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Articles

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Statutory Interpretation: An Outline of Method

I. Introduction

We are moving ever more surely and deeply these days into an age of legislation.

In the past, judge-made law was the dominant feature, as it was also the matrix, the fundamental and pervasive stuff, of our legal system. Statutes were scattered islands in the ocean of common law. For some time they were regarded by the courts as peculiar incursions on the system, troubling the harmony of caselaw patterns. A legislative enactment was seen, in the words of the late Chief Justice Stone, as an "alien intruder in the house of the common law."[1]

But change has come and is currently at work at an astonishing pace. The islands of legislation have become much more numerous; they have become archipelagoes in some areas. The islands have grown in size; some are almost continents. What once seemed a peculiar incursion has become normal and pervasive. Statutes can no longer be regarded as intruders. As more and more common law is displaced, overlaid or supplemented, the system is becoming legislative in character.

The operation of our legislatures shows what has been happening. Like the legendary mill that is forever grinding salt at the bottom of the sea, our legislatures have been regularly turning out a substantial volume of new legislation to take its place in the law. For example, in the United States during the two-year life of the 93d Congress (1973-1974), there were introduced some 23,396 bills and joint resolutions, of which 687 were enacted.[2] In the New York legislature, 15,193 bills were introduced and 1,214 were enacted in 1971, and 7,777 bills were introduced and 1016 enacted in 1972;

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1. H. Stone, *The Common Law in the United States* (1936), 50 Harv. L. Rev. 4 at 15.

2. 120 Cong. Rec. D. 1427, D 1429 (daily ed. January 10, 1975).

and this is only one of fifty states all of which are adopting new statutes in great numbers.[3] In Canada also the legislative machines are producing steadily.

Note that the process of legislating feeds upon itself. One statute breeds more statutes. When a legislature passes a law it assumes a new burden of responsibility (the more detailed the law the greater the burden) for the updating and development of that law as policies evolve or circumstances change or flaws are revealed. "Once begin the dance of legislation," said Woodrow Wilson, "and you must struggle through its mazes as best you can to its breathless end — if any end there be."[4]

The great growth in our statute law which results from all this activity is of course reflected in the work of the courts. Some thirty years ago, Mr. Justice Frankfurter reported that in the Supreme Court of the United States the cases not resting on statutes were "reduced almost to zero."[5] A check of one State Supreme Court in 1951-1953 showed the proportion of "common law cases uninfluenced by statute" to be down to 38%.[6] A count of recent cases in the New York Court of Appeals shows about 60% turning directly on statutes, with quite a few of the remaining cases involving or referring to legislation.

While all this shows in some measure what is happening, it is the way in which we are moving into this legislative age that is of concern here. Compare with our legislative evolution the major effort undertaken to prepare the German Civil Code, where an overall view was adopted and a comprehensive enactment developed with conscious attention to long-term viability and flexibility and to the division of labour between courts and legislators.[7] By contrast the change in our Anglo-American system

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3. Council of State Governments, *The Book of the States 1974-75* (Lexington, Ky.: Council of State Governments, 1974) at 84-85. The table shows that in the two year period 1971-72 five states enacted more than 2000 statutes each, ten states enacted 1000 to 2000 statutes each, nineteen states enacted 500 to 1000 each, sixteen states enacted between 200 and 500 each.

4. W. Wilson, *Congressional Government* (Meridian Books ed., 1956) at 195. This work was originally published in 1885.

5. F. Frankfurter, *Some Reflections on the Reading of Statutes* (1947), 47 Colum. L. Rev. 527 at 527.

6. A. Menard, *Legislation and the Colorado Supreme Court — Techniques of Statutory Construction* (1954), 26 Rocky Mt. L. Rev. 425 at 425-26.

7. See, *e.g.*, *A General Survey of Continental Legal History* (Boston: Little Brown & Co., 1912) at 446-451; E. Rabel, *Private Laws of Western Civilization* (1950), 10 La. L.R. 265.

has tended to be almost casual, a piecemeal process that goes on act by act. Until recently we have been backing into our legislative age, one statute at a time, with our eyes firmly fixed on the past, on the way we have always done things. We have been building up the legislative part of our law in many instances through relatively narrow, more or less detailed responses to particular problems, without taking a general look at what it means to enter upon a legislative system and how we should handle the problems this poses. Such a mode of proceeding could well result, *inter alia*, in a system difficult to manage because of the legislative burden and insufficiently flexible for sound administration and development.

Surely, to cope effectively with a legislative system, we must come to it face forward. We must reexamine many of the ways in which we operate and make such changes as may be appropriate for the needs of the new era. Many aspects of our making and maintenance of statutes and of our application of statutes will require to be restudied. Let us note some of these to set our main topic in perspective.

For example, our drafting techniques should be reviewed with an eye toward, among other things, the more effective use of generality as a tool for delegating law development to courts and administrators and gaining long-term flexibility.[8] Civil law techniques and experience can be instructive on this subject. We need also further study by draftsmen, legislators, legal scholars, and social scientists of our means of making laws effective, *i.e.*, sanctions.[9] And our machinery for the reform and revision of statute law demands attention as the statutes multiply and the responsibility of the legislature to keep them viable increases. Here the pioneering efforts of Canada's Law Reform Commission and the labours of its provincial commissions, as well as the work of the Law Commission and the Scottish Law Commission in the United Kingdom, furnish invaluable lessons and examples.[10] Again, in the

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8. H. Hart & A. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (tentative ed. Cambridge, 1958) at 129, 720, 798-808.

9. See, *e.g.*, H. Read, J. MacDonald & J. Fordham, *Cases and Other Materials on Legislation* (2d ed. Brooklyn: Foundation Press, Inc., 1959) c. 7.

10. On the organization and operation of the Law Reform Commission of Canada, see, *e.g.*, M. Friedland, *The Work of the Law Reform Commission of Canada* (1972), 6 L.S.U.C. Gaz. 58 and J. Barnes, *The Law Reform Commission of Canada* (1975), 2 Dalhousie L.J. 62. Professor Barnes, discussing the English and Canadian scene, observes (at 67): "Today we are beyond the point of having to ask why we need permanent law reform agencies. We are now at the stage of

United States, at least, we must look to our legislative processes to see what can be done to make them more effective in dealing with needed law reform and law revision and codification. Finally, there is the vital matter of statutory interpretation. In this connection, observe that, as statutes increase in number and scope, there will of course be a greater incidence of conflicts to be adjusted between one statute and another, of related statutes needing to be harmonized, and of opportunities to make creative use of a statute's policy as a premise for judicial reasoning in cases outside the statute. All these developments deserve careful study. But the most urgent task facing us in this area — and it is this subject to which the rest of this paper is devoted — is the development of a sound general method of statutory interpretation.

If we are embarked, as argued above, upon an age of legislation, we must anticipate that the interpretation of statutes will account for a very large and steadily growing part of the work of courts and lawyers.[11] The extent of the role interpretation already plays in the courts was suggested earlier. How well the courts discharge that role has a great effect on the nature of the task of legislative drafting, on the burdens and business of the legislature, and on the effectiveness of legislative law and of the legal system as a whole. In such circumstances, it is plainly imperative that we look hard at our existing interpretative rules and approaches, and at their adequacy, in preparation for the new age.

Looking at these rules and approaches today one finds a maze of conflicting, mutually inconsistent prescriptions, a veritable jungle. In the United States, for example, there are still vestiges of the plain meaning approach alongside the dominant legislative intent approach. Unresolved problems persist about the management of

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considering how a law reform body should work in practice and what should be its philosophy and function". On the Canadian provincial law reform commissions, see, *e.g.*, R. Gosse, *Canadian Law Reform Agencies* (1970), 1 Can. B. Ass'n J. 1; W. Bowker, *Alberta's Institute of Law Research and Reform* (1968), 11 Can. B.J. 341, and L. Skene, *The Nova Scotia Law Reform Advisory Commission: An Early Appraisal* (1975), 2 Dalhousie L.J. 201. On the British Law Commissions, see, *e.g.*, L. Scarman, *Law Reform: The New Pattern* (London: Routledge and Kegan, 1968); L. Scarman, *Law Reform — Lessons from English Experience* (1968-69), 3:1 Man. L.J. 47; L.C.B. Gower, *Reflections on Law Reform* (1973), 23 U. Toronto L.J. 257; and J. Farrar, *Law Reform and the Law Commission* (London: Sweet & Maxwell, 1974).

11. The Law Commission and the Scottish Law Commission, *The Interpretation of Statutes* (Law Com. No. 21) (Scot. Law Coms. No. 11) (London: Her Majesty's Stationery Office, 1969) at 3 [hereinafter cited as "Law Commission Report"].

the intent approach. A sizable body of traditional maxims and presumptions of doubtful weight and incidence still haunts us. It was said harshly in 1958, and there is arguably truth in the statement today, that "American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation."[12] In the United Kingdom and Canada the literal rule, the golden rule and the mischief rule still coexist and vie for recognition in the cases although they may be argued to represent inconsistent positions.[13] And again a body of questionable maxims and presumptions is available to supplement these approaches. In Canada and the United Kingdom, as in the United States, the existing state of the law of interpretation has been roundly criticized.[14]

A way needs to be charted through this jungle. At the least, it seems important to make the effort in this age and the effort seems an undertaking appropriate to the energies and capacities of law school faculties, situated as they are in a position to be heard by those on the bench and at the bar and in a position to influence those who will make and administer the law hereafter.[15] With these things in mind, this paper undertakes to outline a method for the interpretation of statutes, considering what the courts have done and what some scholars have said about it. The aim is to provide a sound, workable approach to a difficult, demanding job. If, within the compass of this paper it is not possible to deal exhaustively with all aspects of this complex, ramified subject, we will try nonetheless to deal with its most important phases.

II. An Approach to Statutory Interpretation

Where does one properly begin the task and the method of

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12. Hart & Sacks, *supra*, note 8 at 1201.
13. Law Commission Report, *supra*, note 11 at 14 *ff.* Compare E. Driedger, *The Construction of Statutes* (Toronto: Butterworths, 1974) at 2, 67, 81-82 arguing from the cases that today the three rules named in the text have been fused into one principle or approach.
14. As to Canada, see *e.g.*, J. Willis, *Statute Interpretation in a Nutshell* (1938), 16 Can. B. Rev. 1 and J. Corry, *Administrative Law and the Interpretation of Statutes* (1936), 1 U. Toronto L.J. 286. As to England, see Law Commission Report, *supra*, note 11 at 9 for criticisms by Allen, Lord Evershed, and Mr. Justice Frankfurter and at 17 *ff.* for criticisms by the Commission itself.
15. Two recent treatises focus new and welcome attention on statutory interpretation: Driedger, *supra*, note 13, and R. Dickerson, *The Interpretation and Application of Statutes* (Boston: Little, Brown & Co., 1975).

interpretation of a statute? It may appear pedantic but let us say anyway, at the outset, that one begins with mastering the facts and reading the applicable statute as a whole and isolating the terms which are in issue in relation to the facts. The necessity for close reading of the words of a statute is basic. It is after all the obligation to deal with an official unvarying text, promulgated by a superior lawmaking authority, that gives statutory interpretation its special character. Case-minded students and lawyers often find it difficult to adjust themselves to the discipline that results from a fixed text.[16] Judge Friendly reports that Felix Frankfurter when a Professor of Law had a threefold injunction to his students: (1) read the statute, (2) Read the Statute, (3)READ THE STATUTE![17] That injunction is tied to Mr. Justice Frankfurter's trenchant observation that interpretation is "confined by" if not "confined to" the words of the statute[18] — a notion to which we will recur.

Reading a statute is, however, a task with its own special discipline. Certain premises and aims which are fundamental to a sound method of interpretation must be kept in mind from the beginning. We will speak of these directly, but before we turn to them let us digress a moment to speak of an approach to the reading of statutes that is excluded from the method here outlined. That is the approach of the literal rule or, as we call it in the United States, the plain meaning rule. Perhaps we can agree now, at last, to eliminate this approach once and for all from the methods of statutory construction.

1. Plain Meaning: The Literal Rule

Most of you will recall the terms of the literal rule. "If the language of a statute be plain, admitting of only one meaning," says Lord Atkinson in *Vacher & Sons, Ltd.* v. *London Society of Compositors,*[19] "the legislature must be taken to have meant and intended what it has plainly expressed, and whatever it has in clear terms enacted must be enforced though it should lead to absurd or mischievous results." He goes on to suggest that the language of the provision being plain, the judges are "not concerned with the question whether the policy . . . is wise or unwise or whether it

16. E. Griswold, *Appellate Advocacy* (1971), 26 Record 342 at 346.
17. H. Friendly, *Benchmarks* (Chicago: U. of Chicago Press, 1967) at 202.
18. Frankfurter, *supra,* note 5 at 543.
19. [1913] A.C. 107 (H.L.).

leads to consequences just or unjust, beneficial or mischievous." The golden rule should be mentioned here also. Although the Law Commission Report suggests it is really a form of the mischief rule,[20] it seems much more closely tied to the literal rule in its terms. It too speaks in terms of plain meaning, though it expressly allows the courts to depart from the plain meaning under some circumstances if to follow that meaning would produce a result so absurd, or so inconsistent, as to convince the court that the intention could not have been to use the words in their plain signification.[21]

In the United States, a typical statement of the plain meaning rule appears in *Caminetti* v. *United States*[22] where Mr. Justice Day said "where the language is plain and admits of no more than one meaning, the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion." The uncertain possibility of an exception to the plain meaning rule in the event its application leads to "absurd or wholly impractical results" is also referred to in the American cases.[23]

The Report of the Law Commission and Scottish Law Commission suggests that while some modification appears to be under way the literal rule is alive and still a factor in decision-making in the United Kingdom.[24] It is alive too, it seems, in Canada.[25] A major change of attitude has, however, overtaken the plain meaning rule in the United States. After a long period in which the plain meaning rule coexisted with rules based on legislative intent and the use of legislative history, the United States

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20. Law Commission Report, *supra,* note 11 at 19.

21. See the opinion of Lord Blackburn in *River Wear Commissioners* v. *Adamson,* [1877] 2 A.C. 743 at 764-5. In Driedger, *supra,* note 13, c. 2, it is argued that the cases show that departures from the plain meaning under the "golden rule" are justified only when according that meaning produces some disharmony in relation to the rest of the statute or to related statutes; such departures are not justified, it is said, when the literal meaning merely produces consequences thought by the court to be absurd.

22. (1917), 242 U.S. 470 at 485.

23. *Id.* at 490.

24. Law Commission Report, *supra,* note 11 at 5.

25. See, *e.g., R.* v. *Maroney,* [1975] 2 S.C.R. 306; 18 C.C.C. (2d) 257; 27 C.R.N.S. 185; *Tupper* v. *The Queen,* [1967] S.C.R. 289; 63 D.L.R. (2d) 289; [1968] 1 C.C.C. 253; *R.* v. *Mojelski* (1968), 65 W.W.R. 565 (Sask. C.A.). Compare, *Reference Re Certain Titles to Land in Ontario,* [1973] 2 O.R. 613; 35 D.L.R. (3d) 10 (C.A.). Compare also, Driedger, *supra,* note 13 at 61, concluding, after consideration of English and Canadian cases, that the literal rule has been modified, in that "today, the words of the Act are always to be read in the light of the object of the Act".

Supreme Court in 1940 in *United States* v. *American Trucking Associations*[26] used forceful language to repudiate the plain meaning rule as a rule excluding resort to sources of interpretive aid beyond the words of the statute. The Court stated: "When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination'."[27] Since that time, the Supreme Court has seemed to mean what it said so forcefully. Although references to plain meaning or literal meaning appear from time to time in the cases,[28] they are not used by the court to support exclusion from judicial consideration of relevant statutory or non-statutory materials bearing on the intent or purpose of the measure in question. And in 1974 in *Cass* v. *United States*[29] the Supreme Court, when urged anew by a litigant to apply the old exclusionary plain meaning rule, reaffirmed in express terms the language of the *American Trucking* case quoted earlier. But notwithstanding all this, the rule dies hard, if it dies at all. A recent study by Professor Arthur W. Murphy shows that, in the lower federal courts, for example, there has been resort to the rule from time to time, even in its old exclusionary form, in apparent disregard of the Supreme Court's position and practice.[30] On June 1, 1976 the Supreme Court, citing *American Trucking* and *Cass,* expressly ruled that it was error for a Court of Appeals to have bypassed legislative history on the grounds of a

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26. (1940), 310 U.S. 534.
27. *Id.* at 544.
28. See, *e.g. United States* v. *Public Utilities Comm'n of California* (1953), 345 U.S. 295; *Ex parte Collett* (1949), 337 U.S. 55; and *United States, Trustee* v. *Oregon* (1961), 366 U.S. 643. For a recent case referring to "plain meaning" see, *e.g., United States* v. *American Building Maintenance Industries* (1975), 422 U.S. 271 at 281.
29. (1974), 417 U.S. 72. One could argue that the Court's remarks in this case respecting the plain meaning rule were *dictum,* since it expressly noted that "the question is sufficiently doubtful to warrant our resort to extrinsic aids".
30. A. W. Murphy, *Old Maxims Never Die: The "Plain-Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts* (1975), 75 Colum. L. Rev. 1299 at 1304-05. See, *e.g. Easson* v. *Commissioner of Internal Revenue* (1961), 294 F.2d 653 (9th Cir.); *Gilbert* v. *Commissioner of Internal Revenue* (1957), 241 F.2d 491 (9th Cir.); *Globe Seaways, Inc.* v. *Panama Canal Co.* (1975), 509 F.2d 969 (5th Cir.); *Mandel Bros.* v. *Federal Trade Commission* (1958), 254 F.2d 18 (7th Cir.); *American Community Builders, Inc.* v. *Commissioner of Internal Revenue* (1962), 301 F.2d 7 (7th Cir.); and *Heilman* v. *Levi* (1975), 391 F. Supp. 1106 (E.D. Wisc.).

claimed "'plain meaning".[30a]

There are many reasons why the literal or plain meaning approach should be abandoned, along with the golden rule that builds on it. Not least is the fact that the literal rule runs counter to the findings of students of the symbolic aspects of language. Pitched as it is in terms of *the* plain meaning of statutory words, it assumes that words may have a single necessary meaning independent of their full context, without regard to how those words were used. This is dangerous and unwise.[31] At root, the literal approach puts the wrong question. The question in human interchanges is not what the words mean but what the user of the words meant by them. Given the inexactness and imperfection of words as symbols in a world of endlessly varied and shifting facts, to put the right question is crucial. Words are means not ends.[32] They are vehicles for the transfer of thought from one human agency to another. A statute, made up of these words, these vehicles, these means, is in significant part a communication from the legislature to the courts and other addressees. If the communication is to work well, the task must be in the first instance to ascertain not what the words as words mean abstractly or to the court or as a matter of common usage but what the legislature sought to convey when it employed them. We may decide later, when we have ascertained what was sought to be conveyed, that the words can not fairly carry the meaning intended but that is another issue, to be discussed later.

The need for asking the right question in interpretation is underlined when one reflects on the difficulties a statutory draftsmen faces when he must generalize with imperfect words in framing a statutory rule to deal with an uncertain future. Questions are bound to arise under any general direction, however well drafted — questions of coverage, of unexpressed qualifications and the like. Reliance on literal meaning is a wholly inadequate response to

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30a. *Train* v. *Colorado Public Interest Research Group, Inc.* (1976), 96 S. Ct. 1938.

31. C. Ogden & I. Richards, *The Meaning of Meaning* (8th ed. New York: Harcourt, Brace & Co., 1946). And see generally on this subject, H. W. Jones, *The Plain Meaning Rules and Extrinsic Aids in the Interpretation of Federal Statutes* (1939), 25 Wash. U.L.Q. 2. Mr. Justice Holmes remarked in *Towne* v. *Eisner* (1918), 245 U.S. 418 at 425, that "[a] word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used".

32. Note, *Re-evaluation of the Use of Legislative History in the Federal Courts* (1952), 52 Colum. L. Rev. 125 at 134.

the problems and efforts of the law-drafter and law-giver.[33] A century ago, Francis Lieber gave an eloquent illustration of the difficulties inherent in the giving of even relatively narrow directions.[34] Professor Lieber's illustration richly repays reading in its entirety, but for present purposes it will be enough to indicate that he puts the case of a housekeeper handing some money to a domestic and giving him the simple direction to "fetch some soup meat." As he points out, this comparatively uncomplicated order involves all manner of unstated assumptions, as for instance that the domestic is not to delay, is to go to the usual market, is to buy certain kinds of meat, is not to pay too much for the meat, is not to add anything disagreeable or injurious, and so forth. The addressee of a command, he shows, must always supply specifications drawn from the context and it is always necessary for the order-giver to rely on the addressee's common sense and good faith in doing so. To carry Professor Lieber's case a step further, suppose that our domestic comes to the market and finds — the hour being late — that there is only spoiled meat left in the stalls. If he followed the plain meaning rule, he would presumably "fetch the meat" anyway, even though it is inedible. Would you not as employer feel like dismissing such a domestic? He has failed to carry out the simplest obligation of a communication situation. He failed to ask about the purpose of the order, why the order was given — *i.e.*, to secure something to eat — and so he has made a useless expenditure for inedible provisions. The problem is the same with statutes as it is in such a case. A good faith, common sense effort to reconstruct the context and purpose is essential. Literal meaning is a wholly insufficient tool. As Judge Learned Hand said, "there is no surer way to misread any document than to read it literally."[35] And the paralyzing effect of literalness is well known to labour unions and used by them in so-called "by the book" strikes or in "working to rule." Yet, in the complex, demanding task of statutory interpretation, our courts persist in clinging to an approach which is clearly intolerable even in the simplest situations of non-statutory communication.

If the literal rule ignores the limits of language and the teachings

33. The literal rule breaks down, argues Professor Corry, in relation to general propositions: Corry, *supra*, note 14 at 301.
34. F. Lieber, *Legal and Political Hermeneutics* (3d ed. W. G. Hammond, 1880).
35. *Giuseppi* v. *Walling* (1944), 144 F.2d 608 (2d Cir.) at 624 (concurring opinion).

of semantics and assumes unattainable perfection in drafting,[36] it also conflicts with the fundamental principle of legislative supremacy. Curiously, it is argued by some scholars that deference to the legislature and the avoidance of judicial lawmaking are reasons for adopting the literal rule.[37] It is assumed in some of these cases that the only alternative is the exercise of an unwarranted discretion. But the risk is that the meaning which seems plain or ordinary to the deciding judge is not the one attached to the statute by its enactors. That seems clearly to have been the result in the *Caminetti* case cited earlier.[38] Why should the judge be permitted to impose his own reference or that of some hypothetical average person on statutory words instead of inquiring in the first instance as to the reference of the enactors? Does it not seem obvious that a way to minimize the risk of frustrating the legislative will is to pose the question which is keyed to the legislative will, the question as to what was meant or purposed by the legislators? The judge cannot ensure that his reading does not contradict some reasonable legislative reading of the words unless he canvasses the possibilities. In any case, to pose and pursue the question of legislative purpose is far from an exercise in uncontrolled discretion. Recalling our problem of the domestic and the "soup meat", and the nature of human communication, one can only conclude that the interests of the legislature are being ignored and signally disserved when its commands are taken literally.[39]

The argument is sometimes made for the literal rule that its application is necessary to assure certainty in the law.[40] Writing thirty-eight years ago from the Dalhousie Law School, Professor John Willis persuasively denied that the literal rule produces

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36. See the criticisms of the literal rule in Law Commission Report, *supra,* note 11 at 17-19.

37. E.R. Hopkins, *The Literal Canon and the Golden Rule* (1937), 15 Can. B. Rev. 689 at 696; Q. Johnstone, *An Evaluation of the Rules of Statutory Interpretation* (1954), 3 U. Kan. L. Rev. 1 at 13. Compare Corry, *supra,* note 14 at 312, where it is argued that the "supremacy of Parliament would not be shaken in any way if the courts should throw off the spell of literalness".

38. (1917), 242 U.S. 470.

39. Note that the criticisms of the literal rule apply to the golden rule insofar as the latter builds on plain meaning. The latter rule is salutary to the extent it permits results to be weighed by the court, but like the literal rule it rejects consideration of legislative policy and so is also inconsistent with legislative supremacy.

40. See, *e.g., George Van Camp & Sons* v. *American Can Co.* (1929), 278 U.S. 245 at 253, where Mr. Justice Sutherland argues that failure to follow the plain meaning would make a statute a "concealed trap for the unsuspecting".

certainty.[41] The obvious difficulties of deciding whether a statute is to be found ambiguous or unambiguous have been noted by other writers.[42] How is one to foretell rationally whether a given provision will strike a court as "plain"? Decisions arrived at by "plain meaning" may in fact confound expectations.[43] There are even instances where judges have found different "plain meanings" in the same statutory language.[44] Indeed, it has been suggested that the characterization of "plain" or "ambiguous" is used by courts as a device to achieve a result arrived at on some other basis, *i.e.*, as a screen for the imposition of judicial views.[45] Deciding cases on grounds of "plainness" also means deciding them without hard thought about underlying policies, without recourse to that reasoned consideration and discussion of the substantive aspects of the problem which alone can provide a base for the law to build on soundly and which alone permit rational prediction for the future. The discussion that characterizes plain meaning cases has been labeled as "sterile verbalism."[46] Recalling our domestic and his soup meat once more, one may ask whether certainty, or general expectations, really can be served by the application of the literal rule. Do not reasonable persons expect, should they not expect, that interpretation will be dominated not by literalism but by a weighing of purposes with good sense and good faith?[47]

Our task here is to outline a method, an approach, for the interpretation of legislation. So far, we have called for the reading of the statute and digressed to say what our approach is not. We

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41. Willis, *supra,* note 14 at 10.
42. See, *e.g.,* C. Nutting, *The Ambiguity of Unambiguous Statutes* (1940), 24 Minn. L. Rev. 509.
43. See, *e.g. Caminetti* v. *United States* (1917), 242 U.S. 470.
44. See, *e.g., Schwegmann Bros.* v. *Calvert Distillers Corp.* (1951), 341 U.S. 384; and *Ellerman Lines* v. *Murray,* [1931] A.C. 126 (H.L.).
45. Willis, *supra,* note 14 at 11; Jones, *supra,* note 31 at 18.
46. Hart & Sacks, *supra,* note 8 at 1265.
47. In reflecting on the literal rule, note should be taken of the position adopted in Driedger, *supra,* note 13. Professor Driedger here performs the heroic feat of combining the three arguably inconsistent rules, the literal, golden and mischief rules, with some modifications, into one approach which is described as "literal in total context". Whatever basis this composite approach may have in the cases, it seems of questionable value, given the arguments against the literal rule (text, *supra*), to preserve certain vestiges of literalism in the resulting hybrid — for example (a) requiring a difficult and pivotal determination as to whether or not "the words are clear and unambiguous" and (b) stressing the "grammatical and ordinary sense" of the words used when the question more appropriately is what sense was intended by the legislature as indicated by text and context.

have rejected the literal and golden rules with their dependence on "plain meaning". Let us turn now to what the approach is. Our discussion covers first the premises and aims of interpretation, then the subjects of specific intent, purpose, and policy, and, finally, the post-enactment aids, the maxims and presumptions.

2. Some Basic Premises

Before concrete steps are described for resolving statutory issues, it is important to define some assumptions or premises that establish a tone or direction and so condition what is to be done.

The first premise is the supremacy of the legislature. This premise provides our fundamental interpretive guideline. It is a constitutional tenet of our Anglo-American legal system that the elected representative legislature is supreme in lawmaking, in the shaping and declaring of major public policy. We have suggested that the literal or plain meaning approach is inconsistent with that tenet. It follows from that tenet that what the legislature has said and tried to do are of paramount importance in the interpretation of statutes. And this is the underpinning for the notion of legislative intent, of Parliamentary will.

The second premise has to do with the function of the court in interpretation. Here it is vital to repudiate any notion that the court's function is a mechanical one, that the court is a robot automatically applying all-sufficient legislative directions, that it is, as sometimes urged in connection with the literal rule, not concerned with why the legislature acted as it did or with the justice or injustice of the results contended for.[48] Such notions are wholly inadequate in light of what we have said about the difficulties of drafting and applying general laws, with imperfect words and with imperfect foresight, to cover endlessly diverse and changing facts for an indefinite future. If even our domestic seeking "soup meat" must ask why and use creative intelligence within the framework of his orders, how much more important is it that a court do so in the infinitely more complex and demanding task of construction that a statute may present. The basic character of courts as organs for the reasoned development and rationalizing of law has been eloquently described elsewhere and it is pertinent here to reemphasize that character.[49] As a second

48. For an example of the consequences of judicial failure to consider these vital questions, see *Johnson* v. *Southern Pac. Co.* (1902), 117 F. 462 (8th Cir.), *rev'd.* (1904), 196 U.S. 1.

49. Hart & Sacks, *supra,* note 8, especially 162-171.

premise, then, it is proposed that the court look upon itself, and act, as a kind of delegate or co-worker of the legislature. In this role, it should be seen as responsible for applying the statute in an intelligent, reasoned, sometimes even creative,[50] manner to the case before it so that — within the leeways provided by the statute's words and policies — it may make sense of that case and statute as a part of the whole body of law. For this purpose the legislature should be presumed in the absence of strong evidence to the contrary to be a reasonable body intending reasonable results. To propose a role for the court of the kind we have described is to call for no more than any policy maker should normally expect from one charged with applying his directives.

In relation to this second premise just described, recall Sir Frederick Pollock's remark in 1882 that the methods of the English courts in dealing with statutes "cannot well be accounted for except upon the theory that Parliament generally changes the law for the worse, and that the business of the judge is to keep the mischief of its interference within the narrowest possible bounds."[51] How much difficulty might have been avoided if the courts had seen themselves not as contestants or resisters of the Parliament but as delegates or co-workers, cooperating with the legislature in evolving just law for society within the framework of a statute and its purposes. The importance to interpretation of our second premise cannot be overestimated.

3. The Objective

With these two basic premises noted, it is necessary to speak next of the aim of interpretation as that will shape our method. The aim, as everyone knows, is generally described as the ascertaining and effectuating of the legislative intent — the will of Congress, the will of Parliament. The courts have often affirmed this formula,[52] which flows from the premise of legislative supremacy. It merits some attention.

Note that the concept of legislative intent has been much criticized. It has been labeled a "fiction"[53] and called

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50. See generally text, *infra*, at notes 89-98.
51. F. Pollock, *Essays in Jurisprudence and Ethics* (London: Macmillan & Co., 1882) at 85.
52. For a recent example, see *Philbrook* v. *Glodgett* (1975), 421 U.S. 707 at 713.
53. M. Radin, *Statutory Interpretation* (1930), 43 Harv. L. Rev. 863 at 869-70; J.

"beclouding."[54] "[A] composite body," it is said, "can hardly have a single intent."[55] Even if such an intent exists, it has been argued that it is undiscoverable and, if discoverable, irrelevant.[56] But these epithets and arguments are too extravagant. It may be granted that the concept of legislative intent is fictional if it is meant to suggest that all or most of the legislators voting for a statute share the same views of the detailed applications of the statute's provisions. But it seems probable that the majority legislators in voting at least agreed as to general purposes or assented to the purposes of others. The action of a composite body in enacting legislation is surely purposive. To deny this would be to deny the worth or validity of legislative functioning.[57] And it is not necessary to insist on unanimity of all or most members of the legislature or of its majority. It is practicable and realistic in relation to purposes and even to details of legislation that the views of those to whom the legislators delegate responsibility should be taken as standing for the views of the legislature.[58] Evidence is often available to show general purposes; the views of the responsible parties can often be traced. The premise of legislative supremacy supports the relevance of such material.

The concept of legislative intent draws an analogy between the will of a single person and the will of the body. It is acceptable if it is recognized that the analogy is rough and that "intent" must carry a special sense in its application to the group.[59] Beyond this the concept has the virtue of referring the court to a guide outside its own subjective judgment. It suggests a goal,[60] attainable to a degree, and calls for an interpretive attitude that acknowledges the

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Corry, *The Use of Legislative History in the Interpretation of Statutes* (1954), 32 Can. B. Rev. 624 at 625; Driedger, *supra,* note 13 at 82.

54. Frankfurter, *supra,* note 5 at 538.

55. Willis, *supra,* note 14 at 3. See also Corry, *supra,* note 14 at 290; Johnstone, *supra,* note 37 at 14; Driedger, *supra,* note 13 at 82.

56. Radin, *supra,* note 53 at 870-2.

57. Note, *supra,* note 32 at 126.

58. Corry, *supra,* note 53, argues that judicial reliance on the views of a few to stand for the many is judicial lawmaking. Compare Judge Hand's discussion in *Securities Exchange Commission* v. *Collier* (1935), 76 F.2d 939 and see J. Landis, *A Note on "Statutory Interpretation"* (1930), 43 Harv. L. Rev. 886 at 888-889 and H. Jones, *Extrinsic Aids in the Federal Courts* (1940), 25 Iowa L. Rev. 737 at 743-750.

59. Dickerson, *supra,* note 15 at 78-79.

60. A. Cox, *Judge Learned Hand and the Interpretation of Statutes* (1947), 60 Harv. L. Rev. 370 at 372.

role of the legislature. Some scholars prefer to abandon the concept of intent and to substitute an "objective" concept of legislative purpose so as to avoid the suggestions of subjective design thought to inhere in the term "intent."[61] In this latter view, purpose is to be elicited from the Act and its context, not from the minds of legislators. But intent is a concept which has historically been used and is still in use in the courts. It is viable if it is steadily recognized that intent must be related to the enacted words of the statute, that one must be on guard as to the attenuated sense of the term when foresight is limited or nonexistent, and that aside from judicial notice of pertinent social facts, it is generally to be established from the text and documented context. Whichever rubric is adopted — legislative intent or "objective" purpose — the role of the legislature's purpose, as far as we can establish it, is preeminent. In the end, if the problems are understood and articulated, the difference in these rubrics does not seem to be one of overriding importance.

4. The Text

Let us return now to the actual task of interpretation. We began by urging that the words of the statute be read in relation to the facts of the case. They must be read in light of the assumptions or premises stated and of the objective of carrying out the will of the legislature. In reading a statute for interpretive purposes the first task is to comb its face for evidence of the intent with which the pertinent words were used. Note that our earlier rejection of the "plain meaning" approach was not meant to suggest that the text is anything other than the principal element in the interpretive effort. Normal usage and consistency provide starting points for appraising the sense, subject to conditioning by the context. The precise words

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61. Mr. Justice Frankfurter, *supra,* note 5 at 538-539 speaks to this point: "Legislation has an aim; it seeks to obviate some mischief, to supply an inadequacy, to effect a change, to formulate a plan of government. That aim, that policy is not drawn, like nitrogen, out of the air; it is evinced in the language of the statute, as read in the light of other external manifestations of purpose. That is what the judge must seek and effectuate, and he ought not to be led off the trail by tests that have overtones of subjective design. We are not concerned with anything subjective. We do not delve into the minds of legislators, or their draftsman or committee members". And again: "The purpose which a court must effectuate is not that which Congress should have enacted or would have. It is that which it did enact, however unjustly, because it may fairly be said to be imbedded in the statute . . . ." See generally, Hart & Sacks, *supra,* note 8 at 1410-1417.

which are in issue in relation to the facts must be weighed in the light of successive circles of context. The provision in question must be read in the setting of surrounding provisions, of the Act as a whole with its title and any preambles or declarations of policy. From this the interpreter must formulate "working hypotheses" as to the intended purpose and meaning of the Act. He is to avoid final judgment in most cases at this stage and, as we said, is not to think in terms of a plain or literal meaning. The working hypotheses or tentative judgments are then to be tested against wider circles of context which may include — in the United States — the internal legislative history of the provision. These circles embrace also the preenactment history of legislation and other law on the subject, with the light this may shed on the evil to be remedied. They encompass relevant surrounding legislation and caselaw. Even postenactment legal developments may have a bearing.

5. Specific Intent

We have said that the text and its surrounding contexts are to be combed for evidence of intent. Dean Landis distinguished two senses of intent:[62] first, intent in the sense of meaning, or specific intent, which is applicable when the legislature specifically foresaw the problem in issue and meant to resolve it in a certain way; second, intent in the sense of the general purpose or aim behind the legislation. The search of text and contexts just described is a search for evidence of both of these kinds of intent.

If in the search of text and contexts highly persuasive evidence of a specific intent is found, controlling weight should normally be accorded to it. For example, the language of the act may be quite in point and supported, or not contradicted in any way, by the contexts, and the purpose and sense. Or, in the United States, the search of contexts may turn up legislative committee reports or debates or other materials which show the legislature had the particular problem in view and sought to deal with it in one fashion or another. While in such cases the specific intention thus found is generally to be followed, this is subject to limitations imposed by the words used in the Act. In a situation where the evidence of specific intent or purpose would require that the words be given an

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62. Landis, *supra,* note 58 at 888 and see Jones, *supra,* note 58 at 740-741 and Cox, *supra,* note 60 at 370-371. The distinction has also been made by the courts, as in *California* v. *Buzard* (1965), 382 U.S. 386.

unlikely meaning and affected persons reading the statute might be misled to their injury, the unlikely meaning cannot be attributed to the statute. An interesting case, *Commissioner of Internal Revenue* v. *Acker,* decided by the U.S. Supreme Court in 1959[63], came close to such an issue. In the *Acker* case, the defendant had failed to file a declaration of estimated tax as required by the taxing statute. One section of the statute prescribed additions to the tax in the event of such a failure and these were assessed. But the Commissioner also sought to collect under another section [294(d)(2)] which provided for an addition to the tax in the case of a "substantial underestimate" of tax. The majority declined to rule that a failure to file an estimate — separately and expressly penalized as such — was also to be treated as a substantial underestimate. They refused to give controlling weight to a Congressional Conference Report and administrative regulation stating in terms that, in the event of failure to file, "the amount of the estimated tax for purposes of [294(d)(2)] is zero." Mr. Justice Frankfurter dissented vigorously, relying on the Conference Report to justify the unlikely meaning and the additional penalty. The case shows that the language used may — especially in a penalizing situation — limit the impact of extrinsic evidence of intent. Note too, particularly in connection with older statutes, that unforeseen circumstances arising after enactment might well affect the persuasiveness of such evidence.

The likelihood that persuasive evidence of a specific intention will be found is of course reduced by rules such as those prevailing in Canada and the United Kingdom which exclude Hansard from judicial consideration in interpretation[64] and limit judicial use of Royal Commission Reports. It is not proposed to consider at length here the pros and cons of the exclusionary rules, as these have been extensively discussed in the Canadian Bar Review.[65] Let it be said,

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63. (1959), 361 U.S. 87.

64. *Gosselin v. The King,* [1903] 33 S.C.R. 255; *Assam Railways and Trading Company* v. *Commissioners of Inland Revenue,* [1935] A.C. 445 at 457-459 (H.L.) (*per* Lord Wright). Compare the position taken in various Continental jurisdictions, as discussed in H. Gutterridge, *A Comparative View of the Interpretation of Statute Law* (1933), 8 Tul. L. Rev. 1, and in the United States, text at notes 69-76.

65. D. G. Kilgour, *The Rule Against the Use of Legislative History: Canon of Construction or Counsel of Caution* (1952), 30 Can. B. Rev. 769. [See on this article, letter of J.T. MacQuarrie (1952), 30 Can. B. Rev. 958; letter of Kilgour (1953), 31 Can. B. Rev. 1087; and, letter of J. Milner (1953), 31 Can. B. Rev. 228]; K. Davis, *Legislative History and the Wheat Board Case* (1953), 31 Can. B. Rev. 1 [See on this article, letter of J. Milner (1953), 31 Can. B. Rev. 228]; Corry, *supra,* note 53.

however, that Professor Corry's 1954 lecture at Dalhousie[66] rejecting all parliamentary materials as unworthy seems to go much too far. It is difficult for example to understand why the minister whose department sponsored a bill and who pilots it through the House of Commons is not to be considered a reliable spokesman[67] or why Royal Commission Reports should not be freely looked to. One may regret that the Law Commission and Scottish Law Commission though calling for wider use of extrinsic sources, determined to stand by the existing rule as to Hansard.[68] The problem of isolating reliable information in Hansard to which the Commission referred is surely not insuperable if one locates the responsible spokesmen. The problem of availability would surely be solved by public or private initative if the rules were changed. In the United States, in the federal courts, there is now a long tradition of resort to so-called internal legislative history materials. Recognizing the key role standing committees play in the U.S. legislative process, federal courts have made extensive use of the published reports of such committees.[69] The records of committee hearings are sometimes cited.[70] Remarks made in floor debate — especially by responsible committee spokesmen — may be referred to,[71] though the courts have had some difficulties here,[72] and doubts persist as to the reliability of the Congressional Record.[73] Conference reports are consulted,[74] as also are messages of the executive.[75] In sum, the full range of legislative history materials is called upon for interpretive aid at the federal level.[76] In using such materials, the courts have shown some grasp of the realities of the legislative process.[77] They have demonstrated, again and again, a capacity to weigh evidence drawn from that process even as they

66. Corry, *supra*, note 53.
67. Davis, *supra*, note 65, and letter of Milner, *supra*, note 65.
68. Law Commission Report, *supra*, note 11 at 36.
69. *Church of the Holy Trinity* v. *United States* (1892), 143 U.S. 457.
70. *O'Hara* v. *Luckenbach Steamship Co.* (1926), 269 U.S. 364.
71. *Gossnell* v. *Spang* (1936), 84 F.2d 889 (3d Cir.).
72. See, *e.g.*, *United States* v. *Ryan* (1955), 225 F.2d 417 at 426-427 (2d Cir.) (Hand J., dissenting); *United States* v. *McKesson and Robbins, Inc.* (1956), 351 U.S. 305.
73. Neuberger, "The Congressional Record is Not a Record", *New York Times Magazine*, April 20, 1958, reprinted at (1958), 104 Cong. Rec. 6816-6818.
74. *Mitchell* v. *Kentucky Finance Co.* (1959), 359 U.S. 290.
75. *Johnson* v. *Southern Pacific Co.* (1904), 196 U.S. 1.
76. Jones, *supra*, note 58.
77. *SEC* v. *Robert Collier & Co.* (1935), 76 F.2d 939 (2d Cir.).

weigh other kinds of evidence. In the states, by and large, there has been willingness to consider extrinsic materials but many kinds of aids available at the federal level — standing committee reports and hearings, floor debates, conference reports — are not generally available at the state level. The practice of the United States courts with relation to internal legislative history sources has not gone unchallenged at home and debate persists over the availability and reliability of such sources and whether the costs and burdens of consulting them are justified by the results.[78] But there is today no discernible disposition in the Supreme Court to retreat from or reconsider the rules that permit recourse to internal legislative history materials. Behind this attitude, one may venture, is a belief tested by experience that such materials provide significant insights into legislative intent and into the social purposes behind legislation.

Even with the full range of legislative history to draw from, however, it must be stressed here that difficult cases are not resolved with great frequency by extrinsic evidence of specific intent. And it is, of course, a mistake to treat the search of contexts as a search in which preexisting specific answers must be found for interpretive questions.[79]

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78. See, *e.g.*, Mr. Justice Jackson's article, *The Meaning of Statutes: What Congress Says or What the Court Says* (1948), 34 A.B.A.J. 535 and his concurring opinions in *Schwegmann Bros.* v. *Calvert Distillers Corp.* (1940), 341 U.S. 384 at 395 and *United States* v. *Public Utilities Comm'n of California* (1953), 345 U.S. 295 at 319. See also C. Curtis, *It's Your Law* (Cambridge: Harvard University Press, 1954) at 52. Most recently Professor Dickerson in chapters 9 and 10 of his work on statutory interpretation, *supra,* note 15, has joined the attack on the use of internal legislative history sources. He defines "context" rigorously to exclude such sources. This definition is contrary, however, as he notes, to "the view now prevailing among liberal American jurisprudes"; it is contrary also to the view taken in this lecture. Apart from the concept of "context", Professor Dickerson urges that the benefits gained from consulting internal legislative history do not justify the costs and inconvenience that result from thus vastly multiplying the research materials that must be combed for counseling, advocacy and other purposes. To appraise such an argument, a more extensive investigation of the practical experience with the use of such material would seem to be needed. Note that Professor Dickerson acknowledges, in any case, that at least some of these sources may properly be considered in relation to judicial lawmaking in the application of statutes. For a sampling of the literature favouring use of internal legislative history, see, *e.g.*, Landis, *supra,* note 58; Jones, *supra,* notes 31 and 58; Davis, *supra,* note 65; Note, *supra,* note 32; C.D. Breitel, "The Courts and Lawmaking" in M. Paulsen, ed., *Legal Institutions Today & Tomorrow* (New York: Columbia University Press, 1959) at 29-32. Compare Hart & Sacks, *supra,* note 8 at 1284-1286, 1415-1416.

79. W. Bishin, *The Law Finders: An Essay in Statutory Interpretation* (1965), 38

6. Purpose

By all odds, the most important harvest to be reaped from the study of a statute and its context is normally a more generalized sense of what the legislature was trying to do, why it did what it did. We are speaking here of legislative purpose which represents the second aspect of intent and is surely the most significant factor in the interpretive process. That we must take account of purpose in every communication situation was suggested earlier in our discussion of Francis Lieber's case of the domestic sent to "fetch soup meat." Legislation, like other utterances, is a purposive act and the effort must be to reconstruct the purpose that propelled the lawgivers if meaning is to be assigned faithfully and intelligently. In every case the interpreter is to look for this animating principle and reason from it. Even if evidence of a specific intention is available, the legislative purpose is still vital as a check on that evidence and as a guide to its use.

The central role of purpose in interpretation has been amply acknowledged. "The general purpose," said Mr. Justice Holmes, "is a more important aid to the meaning than any rule which grammar or formal logic may lay down."[80] And this view of the importance of determining and relying on purpose is now widely shared by judges[81] and scholars.[82] Courts have frequently used the purpose approach.[83] Recently, the Law Commission and Scottish Law Commission recommended that a construction which would

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So. Cal. L. Rev. 1.

80. *United States* v. *Whitridge* (1935), 197 U.S. 135 at 143.

81. Frankfurter, *supra,* note 5; Cox, *supra,* note 60.

82. See, *e.g.,* Landis, *supra,* note 58; Corry, *supra,* note 14; Jones, *supra,* note 58; and H. Jones, *Statutory Doubts and Legislative Intention* (1940), 40 Colum. L. Rev. 957; Hart and Sacks, *supra,* note 8, especially at 1410-1417. J. Witherspoon, *Administrative Discretion to Determine Statutory Meaning: "The Middle Road": I* (1962), 40 Texas L. Rev. 751 summarizes the position of the so-called "middle-road" scholars favouring purpose interpretation. In *The Essential Focus of Statutory Interpretation* (1961), 36 Ind. L.J. 423 at 433, Professor Witherspoon commented: "The great bulk of 'middle road' scholars have always insisted that relevant legislative purposes must be carefully regarded in administration of statutes. In light of the rather universal legislative, administrative and judicial practices obtaining today in this country concerning the operation of legislative purposes, the war concerning the role of legislative purposes in administration has been won by these scholars". Driedger, *supra,* note 13 at 81, proposing a hybrid approach to interpretation, lays stress on ascertaining the object or purpose of the Act in every case.

83. For an excellent illustration of a case resting on legislative purpose, see *Johnson* v. *Southern Pacific Co.* (1904), 196 U.S. 1.

promote the legislative purpose underlying a provision should always be preferred in interpretation to one which would not.[84] With so substantial a concurrence of views, one may hope that the courts will definitely forego the seductive appeal of "plain meaning" and will turn in every case to interpretation in accordance with intent or purpose.[85]

How to interpret in accordance with purpose was aptly described almost four centuries ago in the resolutions in *Heydon's Case* outlining what is known today as the mischief rule.[86] It calls, in essence, for analysis of the prior law, the mischief to be remedied and the remedy enacted and then, on the basis of the "true reason of the remedy" as thence derived, it demands such an interpretation as will suppress the mischief and advance the remedy. The general purpose, or "true reason of the remedy" as thus developed provides a basis for inferences to resolve the specific issue. The statute itself and its scheme are prime sources for purpose; then the wider circles of context mentioned earlier. Note that the need for and validity of the search for purpose along the lines proposed in *Heydon's Case* are not affected by the unavailability of legislative history materials. To be sure, Hansard or Congressional documents or debates may provide valuable evidence for such a search. But the question as to purpose is the appropriate question in every case whatever may be

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84. Law Commission Report, *supra*, note 11 at 51.

85. Lord Denning M.R. in a recent case has observed "[w]e no longer construe Acts of Parliament according to their literal meaning. We construe them according to their object and intent": *Engineering Industry Training Bd.* v. *Samuel Talbot (Engineers) Ltd.*, [1969] 2 W.L.R. 464 at 466 (C.A.).

86. *Heydon's Case* (1584), 3 Co. Rep. 7a at 7b; 76 E.R. 637 at 638 (Ex.) phrases the mischief rule as follows:

> And it was resolved by them, that for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law) four things are to be discerned and considered: —
>
> 1st. What was the common law before the making of the Act.
>
> 2nd. What was the mischief and defect for which the common law did not provide.
>
> 3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth.
>
> And 4th. The true reason of the remedy; and then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and *pro privato commodo*, and to add force and life to the cure and and remedy, according to the true intent of the makers of the Act, *pro bono publico*.

the resources (perhaps only the statute itself) to answer it.

The task of establishing purpose is of variable difficulty. Perhaps it is not hard to determine that the purposes of an anti-speeding statute are safety and order on the highway. And the statute itself may contain, in a preamble or title or declaration, some statement of its own purpose which may be used if it is in harmony with text and context and pertinent to the problem in hand. But the determination of purpose in accordance with *Heydon's Case* or otherwise may often be a complex undertaking. Occasionally, the statutory purpose and the statutory issue are so interwined that one must in effect resolve the issue in order to frame the purpose. And purposes exist, as has been said, in "hierarchies and constellations."[87] One can see something of the flexibility of purpose, and of the judgments involved, from Professor Radin's example of a statute declaring that gambling contracts are void. He points out that the purpose may be narrowly stated as one "to make it impossible to sue on gambling contracts" (or to make their gambling character a defence); or it may be more broadly stated as a purpose "to discourage gambling." In the background, he points out, are the vaguer, more general purposes of law: justice and security.[88] It can easily be seen from this that the determination of purposes to aid in resolving statutory issues will often demand a creative effort by the courts.

7. Policy

The insight that interpretation, though based upon legislative intent, may yet involve an originative judicial contribution is of critical importance. That insight is not, to be sure, a new one. Mr. Justice Cardozo has cautioned us that "codes and statutes do not render the judge superfluous, nor his work perfunctory and mechanical." "Interpretation," he said, "is often spoken of as if it were nothing but the search and the discovery of a meaning which, however obscure and latent, had none the less a real and ascertainable pre-existence in the legislator's mind. The process is, indeed, that at times, but it is often something more."[89] Others have pursued the same point.[90] Professor Corry warns, "In many

87. Hart & Sacks, *supra,* note 8 at 1414. See generally the excellent discussion of the methods and problems of inferring purpose at 1410-1417.
88. Radin, *supra,* note 53 at 876-77.
89. B. Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921) at 14-15.
90. See, *e.g.*, Corry, *supra,* note 14 at 291-292; Jones, *supra,* note 82 at 970-972;

cases, there is no logical compulsion on the judge to accept a single meaning; two or more possible meanings are open to him. In making his choice, he makes law in spite of his protests to the contrary.''[91]

We must take into account, then, in developing a candid, viable method of interpretation that the interpreting judge will be called on to act as a lawmaker rather than a lawfinder in many situations. Some statutes, by virtue of their generality, or otherwise, clearly contemplate judicial creativity.[92] As one moves away from specific intent, and as issues are shaped by legislative failure to deal with particular cases, or by new and unforeseen circumstances, there may be no question of legislative foresight in any meaningful sense. Or the evidences of specific intent may give rise to significant dilemmas. Or — as in the *Acker* case discussed earlier[93] — the tension between the words used and the indicia of intent may give rise to doubts and issues beyond intent. Resort to purpose will resolve many of such problems, and that avenue must of course be explored. But as appears from the preceding discussion of purpose there is often leeway in defining purposes or in their selection from among various alternatives and from various levels of generality or in their application to the issue at hand. In the *Acker* case, for example, the purpose of supplying adequate penalties to ensure the filing of proper tax declarations and estimates would be largely satisfied by either of the two competing readings of the statute. Where such leeway remains, legislative choices must be made by the courts, and that step must be frankly reflected in the method we are evolving. The existence of such choices should not be more surprising or distressing here than it is in a common law setting.

When the judge acts as legislator, making choices not determined

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K. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to be Construed* (1950), 3 Vand. L. Rev. 395 at 400-401; Breitel, *supra,* note 78; C.D. Breitel, *The Lawmakers* (1965), 65 Colum. L. Rev. 749 at 765-772. See also Dickerson, *supra,* note 15, at c. 3 (see especially footnote 5 at 14 and materials there cited) and c. 12. Professor Dickerson treats ''cognition'' (ascertainment of meaning) and ''creation'' (judicial lawmaking) as distinct, major aspects of the adjudication of statutory issues. Note that the lawmaking aspect of the treatment of statutes is largely passed over in the Law Commission Report, *supra,* note 11, and hardly discussed in Driedger, *supra,* note 13.

91. Corry, *supra,* note 14 at 291. Professor Corry observes: ''No science of legislation or interpretation can ever eliminate this creative work of the judge''.

92. Breitel, *supra,* note 78 at 15-22.

93. (1959), 361 U.S. 87.

by evidence of intent, what does sound method require of him? What is to guide his choices? In broad terms, his effort must be a disciplined one: to read the statute so as to make the best possible sense of it in the developing legal and social context, in a manner consistent with the terms of the statute and with purposes reasonably attributable to it. The considerations beyond intent to be weighed in making this effort we may label "policy" or "public policy." In weighing policy, the court will be acting much as it would act in a common law case when there is no binding precedent. Thus, as in such a case, its striving to reach a wise decision, to do justice, should be informed, *inter alia,* by due regard for consequences — *i.e.,* the social advantage of one result as against another. It should be informed by due regard as well for custom, for general community expectations, for general principles and for such related caselaw and legislation as may be pertinent even though not binding.[94] And presumptions, such as the penal statutes rule, may merit attention.[95] Of course, the more the court can be enlightened as to the relevant societal facts and legislative policies the more effective will be its lawmaking.[96] Yet even as we recognize the latitude for all these considerations, we must stress again a point we have just noted — *i.e.,* that lawmaking in the statutory setting must be harmonized with the statutory framework and with a rational purpose attributed to the statute. The leeway for the courts is confined. There is no intention here, of course, to disparage judicial use of statutes by analogy in cases beyond their terms, but that is another subject for another time and place.

Courts are not always aware or candid about the role of "policy" or "public policy" in their decisions under statutes or elsewhere,[97] but we must urge that this role be articulated if it is to be realized properly and criticized effectively. Advocates, too, are remiss, and thereby contribute to judicial omissions. All too often those arguing

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94. See generally, Cardozo, *supra,* note 89.

95. See *infra,* notes 115-6 (penal statutes rule). See the ensuing discussion of other presumptions.

96. Jones, *supra,* note 82 at 974.

97. Long ago, Mr. Justice Holmes complained: "I think that the judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage. The duty is inevitable, and the result of the often proclaimed judicial aversion to deal with such considerations is simply to leave the very ground and foundation of judgments inarticulate, and often unconscious . . . .": *The Path of the Law* (1897), 10 Harv. L. Rev. 457 at 467. Compare Cardozo, *supra,* note 89 at 117-119.

statutory cases do not sufficiently grasp their opportunities to argue "policy" to the courts — and to bring societal facts to their notice so as to help them make sense of the law within the leeways they have. Arguments of social advantage, for example, are not pertinent only to the definition and selection of purpose where obvious choice exists. They are often pertinent more broadly to the task of weighing the evidence of intention, whether specific intention or purpose, and deciding the questions of degree that enter into the final attribution of intent. Courts are apt to say in interpretation that the wisdom or unwisdom of results they reach is of no consequence. And yet such wisdom or unwisdom may shed important light on whether or not it is reasonable to attribute a particular specific intention or purpose to the legislature. We have argued elsewhere that legislatures should be assumed in interpretation to be reasonable bodies not intending unreasonable consequences unless such an intent is clearly shown. This is surely implied by the court's responsibility to act as good faith delegate or co-worker of the legislature which we have described as a premise of interpretation.

We have now set out the basic outlines of a method of interpretation: the assumptions, the objective, the scrutiny of the text and contexts for specific intention and purpose and the weighing of policy in light of which the interpretive question is to be resolved.[98] Certain matters, however, remain to be considered, including the treatment of prior judicial, administrative and legislative constructions, and including the familiar maxims of interpretation and presumptions.

8. Prior Constructions

How are prior judicial interpretations to be treated under the method we have been discussing? Note that when a court construing a statute is confronted with a relevant earlier decision by the same or a higher tribunal, the earlier decision injects another element of authority into the interpretive process. Courts have a fondness for their own handiwork. Inevitably there is a risk that this new element of authority will be given more weight than is proper, at the expense of the legislative intent and purpose we have been stressing. If, for example, the earlier decision is in some measure at odds with intent or purpose, and if the judicial eye is trained wholly or mainly upon

98. For a judicial opinion embodying in large part the method here proposed, see *FTC* v. *Sun Oil Co.* (1963), 371 U.S. 505.

it, a slight initial error may like a navigator's fault be extended as it is pursued. The divergence between interpretation and intent may be compounded. To bar such results it is necessary that the method we have described be followed in every case, whether or not precedent exists. The statutory framework of text and intent is always paramount. Each new issue must be resolved in harmony with that framework. Precedent is to be followed only as that framework permits. Within the framework, of course, precedent is vital. The methods of dealing with precedent are very similar to those applicable in a common law setting, though the courts here, conscious of treading in legislative domains and hedged by fixed statutory terms, may see themselves as less free to rework, more bound to follow, their own past precedents. When a prior ruling is challenged as inconsistent with legislative intent and the question is whether to overrule, the wrongness of the earlier decision must be weighed in the balance with the policies supporting *stare decisis*. It follows, however, from what we have said earlier about intent and the role of the court as delegate or co-worker that the courts should hesitate to cast upon a heavily burdened legislature the responsibility for correcting judicial errors regarding intent when the courts could reasonably make the correction themselves.[99] The arguments of legislative "adoption" sometimes made to bolster prior judicial interpretations are not compelling without a clear showing of legislative awareness and endorsement.[100]

When à court is confronted in interpretation with a prior administrative construction of the statute, the administrative construction must, again, be dealt with in a manner consistent with legislative intent and text. Such constructions do nevertheless involve special considerations. In the United States, administrative rulings are commonly treated as meriting some deference based on the position of the agency among the institutions of government. Like judicial constructions, they are post-enactment expressions and so cannot be taken, without more, as evidence of the enacting legislature's intent. It may be however that, by reason of the agency's participation in the drafting or enacting process, its interpretation is based on a special knowledge of that intent and so can be viewed as shedding light thereon.[101] Absent such special

99. See, *e.g., Girouard* v. *United States* (1946), 328 U.S. 61 at 69-70.
100. *Cleveland* v. *United States* (1946), 329 U.S. 14 at 22-24 (Rutledge J. concurring); Hart & Sacks, *supra,* note 8 at 1394-1405.
101. *United States* v. *American Trucking Ass'ns* (1940), 310 U.S. 534.

knowledge, an agency construction represents some evidence of what in the circumstances constitutes a reasonable interpretation of the statute. Its weight may be bolstered by the deference already mentioned or by considerations drawn from any pertinent expertise the agency may have [102] or, in the case of settled administrative interpretations, by considerations of stability and reliance.[103] Arguments of legislative "adoption" are no more compelling for administrative interpretations than for judicial rulings.

With the progress of the legislative age and the growing pervasiveness of legislative law, we may anticipate an increase in situations where the legislature after adoption of a statute acts in some way that amounts to a legislative interpretation of its own enactment. Thus, it may make a declaration as to the meaning of the earlier statute,[104] or it may adopt an amendment,[105] or a further statute,[106] which involves assumptions about the construction of the earlier measure. How is such a legislative construction to be treated by a court later seeking to interpret the same act in accordance with legislative intent as we have proposed? The intent evidenced by the later legislative construction is obviously to be differentiated from the intent of the enactors of the original Act. The later intent can generally be given effect for the future, of course. In the United States, however, insofar as its effect on the past is concerned, the later expression of intent must be tested against constitutional rules prohibiting certain types of retroactive legislation.[107] When such rules do not bar the way, the later expression of intent may be applied to the original Act if the intent to affect the past is clear enough to overcome the ordinary presumption against such a result. Even in areas where retroactivity is barred, the legislative construction may be accorded weight by the courts as evidence of a reasonable construction — a weight strengthened by deference to the legislature's position in the lawmaking process.

9. Maxims

In our quest for a sound method of statutory interpretation for the legislative age, what is to be done with the so-called maxims or

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102. *Levinson* v. *Spector Motor Service* (1947), 330 U.S. 649.
103. *Alaska Steamship Co.* v. *United States* (1933), 290 U.S. 256.
104. See, *e.g.*, *FHA* v. *The Darlington, Inc.* (1958), 358 U.S. 84.
105. See, *e.g.*, *Galvan* v. *Press* (1954), 347 U.S. 522.
106. See, *e.g.*, *Flora* v. *United States* (1960), 362 U.S. 145.
107. See, e.g., on this problem, *FHA* v. *The Darlington Inc.* (1958), 358 U.S. 84.

canons of construction to which courts have resorted in the past and which persist in the cases — maxims such as *eiusdem generis, noscitur a sociis, expressio unius est exclusio alterius,* the maxim of consistency, the maxim of the last antecedent, and so on? These maxims are not necessarily related to the search for legislative intent which we have suggested forms the core of interpretation. On the face of it, they are mechanical in character and may call for a particular construction of particular verbal configurations without regard to the nature of the problem involved, or to the context or to the sense of the result. Nor are such "rules of thumb" necessarily consistent with ordinary practice in the use of words.

Consider *eiusdem generis,* for example, which says that when general words appear in conjunction with an enumeration of particulars, the general words are to be limited to the class of things indicated by the particulars. Insofar as this maxim (or *noscitur a sociis,* to which it is related) directs the interpreter to read words in their context, it is unexceptionable and echoes our earlier insistence on that step. The decision as to what class the particular or associated words define, and whether the term in issue must indeed conform to the class, cannot however be automatically determined as the maxim would seem to suggest. That decision must depend on the setting. In *United States* v. *Alpers*[108] there was a statutory prohibition against depositing with a carrier for transmission in interstate commerce "any obscene . . . book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or *other matter of indecent character.*" The startling argument — startling to nonlawyers, that is — was made that since the particular terms included only articles the public could see or read, the general term "other matter of indecent character" should by the rule of *eiusdem generis* be restricted to such articles and could not include obscene phonograph records. A majority of the Court understandably rejected this argument. On the other hand compare the Mann Act, the so-called White Slave Traffic Act, involved in the *Caminetti* case.[109] This notorious statute penalizes those who transport women across state lines for "prostitution, debauchery or *any other immoral purpose.*" Here, by contrast, it might be appropriate, and not startling, to apply the *eiusdem generis* maxim to limit the obviously overbroad general phrase — "any other immoral

108. (1950), 338 U.S. 680.
109. *Caminetti* v. *United States* (1917), 242 U.S. 470.

purpose'' — to sexual immorality and to exclude, for instance, a man who transports a woman across state lines to serve as his accomplice in a holdup.

Related difficulties attend the *expressio unius* maxim. The notion expressed in this maxim is sometimes appropriate, and sometimes not, in human communication. The sign DON'T WALK that appears on New York street corners when the traffic light turns red is clearly not to be taken as exclusive, *i.e.*, as allowing pedestrians to *run* across the street against the traffic. By contrast, one will quickly find, if one experiments, that the signs that say MEN or WOMEN on our washrooms are most definitely to be taken as excluding the sex not mentioned! In sum, the maxims do not of themselves yield sound results. Whether in speech or in statutes the context must be consulted to see if the path they indicate is appropriate. Given this unreliability, it is not surprising to learn that for most of the maxims counter-maxims can be found in the cases.[110]

What is the utility of these maxims, then? They do serve at least one important function — particularly for the draftsman, advocate or counsellor. They identify recurrent types of ambiguity. The existence of a maxim dealing with a certain type of verbal problem warns us that such a problem is a common source of interpretive difficulties. We are on notice that doubts will frequently arise in relation to general terms associated with other words in enumeration (*eiusdem* and *noscitur*) or in relation to negative implications (*expressio*) or consistency (rule of consistency) or the effect of modifiers (last antecedent).

It has also been urged that, provided they are not treated as rules, the maxims may be useful devices in that they indicate, for particular types of verbal difficulty, one linguistically permissible solution which may be applied when the context warrants.[111] This is well enough. But they have in fact from time to time been treated as rules by commentators[112] and courts[113] and there is a serious risk that they will be so applied, without regard to context or intent, by the naive or lazy or the calculating. If used in this way, they may

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110. Llewellyn, *supra,* note 90 at 401-06.
111. Hart & Sacks, *supra,* note 8 at 1220-1222, 1412.
112. See, *e.g.*, Willis, *supra,* note 14 at 7-8. Compare, Driedger, *supra,* note 13 at 91, affirming that *ejusdem generis* is ''not a rule of law''.
113. See, *e.g.*, *Taylor* v. *Michigan Public Utilities Comm'n* (1922), 217 Mich. 400; 186 N.W. 485.

defeat all our painstaking prescriptions for sound method in interpretation.[114] They should probably be added to W.S. Gilbert's "little list" of things that "never would be missed." In the end, the least we can do about these maxims in preparing for the legislative age is to insist that they be clearly labeled and treated as non-mandatory. We must require that they be invoked, if at all, only after a full investigation of intent, with analysis of contexts, shows that their use is appropriate in the particular case.

The rule of consistency warrants a special mention. In working with a statutory text in the first stage of interpretation it may not be unreasonable to assume, tentatively, that the words of the Act are used consistently. A good legislative draftsman will normally strive for consistency, this being one of the most important devices available to him to control meaning. But achieving perfect consistency is very difficult, and human failures abound, so that again legislative intent in context should govern rather than an inflexible mechanical rule.

10. Presumptions

A final element to be weighed in relation to our method of interpretation consists of the various presumptions which have been evolved and applied by the courts in construing legislation. Though they are phrased as presumptive of intent they are really policies of the courts and may in some cases run counter to intent. Unlike the verbal maxims we have just considered, which are essentially neutral in terms of substantive policy, the presumptions commonly embody judicial conclusions as to where the weight of decision is to be thrown in cases relating to particular kinds of subjects.

One example of a presumption familiar in United States law is the oft-stated doctrine that penal statutes are to be strictly construed — *i.e.*, construed in favour of defendants. Originating long ago as a tool of nullification of over-severe criminal laws, this doctrine is perhaps somewhat less needed today. Underlying the doctrine, as explained by Mr. Justice Holmes in *McBoyle* v. *United States,* is the notion that "fair warning" should be given before individuals are penalized.[115] That notion may be most apt when the conduct in question is not normally seen as seriously wrong. But there is beyond this a persistent social view, reflected sometimes by the

114. Dickerson, *supra,* note 15 at 229.
115. (1931), 283 U.S. 25.

courts, that the government ought as a general matter to have to "turn square corners" before visiting any punishment on its citizens. These underlying policies find expression at the constitutional level in the United States in the due process requirement of definiteness.[116]

Another familiar presumption affirms that a statute is presumed, in the absence of a clear expression to the contrary, to operate prospectively.[117] There are of course, as earlier noted, various constitutional limitations in the United States on the retroactive operation of statutes — prohibitions against bills of attainder and *ex post facto* laws, as well as prohibitions against impairing the obligation of contracts and, based on due process, against interference with vested rights. In areas where legislation may constitutionally be given retroactive effect, the presumption may be applied to avoid retroactivity. Like the constitutional prohibitions, it reflects, though at a subconstitutional level, a policy of fairness, of avoidance of probable hardship especially where there may have been reliance on prior law.

Among the many other presumptions, which are too numerous to catalogue exhaustively here,[118] mention may be made of a notorious one to the effect that "statutes in derogation of the common law are to be strictly construed."[119] Historically, resort to this presumption by courts in the United States often manifested hostility to legislation. Apart from such hostility it could also be argued to represent — along with the presumption that repeals by implication are not favoured[120] — a general policy in favour of maintaining certainty and stability by preferring existing law. This maxim is not frequently encountered today and its decline probably stems from a growing and welcome hospitality in the courts toward legislative innovation.

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116. Note, *The Void-for-Vagueness Doctrine in the Supreme Court* (1960), 109 U. Pa. L. Rev. 67.

117. See, *e.g.*, *Weiler* v. *Dry Dock Savings Institution* (1940), 258 App. Div. 581; 17 N.Y.S. 2d 192.

118. For discussion of many of the presumptions operative in English and American law see, *e.g.* Willis, *supra*, note 14 at 17-27 and Driedger, *supra*, note 13, c. 9.

119. See, *e.g.*, *Johnson* v. *Southern Pac. Co.* (1902), 117 F. 462 (8th Cir.), *rev'd* (1904), 196 U.S. 1. The canon is discussed at length in J. B. Fordham and J. R. Leach, *Interpretation of Statutes in Derogation of the Common Law* (1950), 3 Vand. L. Rev. 438.

120. See, *e.g.*, *Morton* v. *Mancari* (1974), 417 U.S. 535.

These judicial presumptions of which we have been speaking have some importance and impact in statutory construction. It is apparent that some of them — for example, those addressed to penal statutes and prospectivity — are *quasi*-constitutional in character[121] and reflect fundamental social policies. Yet the incidence of the judicial presumptions is uncertain and the courts do not apply them rigorously or uniformly. It is often difficult to tell what weight is accorded them when they are used, as they often are, in conjunction with other arguments. And there exist conflicting presumptions. For example the "strict construction" presumptions may be opposed by the doctrine that remedial statutes are to be liberally construed.[122] Are not most statutes remedial? When equal and opposite presumptions exist in this way, their application may be a matter of judicial discretion and predictability suffers.

What disposition is to be made then of these presumptions? As noted, they may have little relation to the legislative intent or purpose which we have stressed as the touchstone of interpretation. Indeed the serious danger — illustrated by the presumption about statutes in derogation of the common law — is that they will be used unjustifiably to frustrate intent. It is vital to insist that such presumptions should not be applied before the legislative intent is fully and fairly determined from a study of text and context as we have earlier proposed. They are not to be substituted out of hand for that determination, or for a decision based thereon.[123] But when doubt remains after resort to the indicia of intent, or sometimes when legislative desires are not clearly enough expressed, these presumptions may nonetheless represent significant policies to be weighed in the balance with other policies[124] and given a place in decision-making.

III. Conclusion

By way of conclusion, let us revisit a certain few points among many.

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121. Willis, *supra,* note 14 at 17 and 23, argues that use of certain presumptions amounts to a sort of common law "Bill of Rights". Such devices may be more important in jurisdictions where there is no written constitution guaranteeing basic rights.

122. *Johnson* v. *Southern Pac. Co.* (1904), 196 U.S. 1.

123. For a case in which maxims and presumptions were rejected in favour of intent or purpose, see *Gooch* v. *United States* (1936), 297 U.S. 124.

124. Text, *supra* at note 95.

We have called for an end to literalism. We have called for adherence to legislative intention as the aim of interpretation. Text and context are to be combed for evidence of intent. When there is convincing evidence of a specific intention, we have said, that is normally to be followed, but the legislature's purpose remains the primary and most usual guide. We have called for the ascertainment and weighing of legislative purpose in every case as the chief step in interpretation. Interpretive issues are generally to be resolved in the light of purpose, but any evidence of intent is of course subject always to the limits set by the words of the statute. In many decisions, we have acknowledged, public policy will play a significant role which needs to be articulated.

The trend away from literalism in the cases and the swelling chorus of scholars and judges in favour of purpose interpretation give some hope of accelerating change in the directions we have thus indicated. Fortifying the argument for such change is the fact that our overriding concern with intent and with purpose seems consistent with the nature of words and human communication. It is, moreover, consistent with fundamental assumptions of legislative supremacy. Finally, it is in harmony too with our vision of the proper role of courts in the realm of statute law. Let us close by reinvoking this vision. The vision is an inspiring one surely, fit to replace the grudging, negative one of the era of literalism. It is a vision to be kept always before us and to inform all our interpretive efforts — the vision of courts and legislatures as constantly cooperating partners in the development of just law for a just society.