty of using any of the models proffered to arrive at plausible accounts of what "legislative intent" could mean, there are no policy considerations sufficient to support continued use of the expression.

The first argument should be approached cautiously. Commentators using it generally exhibit a fatal tendency to assume that the majority

48. The clearest case of this attitude is in Brunckcn, *supra* note 1, at 130.

condition discussed above is not merely a sufficient but also a necessary condition for legislative intent. They have failed to recognize that acceptance of weaker and perhaps even quite different conditions might be reasonable, and that, therefore, the common run of claims about legislative intent may not be so strikingly irresponsible or "fictional" after all.

But this defense merely calls in the second argument: *are* there any other such conditions? This is a difficult question. Support for the "literal truth" of claims that legislatures have *acted* comes from the citation of explicit legal rules (for example, constitutional ones) setting out the circumstances under which the behavior of legislators will count as an act by a legislature. It is true that even the rules for determining when a legislature has acted (such as rules determining the circumstances under which an "enacting" vote can be taken on a bill, the ways of casting and tallying votes, the proportion of affirmative votes needed for enactment) are sometimes difficult to interpret and apply; but legislators clearly go to great lengths to establish explicitly and precisely the conditions under which the legislature will be regarded as having enacted a statute. They have not, however, given any such formal and extended consideration to the conditions under which the legislature will be regarded as having an intention, except perhaps the intention to enact the statute itself and to use the words appearing in the statute. The acceptance by the legislators of a majority of affirmative votes as constituting (under certain conditions) the enactment of a statute, sheds no light whatever on what they would accept as constituting a legislative intent outside of an intent to enact the statute itself. There is no evidence, indeed, that any legislature has, for its own use, attempted to establish *formal* criteria for the determination of legislative intent vis-à-vis statutes other than the use of statements of intent somewhere within the statutes themselves.[49]

Although legislatures have not provided criteria for the determination of legislative intent, there are relevant judicial and administrative practices. Not only do judges and administrators regularly refer to "the intentions of the legislature," but, in various jurisdictions at various times, more or less regular use is made of "presumptions" as to the intentions of the legislature—*e.g.*, that there is no intent to interfere with the common law unless explicitly stated. Use is also made

49. This is not surprising. One can imagine that authoritative expressions about legislative intent outside the individual statutes would fare no better before judges, administrators and the public than statutory preambles. They too would require "interpretation" if we were to take them seriously.

of appeals to records of legislative proceedings as "evidence" of the intentions of the legislature.

The third argument was that all models of legislative intent will in the end make the unsound move of treating legislatures as human beings. As shown earlier, the roots of this argument are very deep. We shall not pursue the matter further, except to suggest below some relevant analogies and disanalogies to legal treatments of persons and to suggest in closing some possible variations in our attitudes toward the issue.

The fourth argument was that, in view of the difficulties in arriving at plausible accounts of what "legislative intent" could amount to on any of the models put forward, there are no policy considerations sufficient to support continued use of the expression. Although considerations bearing on this argument will also be mentioned briefly at various stages of the discussion below, it will be raised again directly only at the end of the paper.

F. *Models of Legislative Intent*

The following discussion of models of legislative intent attempts to discover what support each can muster against the above arguments.

1. *The Majority Model.* Consider initially the following straightforward argument for the sufficiency of the majority model of legislative intent. On the supposition that judges and administrators believe themselves to have a legitimate interest in the intentions of the legislature, if there were any such intentions, they might argue as follows:

"The idea of a legislature intending x without *any* of its members, officers or agents intending x would hardly give us even a beginning for an acceptable account of the intentions of the legislature. But, if at least some member(s), officer(s) or agent(s) of the legislature must intend x, then which and how many? Given that our interest is in the intentions of the legislature concerning a statute enacted by it, we may start by considering the conditions under which the statement 'The legislature enacted the statute' is true. What, in short, counts as a legislature's enacting a statute?

"The important thing is to see what, in accordance with constitutional and legislative rules, results in and amounts to the enactment of a statute. Ordinarily this has to do with majorities of affirmative votes by the legislators, taken and tallied under specified conditions.[50]

50. Excluding executive endorsement or acquiescence (the expression "intention of the legislature" does not require use to consider them), and leaving open whether we would allow something to count as a statute if it were not subsequently enrolled or promulgated.

But, if such a coincidence in behavior (voting affirmatively) by a majority of the legislators is sufficient for and equivalent to saying that the *legislature* has acted (*i.e.*, has enacted a piece of legislation), then a coincidence in the intentions of those very same legislators vis-à-vis the bill and their affirmative votes for it should be sufficient in determining what the *legislature* intended (if anything) by the act or relative to the act.

"The main principle behind our argument is as follows: When there is a group, organization or association recognized by a legal system as a unit for the assignment of rights, powers, duties, etc. (*e.g.*, the *legislature* has the legal capacity to legislate, and the legislators do not, either separately or collectively, *except* when acting in such a way that they constitute a legislature), certain activities on the part of officers, agents or employees of the organization will in certain circumstances be recognized at law as resulting in and amounting to acts of the organization. In such cases, it is reasonable to identify as the intention of the organization in so acting at least whatever intentions are shared by those of its officers, agents, etc., who have discretionary powers in determining or contributing to the determination of what the group does. This is a conventional approach to the intentions of corporations.[51] It should apply to legislatures as well."

From the viewpoint of judges and administrators, this hypothesized argument might seem reasonable. But do the actual practices of these officials support the majority model argued for? Anyone taking a close look at current judicial and administrative practices must conclude that these practices have only the slightest relationship to that model. While judges and administrators obviously utilize evidence of the intentions of various individual legislators, they make no serious attempts to discover the actual intentions of the voting majorities; further, our records of legislative proceedings are still not sufficient to support such an enterprise. There are presumptions galore about what, in the light of our records, the legislators must have been aware of and agreed with, but the realities of legislative processes are such that few of these presumptions are thought to be reliable *enough*.

This may persuade some commentators that courts and administrators generally have not been genuinely interested in the intentions of legislatures. But the behavior of judges and administrators vis-à-vis legislative intent would clearly be capricious and irresponsible only if

Accounting for bicameral legislatures would, of course, complicate but not vitiate the argument.

51. See GRAY, *op. cit. supra* note 47, at 55.

they believed that the majority model set out necessary as well as sufficient conditions for the existence of legislative intent. There is no reason to suppose the judges and administrators believe this, nor did "their" argument above suppose it. Thus there is no good reason to believe that their behavior is either capricious or irresponsible until it is seen to be so in the light of a model plausibly supposed to be their model of the *minimal* conditions for the existence of legislative intent.

Of course, it may not be necessary to move immediately to searching for such a weaker model. Instead we may attempt to uphold the majority model, but restrict the scope of its legitimate application. The conventional move by commentators is to reject appeals to legislative intentions in favor of appeals to legislative purposes.[52] For these commentators, appeals to the former are appeals to the aims of the *details* of statutes, whereas appeals to the latter are appeals to the much more highly generalized purposes behind the statutes, taken as wholes.[53]

The motive behind such a move is obvious. It is an attempt to show that judicial and administrative practices do support the majority model of legislative intent if the applicability of the model is restricted to the more highly general intentions of the legislators.[54] The argument is that, in view of modern legislative processes, coincident purposes among the legislators regarding the highly general aims of a statute are more likely than coincident purposes regarding the specific aims of portions of the statute. Thus, special investigations of each legislator in the majority relative to such more "general" purposes are not needed.[55]

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52. This is characteristic of the writers cited *supra* notes 4-7.

53. See, *e.g.*, Corry, *Administrative Law and the Interpretation of Statutes*, 1 U. TORONTO L.J. 286, 290-92 (1936):

> Even the majority who vote for complex legislation do not have any common intention *as to its detailed provisions.* Though the intention of the legislature is a fiction, the purpose or object of the legislation is very real. *No enactment is ever passed for the sake of its details; it is passed in an attempt to realize a social purpose.* It is what is variously called the aim and object of the enactment, the spirit of the legislation, the mischief and the remedy. (Emphasis added.)

It is not always clear when a commentator is in fact making this move. Talk about the (general) purposes of the statute sometimes seems to refer to what the statute was designed to achieve and sometimes to the purposes interpreters can find for the statute. See Radin, *supra* note 7, at 422-23, and 406, 408, 411, and 419.

54. Witherspoon in fact extends this generality to consideration, not merely of specific aims vis-à-vis a particular statute, but also to whole programs of statute-making, and even to the aims of the legislative process itself, as seen in the light of the traditional functions of legislatures. See Witherspoon, *supra* note 12, at 758, 795-805, 831-32.

55. Another argument sometimes made in support of the restriction is that highly general aims are more important to the legislators themselves than specific aims. *Cf.* Witherspoon, *supra* note 12, at 790, 812, 827. See also HART & SACKS, *op. cit. supra* note 44,

Is it a valid presumption that consensus among the legislators on various purposes of a statute is more likely in proportion to the generality of the purposes? A distinction must be drawn between a purpose that a legislator actually has, and a purpose that he is aware of as one he is supposed to have or is presumed to have. For, as one considers purposes of greater and greater generality, it becomes more and more likely—not so much that the legislators share those purposes—but rather that they are aware of them as purposes that others have, or as purposes that they themselves are presumed to have. Witherspoon's example of such a general "purpose" is:

> To have the statutory formula so administered as to avoid specific procedural or substantive evils collateral to the main purposes of the statute: *e.g.*, undue federal intrusion into matters normally committed to resolution by state authority.[56]

It is easy to imagine a legislator knowing that he is supposed or presumed to have this purpose or that others have it, but it is also easy to imagine him not having it—even though he votes for the legislation in question. Some commentators, realizing that more legislators are likely to be *aware* of such purposes than are aware of the specific purposes of the details of the legislation in question, have either (i) too facilely assumed that being aware of the purpose is equivalent to having it, or (ii) too facilely assumed that silence in the face of knowledge that one may possibly be presumed to share a certain purpose is a good sign that one actually does share the purpose. In fact, there seems little reason to believe that the generality of the purpose alone much increases the confidence with which we can say that the voting majority has it.

It is not much easier to learn about the general purposes of legislators than to learn about the specific intentions of legislators. Thus, even if we look only at general purposes, current judicial and administrative practices are insufficient to support the majority model. We must search for another model of legislative intent which comports more closely with judicial and administrative behavior.

2. *The Agency Model.* It is possible that judges and administrators use an agency model of legislative intent. This model recognizes that legislatures delegate certain responsibilities (such as filling in the

at 1285, where the authors say that "the probative force of materials from the internal legislative history of a statute varies in proportion to the *generality* of its bearing upon the purpose of the statute or provision in question." (Emphasis added.) They are here seemingly appealing to both of the above considerations.

56. Witherspoon, *supra* note 12, at 799-800.

statutory details) to various persons (legislative draftsmen, committee chairmen, judges, administrators), and that this may justify appealing to the intentions of these persons as the intentions of the legislature regarding the aims of statutes or the details thereof.

Few commentators have explicitly appealed to the agency model, but several have touched on it. Driedger appears to identify the intention of the legislature with the intentions of the draftsmen. The competent draftsman

> has in his mind a complete legislative scheme and he attempts to give expression to that scheme in a logical and orderly manner; every provision in the statute must fit into that scheme, and the scheme is as complete as he can conceive it.
> It is this legislative scheme that should be regarded as the purpose, object, intent, spirit, of the Act.[57]

The following remark by Judge Learned Hand suggests identifying the intentions of the legislature with the intentions of legislative committees. He says:

> [Courts] recognize that while members deliberately express their personal position upon the general purposes of the legislation, as to the details of its articulation they accept the work of the committees; so much they delegate because legislation could not go on in any other way.[58]

A remark by de Sloovère, taken in isolation, suggests turning in quite a different direction—*viz.*, to the interpreter, or a least to a class of interpreters. He says:

> The only legislative intention, whenever the statute is not plain and explicit, is to authorize the courts to attribute a meaning to a statute within the limitations prescribed by the text and by the context. . . . In other words, a single meaning which the text will reasonably bear must, if genuine, be considered not as the conclusion which the legislature would have arrived at, *but one which the legislature by the text has authorized the courts to find.*[59]

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57. DRIEDGER, *op. cit. supra* note 16, at 161. See also Brunckcn, *supra* note 1, at 130.

58. SEC v. Collier, 76 F.2d 939, 941 (2d Cir. 1935). At least one commentator agrees that Judge Hand's statement here implies agency. See Johnstone, *supra* note 3, at 14.

59. de Sloovère, *Preliminary Questions in Statutory Interpretation*, 9 N.Y.U.L.Q. REV. 407, 415 (1932). (Emphasis added.) See also Curtis, *supra* note 45, at 425; and, in comment on Curtis' view, Clark, *Special Problems in Drafting and Interpreting Procedural Codes and Rules*, 3 VAND. L. REV. 493, 494-95, 503, 506 (1950). But de Sloovère clearly disclaims that the result of such authorization accords with any supposed legislative intention.

These remarks suggest that the legislature delegates certain responsibilities to other persons in connection with statutes, and in doing so, the legislature exhibits its intention to rely on the judgment and discretion of these persons concerning how to achieve what the legislature wants the statute to achieve. Consequently, the judgment of these persons, having been authorized by the legislature, may stand for the judgment of the legislature. These persons now have somewhat, if not actually, the status of agents of the legislature.[60] Thus, our discovery of what these persons intended in attempting to carry out the assignment of the legislature (*e.g.*, to draft a bill that would, in their judgment, achieve what the legislature wanted to achieve; to interpret the language of the bill so as, in their judgment, to achieve what the legislature wanted to achieve) is a discovery of intentions that the legislature stood behind, wished us to attend to, wished us to regard as authoritative as their own—indeed, wished us to regard *as* their own. These intentions may therefore be taken as, and in fact are, the intentions of the legislature.

The agency model *would* render rational the present "investigations" of judges and administrators into legislative intent, and it would do this without reliance on so many presumptions about the significance of the silence of individual legislators. Investigations of the intentions of "agents" would be sufficient to establish (because they would be equivalent to) the intentions of the legislature. However, the agency model is extremely perilous. It not only requires us to consider whether any of its variations are persuasively similar to typical agency situations, but it confronts us with difficult problems concerning agency itself and in particular concerning the reasonableness of identifying the will of the agent with the will of his principal. Consider the following:

(a) If the legislature is to be thought of as the principal, we presumably would need to know how to identify the actions and intentions of this principal. But, what model of the *latter* are we to use? We would need to feel at home with some *other* model of legislative intention and purpose before we could get on with establishing the plausibility of this new model. Presumably, this earlier model would be the majority model. But the adequacy of this model has not yet been decisively established.

60. "An agent . . . is one who acts as a conduit pipe through which legal relations flow from his principal to another. Agency is created by a juristic act by which one person (the principal) gives to another (the agent) the power to do something for *and in the name of* the principal so as to bind the latter directly." PATON, *op. cit. supra* note 31, at 285. (Emphasis added.)

(b) Even within the traditions of agency the proposal that the actions and judgment of an agent be taken for the actions and judgment of his principal is open to charges of fictionalizing every bit as severe as the initial charges concerning the intentions of legislatures (and by way of them, concerning the nature of corporate personalities).[61] For example, as with the initial controversy, there would be difficulties about whether analogies sufficiently strong to support a claim of identity could be found between the relationship of a principal to his own acts and his relationship to the acts of his agent.[62] Also there will be a worry similar to our earlier worry about the *explicitness* of the legal rules supporting the claims made—that is, a worry about the character of the "juristic act" by which a person designates someone as his agent, and about the degree of explicitness needed in such a "bestowal" of power.[63]

(c) Finally, and closely connected with this last point, each variation of the agency-model—delegation to committee, to courts, etc.—would have to be examined separately in order to discover the justifiability of saying that such a specific "bestowal" of power had actually been made by the legislature.

The strongest case for the bestowal of such power could surely be made in the case of legislative reliance upon draftsmen and committee chairmen. In view of the realities of legislative proceedings, it is certainly plausible to say that legislatures go very far in relying on the judgment and discretion of such persons.[64] When it comes to the interpreters of statutes such as judges and administrators, the claim that legislatures have bestowed such power seems highly dubious. Hagerstrom, for example, gives such a claim short shrift. He says:

> Such a general authorization cannot usually be shown to exist. It is a mere fiction motivated by desire to defend the will-theory, and it may be compared with similarly motived fictions concerning customary law as the general will.[65]

It should be noted, too, that Hagerstrom is here talking about a well-hedged and limited authorization.

61. *Cf.* HOLMES, COLLECTED LEGAL PAPERS 49 (1952).

62. *Cf.* HOLMES, *op. cit. supra* note 61, at 52-53, where he is patently exploring precisely this.

63. *Cf.* PATON, *op. cit. supra* note 31, at 287.

64. *Cf.* Witherspoon, *Administrative Discretion to Determine Statutory Meaning: "The Low Road,"* 38 TEXAS L. REV. 392, 430 (1959). It should be noted, however, that the work of draftsmen and committee chairmen has no legal effect until endorsed by the legislative. This is a striking *disanalogy* with the customary situation in agency.

65. HAGERSTROM, *op. cit. supra* note 19, at 93.

One might counter, however, by claiming that the authorization need not be explicit. In the law of agency, after all, the authorization is not always explicit either—as in instances of so-called "agency of necessity."[66] It would surely be a matter of "necessity" that the best judgment of judges and administrators be relied upon by legislatures. But this argument appears to go too far. We would not want in any wholesale way to hold legislatures responsible for what judges and administrators make out of statutes.

So much, then, for various models of legislative intent and for the justifiability of *de novo* introduction of the use of such models. We have seen that one strongly justified model of such intentions (the majority model) finds little serious support in current judicial and administrative investigations of the intentions of legislatures. We have also seen that the model fitting these investigations best (the agency model) is also the most difficult to justify. But, while the arguments on behalf of either model cannot be decisive, neither are they negligible. In the end our use of either or both of the models may depend simply upon how many ragged edges we are willing to tolerate in the conceptual framework we use to approach legal problems; or, alternatively, our use may depend, as will be suggested below, on how far we are willing to go in developing our legal institutions in such a way as to eliminate these ragged edges.

G. *The Significance of Model-Entrenchment*

Our exploration of the justifiability of talk about legislative intentions cannot stop here. The "realism" of such talk must be examined not only from the standpoint of the reasonableness of *introducing* such talk in light of our present institutions and practices; it must also be examined from the standpoint of how the reasonableness of such talk is supported by the fact that it is already a well-established part of the legal environment. That is, one should consider whether the established use of *references* to legislative intent does not itself produce conditions under which the references become more reasonable as the practice of making them becomes entrenched.

Quite apart from any consideration of whether starting the practice was a good idea in the first place, once it *has* been started it provides part of the institutional background against which legislators recognize themselves to be acting when proposing, investigating, discussing, and

66. See PATON, *op. cit. supra* note 31, at 287.

voting for bills. For example, all legislators now understand that views of the intentions of the legislature may well be formed in the light of certain standard presumptions (*e.g.*, that there is no intent to interfere with the common law unless explicitly stated) and "investigations" (*e.g.*, of debates and committee reports on the bill). If the legislators have a capacity to contribute to the materials and to rebut the presumptions they know will be used by judges and administrators as indicia of the intentions of the legislature, their behavior will influence what the intentions of the legislature can reasonably be said to be.

At present, judicial and administrative uses of materials and presumptions are not always clear or predictable enough to provide a guide for the legislators. But one *can* describe circumstances in which the picture would be much clearer. Courts and administrators could establish much greater regularity in their use of preparatory materials and of "presumptions" concerning legislative intent—a regularity sufficient to enable trained persons to predict with reasonable accuracy what the outcomes of these uses would be in specific cases.[67] Furthermore, legislatures could control the issuing of preparatory materials with a view to their use in just such ways by judges and administrators. In such circumstances, judicial and administrative investigations of the "intentions of the legislature" would surely look more realistic and reasonable than they do today. Even today, however, circumstances provide *some* reason, although perhaps not *enough* reason, to say that realistic references to legislative intent can be made. Even now these references are made in an institutional environment which to some extent sustains their reasonableness.[68]

67. *Cf.* Horack, *Cooperative Action for Improved Statutory Interpretation*, 3 VAND. L. REV. 382, 387 (1950); Mayo, *The Interpretation of Statutes*, 29 AUSTL. L.J. 204 (1955); Jackson, *supra* note 23, at 537-38. And, for an extreme view, see Silving, *A Plea for a Law of Interpretation*, 98 U. PA. L. REV. 499, 512 (1950).

68. Notice in particular how present practices strengthen the temptation of all participants to treat legislatures as persons. When attempting to discover the intentions of a person *vis-à-vis* an action of his, we would think it helpful to be privy to his deliberations (if any) on whether to engage in that action. On analogy, when attempting to discover the intentions of a legislature *vis-à-vis* a statute, we obviously think it helpful to be privy to *its* deliberations on whether to enact the statute. Clearly, insofar as judges and administrators appeal to proceedings on the floor of the house, they are appealing to the deliberations of the legislature (as well as to the deliberations of the legislators). This is just what one would do, if he could, when attempting to learn more about the intentions of any creature. Furthermore, insofar as the investigator thinks that being privy to such deliberations would be helpful, it is not because he supposes that the picture gained will be clear, unequivocal and decisive. Deliberations of individuals on important acts may well be rehearsals of pros and cons quite as indefinite in character as the proceedings of many legislative deliberations.

CONCLUSIONS

We have proposed several models of legislative intent and have examined (1) whether judges and administrators actually could be regarded as taking any of them seriously, and (2) whether they would be justified in taking any of them seriously. As predicted, the results of this examination are not conclusive. No one model of legislative intent is either so strongly or so weakly supported as to make its use either unproblematic or absurd. This is not surprising, given that the controversy about the intentions of legislatures has gone on for so long. But it is an important result to reach and to substantiate. We too often continue to demand clear-cut and decisive answers in the face of facts that simply will not support such answers, thus perpetuating controversy (because there always *is* something to be said for the other side) and rendering ourselves ineffective in dealing with the matters at hand. Our detailed discussion of the controversy over the existence and discoverability of legislative intent enables us to understand, for example, the inappropriateness of treating it only as a straight-forward controversy over facts. Instead of continuing to ask only—*Are* legislatures capable of intent?—we should also shift to such questions as the following:

(a) Are there any policy considerations sufficient to justify continuance of references to legislative intent in view of the difficulties exposed? What, after all, *hangs* on whether the references are continued? This is essentially an inquiry into the *relevance* of appeals to legislative intent—an inquiry that has not been embarked upon here. But it is an inquiry given a new twist by what we have shown. The question is no longer simply: (i) Supposing that there is a legislative intent, what hangs on appealing to it? It is rather: (ii) Does enough hang on such appeals to make their continuance worthwhile even in the face of the difficulties exposed?

But, we may also ask: (b) Is it worth our while in terms of the ideological and practical importance of such appeals, to seek institutional changes strengthening the analogies between these appeals and appeals to intentions elsewhere in law and in life generally (this being the same for us as increasing the rationality of the appeals)? It is important to notice that the difficulties exposed above are not unavoidable facts of life; legislatures and the institutional environments in which they operate are, in a sense, our creatures and can be altered. Depending upon the model of legislative intent one has in mind (and I should emphasize that only the most obvious ones have been examined here), one may seek to bring the appeals closer to the conditions under which

we attribute intentions to corporations, to principals via the intentions of their agents, or, above all, to individual men. The institutional changes accomplishing this could amount to such diverse measures as the fixing of formal limits on what may count as good evidence of legislative intent on the one hand, and alterations in the operating procedures of legislatures on the other.