THE LEGACY OF HANS LINDE IN THE STATUTORY AND ADMINISTRATIVE AGE

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I am privileged to speak at this conference in honor of academician and retired Oregon Supreme Court Justice Hans A. Linde. This is not the first seminar, symposium or occasion to honor Hans Linde, and it will not be the last.

Hans Linde has been a dedicated teacher, scholar and judge, making significant contributions to American jurisprudence in all these roles. He has been said to have "scintillating intellect, affable personality, and coalition-building skill on the court."[1]

As Judge Oakes (a highly regarded judge in his own right) wrote: "Hans Linde is a giant of an intellect . . . . [Until you read his opinions and scholarly writings] you have no idea of the depth or breadth of the man's mental powers."[2]

Hans Linde has been the poster child for state courts to interpret their laws independently of the U.S. Supreme Court's interpretation of parallel provisions in the federal Constitution, while still adhering to the doctrine of federal supremacy. State courts handle more than 95% of the court business in this country, and state court judges have, as Linde continually reminds us, the obligation to expound state law. When the banner of state constitutions was unfurled with new federalism, Hans's writings in the opinions of the Oregon Supreme

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1. William R. Long, *Free Speech in Oregon: A Framework Under Fire*, Or. State Bar Bull., Oct. 2003, at 9, 10.

2. James L. Oakes, *Hans Linde's Constitutionalism*, 74 Or. L. Rev. 1413, 1413 (reviewing INTELLECT AND CRAFT: THE CONTRIBUTIONS OF JUSTICE HANS LINDE TO AMERICAN CONSTITUTIONALISM (Robert F. Nagel ed., 1995)).

Court and his law review articles gave theoretical and pragmatic bases to the movement.

I have tried to remember when I first met Hans Linde. I cannot. My first recollection of Hans is at the meetings of the Council of the American Law Institute. The Council reviews drafts of Restatements prepared by reporters, who are generally leading academicians or lawyers who are experts in the field. Having carefully dissected the drafts, Hans came to the meetings prepared to debate the fine points of law with the reporters. I thought what a wonderful judicial colleague he would be if he helped me edit and refine my draft opinions the same way he critiqued the Restatement drafts. I also realized, with trepidation and sweaty palms, that if we were on the same court and disagreed, I would surely face a challenging, well-thought-out, persuasive dissent or concurrence.

Regardless of whether we agreed, I knew he would put me through the paces. It is, of course, through these kinds of collegial differences and discussion, within the conference room and through published opinions, that the best majority and minority opinions emerge from a court. These are the opinions that help set the dialogue on the law in the years to come.

Nonetheless, I am relieved that today's program does not give Hans Linde an opportunity to respond to my remarks. I have no doubt, however, that I shall hear from him.

Not only have Hans and I worked together in state constitutional law and at the American Law Institute, but also we share a mutual interest in the relationship between the legislative and judicial branches and in statutory interpretation. Hans and I have recognized—before and during our judicial experience—that we live in what Dean/Judge Calabresi has called "an age of statutes." The New York Times recently reported that Harvard Law School will teach legislation and regulation as a required first year law class.[3] Why was that newsworthy? Hans Linde was there years ago.

More than half of the caseload of a state supreme court, and probably federal circuit courts of appeal, involves in one way or another, interpretation of a statute. The issue of statutory interpretation is therefore of great interest and importance to judges, and much has been written about statutory interpretation by both judges and academics. Many of us have searched for the holy grail—

3. Jonathan D. Glater, *Harvard Law Decides to Steep Students in 21st-Century Issues*, N.Y. TIMES, October 7, 2006, at A10.

that is, a single interpretive approach that fits all statutes and cannot be condemned as a result-oriented approach consistent with a judge's policy orientation. I have yet to uncover that grail (and no one else has either), but the search continues to enlighten.[4]

Given the opportunity to come today, I decided this program was a great opportunity to help me write better opinions by giving me the time to examine Justice Linde's methodology in statutory interpretation.[5] His opinions are, of course, influential in Oregon as binding precedent, and they are persuasive across the country.

The prism through which I have read Linde's opinions is my own experience. My characterization of Linde's opinions reflects my own views on statutory interpretation expressed in the opinions I have authored.

The overall theme revealed in Justice Linde's opinions is respect for both the legislative and the adjudicative functions, along with a strong commitment to the legislature as the primary policymaking branch of government. Hans Linde expresses confidence in legislative policymaking, although some label this confidence as idealistic. He defers to the legislature, but he is ever mindful of constitutionally guaranteed individual rights that restrict legislative power.[6] In the words of Judge Wald: Hans Linde "cut[s] the legislature some slack . . . ."[7]

Within Linde's overarching view of the primacy of legislative power, I have selected two themes from Justice Linde's opinions. These themes resonate with my own experiences on the bench. In the limited time allotted to me I cannot give full justice to the intricacies of Justice Linde's lengthy opinions and careful rationales and rationalizations. I can merely give you my impressionistic overview.

First, Linde's opinions attempt to place primary responsibility for statutory interpretation with the entity to which the legislature expressly delegated the interpretative function. Here I will speak about judicial review of administrative law decisions.

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4. *See*, *e.g.*, Timothy P. Terrell, *Statutory Epistemology: Mapping the Interpretation Debate*, 53 Emory L. J. 523 (2004).

5. In the interest of disclosure, I have not read all of Justice Linde's authored opinions.

6. G. Edward White, *Hans Linde As Constitutional Theorist: Judicial Preservation of the Republic*, 70 Or. L. Rev. 707, 710 (1991).

7. Patricia M. Wald, *Hans Linde and the Elusive Art of Judging: Intellect and Craft Are Never Enough*, 75 Tex. L. Rev. 215, 234 (1996) (reviewing INTELLECT AND CRAFT: THE CONTRIBUTIONS OF JUSTICE HANS LINDE TO AMERICAN CONSTITUTIONALISM (Robert F. Nagel ed., 1995)).

Second, Linde's opinions demonstrate that when a court interprets a statute, the court should examine and evaluate all the materials available to reach an interpretation that makes sense in the legislative scheme of things, but that also works in the world in which we live.

I.

Back to the first theme: judicial review of administrative law decisions and how Linde's opinions attempt to place primary responsibility for the interpretation of a statute in the entity to which the legislature delegated the interpretative function.

Interpretation of a statute and application of the statute to disputed facts are the bread and butter of judicial business. As Justice Marshall explained in *Marbury v. Madison*: "It is emphatically the province and duty of the judicial department to say what the law is."[8]

Yet in the 20th and 21st centuries, federal and state legislatures have created specialized administrative agencies. These agencies have quasi-legislative powers, adopting rules under generally worded legislatively delegated authority. These agencies also act like courts, interpreting and applying the statutes and their rules in deciding disputes.

Thus, the continuing issue facing courts in our regulatory society is the extent of judicial oversight of agency interpretation and application of laws. Administrative agencies play an important role in our complex world of regulation, but checks and controls on the agencies are also needed. These checks and balances can be provided by the executive, legislative and judicial branches. What should the role of judges be in providing these checks and controls through judicial review?[9]

Justice Linde has suggested thought-provoking approaches to this problem in his scholarly writings and in his opinions.[10] Let me give you two examples.

In *Megdal v. Oregon State Board of Dental Examiners*, the Board of Dental Examiners revoked dentist Megdal's license on the ground of "unprofessional conduct," a ground set forth in the statute

8. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

9. Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 363 (1986).

10. *See*, *e.g.*, Donald W. Brodie & Hans J. Linde, *State Court Review of Administrative Action: Prescribing the Scope of Review*, 1977 ARIZ. ST. L.J. 537 (1977).

but not fully defined.[11] Megdal's alleged unprofessional conduct was committing fraud on his dental malpractice insurance company by listing dental employees as working in Oregon when they really worked in California.[12]

After chastising counsel for not citing a specific constitutional provision in arguing the unconstitutionality of the statute—a typical Linde comment—Linde nevertheless explored whether the vague phrase "unprofessional conduct" constituted deprivation of liberty or property without due process of law.[13] Justice Linde concluded that federal law was inconclusive.[14] (I have never heard anyone say Justice Linde was a fan of much of the U.S. Supreme Court's constitutional doctrine.) So the Justice turned to the question of what the statutory phrase meant.

Linde wrote that the statutory standard "unprofessional conduct" could be interpreted in one of three ways.[15] First, the statutory phrase could refer to norms of conduct that were recognized in the profession or occupation apart from the views of the agency.[16]

Second, the phrase could express the legislature's own licensing standard in general, inexact terms.[17]

The third option was that the legislature delegated to the Board of Dental Examiners the power to define "unprofessional conduct" by adopting and enforcing rules for regulating the practice of dentistry.[18]

And on what basis did Justice Linde choose among the three alternatives? Each alternative was possible, but only one would appear to best fit the legislative plan.

Justice Linde examined other Oregon statutes creating licensing boards.[19] He was dismissive of the differences in the texts of these statutes, saying: "Sometimes differences in statutory drafting represent deliberate differences in policy. We see no reason to

11. 605 P.2d 273, 274 (Or. 1980).

12. *Id.*

13. *Id.* at 274-75.

14. *Id.* at 278.

15. *Id.*

16. *Id.* at 278-79. This interpretation was not appropriate, wrote Justice Linde, because the application of the words would depend not on interpreting the law but on finding what the existing standards are in fact. *Id.*

17. *Id.* at 279.

18. *Id.*

19. *Id.* at 282-83.

believe that this was the case here."[20] I'm still trying to figure out how he knew this. Rather, he inferred from these other statutes that "[w]hen a licensing statute contains both a broad standard of 'unprofessional conduct' that is not fully defined in the statute itself and also authority to make rules[,] . . . . [the] legislative purpose is to provide for further specification of the standard by rules . . . ."[21]

This legislative delegation required the Board to adopt a rule rather than confront the issue of unprofessional conduct on a case-by-case basis, concluded Justice Linde.[22] Because the agency erroneously applied the standard to ad hoc facts, the revocation of the petitioner's license was reversed.[23]

This approach was revisited in *Ross v. Springfield School District No. 19*.[24] In *Ross*, the Fair Dismissal Appeals Board sustained a school district's dismissal of a teacher who engaged in sexual conduct in an adult bookstore.[25] The statutory standard for dismissal was "immorality."[26] Applying the teachings of the dentist case, Justice Linde concluded that "immorality" should not be determined by reference to the views of "the public," an indeterminate standard that would fluctuate with the morals, standards, and pressures of the community.[27] Linde reasoned that even if public views were the standard, a record would have to be made before the agency of these public views.[28] A repeated refrain in Linde's opinions is that if empirical information is relied upon, that data should be made part of the record.

According to Linde (and his cohorts), the statute—like the one in the dentist case—placed primary interpretive responsibility with the Board to determine immorality.[29] The court concluded that in this instance the Board could interpret the statutory standard of immorality either by an interpretive rule or by adherence to reasoned

20. *Id.* at 283.

21. *Id.*

22. *Id.* at 284-85.

23. *Id.* at 287. The opinion drew a concurrence of three justices who would have preferred to apply common law principles to reach the same result. They argued that the majority engaged in a "very strained interpretation of a statute." *Id.* at 287-88 (Denecke, CJ., concurring).

24. 716 P.2d 724 (Or. 1986).

25. *Id.* at 725.

26. *Id.*

27. *Id.* at 730-31.

28. *Id.* at 727.

29. *Id.* at 728-29.

interpretations in a case-by-case approach.[30]

I wondered how Linde was going to decide between requiring an interpretive rule and allowing case-by-case agency decision making and how he was going to apply the dentist case. Not easy! His opinion tip-toes through the nature of determining "immorality," examines the court's decision in a prior appeal of the same case, differentiates between a legislative delegation (as in the dentist case) and a complete legislative expression in inexact terms (as in the teacher case), and looks at the nature of the particular administrative entity and its responsibilities.

I'm not sure a bright line exists between the two approaches that I could easily apply in the next case, but the opinion poses an interesting approach to interpreting statutes delegating power to administrative agencies.

According to Linde, the Board could proceed in the absence of an interpretive rule if it articulated in the contested case a tenable basis for the legal conclusions by which it applied a statute to the facts.[31] A reasoned decision would guide persons governed by the statute and would guide agency personnel and allow them to maintain consistency in future cases.

Because the Board did not set forth its interpretation of "immorality," the case was remanded.[32] It was a do-over. The teacher was to be heard based on criteria set forth pursuant to the Board's interpretation of immorality, but no further evidence needed to be taken unless a criterion adopted by the Board required it.[33]

Linde's opinion raised a conundrum pointed out by the dissent. If the Board was not to interpret "immorality" by considering the prevailing moral standards, what standard was the Board to use on remand?[34] Would a remand merely delay resolution of the dispute and engender more appeals?[35]

Perhaps Linde, ever the teacher and wordsmith, provided an

30. *Id.* at 729-30.

31. *Id.* at 729.

32. *Id.* at 731.

33. *Id.*

34. *Id*. at 731-32 (Campbell, J., dissenting).

35. *Id*. (The dissent objected that the decision dealt with issues not briefed by the parties and that if the Board is not to interpret immorality considering the prevailing moral standards, what standards is the Board to use on remand? Furthermore, the case had already comprised a full seven years with multiple appeals and, according to the dissent, the decision only further delayed the resolution of the dispute and might engender more appeals.).

answer when he ever so gently gave drafting advice to the legislature. His advice: Legislature, please pause before using such words as "moral" or "immoral" without further elucidation.[36]

Again, interpretation of law is the quintessential judicial activity. The legislature has, however, recognized the expertise and powers of administrative agencies. The Wisconsin Administrative Procedure Act provides that upon judicial review, "due weight shall be accorded the experience, technical competence, and specialized knowledge of the agency involved, as well as discretionary authority conferred upon it."[37] Because of these kinds of statutory provisions, and because the interpretation of the statutes is "so bound up with successful administration of the regulatory scheme," the pull is "to give principal interpretive responsibility to the 'expert' agency that lives with the statute constantly."[38]

One of my colleagues observed ruefully this year, in a concurrence to an opinion giving deference to an administrative agency's statutory interpretation, that "[t]he legislature and the courts have worked in tandem to dilute the role of the courts in protecting substantial rights and interests in agency cases. Property rights become tenuous when they are subject to largely unreviewable ad hoc decision-making–even if by well-qualified, dedicated administrative officials."[39] Another of my colleagues condemns the Supreme Court's judicial deference to an administrative agency's interpretation of a statute, characterizing judicial deference to an administrative agency as judicial decision-avoidance.

In contrast, Justice Linde's approach to judicial review of statutory interpretation by administrative agencies reinforces legislative supremacy and the power of administrative agencies to make decisions.

By adhering to the legislative delegation of power to administrative agencies, Justice Linde grants the agency—rather than the courts—the first crack at defining the meaning of the legislative

36. *Id*. at 728.

37. WIS. STAT. ANN. § 227.57(10) (2006).

38. Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 453 (1989).

39. Hilton ex rel. Pages Homeowners' Ass'n v. Dep't of Natural Res., 717 N.W.2d 166, 184 (Wis. 2006) (Prosser, J., concurring). The Wisconsin Supreme Court gives varying weights of deference to an agency's interpretation and application of a statute depending on such factors as the statutes governing the agency, the agency's expertise on the subject, and the agency's consistency in interpreting the statute at issue. *Id.* at 169.

words.

Justice Linde's decisions prevent judicial usurpation of administrative functions, yet facilitate meaningful judicial review. They assure proper and consistent agency application of the law and careful administrative consideration. These decisions require agencies to provide a source of guidance by adopting a rule or by articulating a connection between the facts the agency finds and the legal conclusions it draws from them.[40] The agencies remain accountable to the legislature and to the courts through agency rule-making and carefully crafted decisions. A court retains the ability to review an agency's rules and decisions to ensure that they comply with the legislative enactment.[41] The court thus carefully cabins regulatory agencies and plays an important role in statutory interpretation in the regulatory state.

II.

Even when promoting legislative supremacy and requiring administrative agencies to function under their legislatively delegated

40. Administrative agencies are not limited simply to interpreting statutes. In *Cooper v. Eugene School District No. 4J*, 723 P.2d 298 (Or. 1986), the court addressed whether the Superintendent of Public Instruction, as head of an administrative agency, had the authority to declare an act of the legislature to be contrary to federal and state constitutions. *Id.* at 301. The act prohibited a teacher from wearing religious dress in a public school. Linde suggested the reason judicial opinions have not allowed agencies to pass on the constitutionality of the laws entrusted to them was not because agencies err in considering such a challenge, but rather was based upon whether a litigant had exhausted all administrative remedies. Linde stated:

> If an agency decides a constitutional issue, though needlessly, the only result is that it will be affirmed on judicial review if the decision was right and reversed if the decision was wrong. It would be pointless to reverse an agency for correctly deciding a legal question on the ground that the agency should have waited for the reviewing court to decide the question.
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> Long familiarity with the institution of judicial review sometimes leads to the misconception that constitutional law is exclusively a matter for the courts. To the contrary, when a court sets aside government action on constitutional grounds, it necessarily holds that legislators or officials attentive to a proper understanding of the constitution would or should have acted differently. Doubt of an agency's obligation to decide constitutional challenges to its governing statute is itself a question of interpreting the agency's statutory duties. The agency's duty to decide such challenges would not be doubted if the legislature provided for it expressly rather than doing so implicitly under the general term "law" in the Administrative Procedure Act . . . .
>
> An agency ordinarily can interpret a statute so as to exclude unconstitutional applications before it is forced to question the statute's validity.

Id. at 303.

41. *See* Wald, *supra* note 7, at 222.

power, a court must interpret statutes. This brings me to my second theme. Linde's opinions demonstrate that when a court interprets a statute, the court should examine and evaluate all the material available to it to reach an interpretation that fits the legislation, makes sense, and works in the real world. Statutory interpretation does not, however, empower a judge to pass judgment on the wisdom of a law or to rewrite the law into one that the judge prefers.

"Legislative words," writes Justice Linde, "like Humpty-Dumpty's, mean what the legislature says they mean, or are intended to mean, if that intended meaning was known or readily could have been made known to any member before the vote."[42] The judiciary must determine the intended meaning of unavoidably vague words in constitutions and laws, must decide which meaning trumps alternative meanings, and must apply this meaning in concrete fact situations generally unforeseen by the legislature.[43] The court provides the gloss to the statute.

During Linde's time on the Oregon Supreme Court, the court readily recognized the utility and importance of considering the text in connection with the purpose of the enactment, its statutory history and development, and material available to the legislature in adopting the enactment. Professor Nagel calls this approach "textualism grounded in experience."[44]

In *Lipscomb v. State Board of Education*, the issue was whether a 1921 constitutional amendment allowed the governor to veto any provision in a statute containing an emergency clause or to veto only the emergency clause itself.[45] To interpret the constitutional provision, Linde concluded it was "necessary to understand the . . . [reasons for] the amendment."[46]

42. Jones v. Wallace, 628 P.2d 388, 391 (Or. 1981) (citing Chapman Bros. v. Miles-Hiatt Inv., 580 P.2d 540 (Or. 1978)). I agree with Justice Linde that in practice courts rarely see disputes over statutes when the parties cannot show possible alternative readings of the words that each claims to be correct in context. *See* Lipscomb v. State Bd. of Higher Educ., 753 P.2d 939, 947 (Or. 1988).

43. *See*, *e.g.*, Portland Gen. Elec. Co. v. Bureau of Labor & Indus., 859 P.2d 1143, 1145-47 (Or. 1993); Jack L. Landau, *The Intended Meaning of "Legislative Intent" and Its Implications for Statutory Construction in Oregon*, 76 OR. L. REV. 47, 47 (1997); Roy Pulvers, *Separation of Powers Under the Oregon Constitution: A User's Guide*, 75 OR. L. REV. 443, 449-50 (1996).

44. INTELLECT AND CRAFT: THE CONTRIBUTIONS OF JUSTICE HANS LINDE TO AMERICAN CONSTITUTIONALISM 5-6 (Robert F. Nagel ed., 1995).

45. 753 P.2d 939 (Or. 1988).

46. *Id.* at 943.

Linde also examined sources contemporaneous with the enactment of the provision, including press reports, a voters' pamphlet, and editorial explanations of the constitutional amendment.[47] These sources "left little doubt" that the amendment was intended to allow the Governor to veto only the emergency clauses of bills.[48]

The defendants urged the court to "disregard historical evidence of [the] purpose and scope" of the constitutional provision because the meaning of the text was plain and unambiguous.[49] The court's answer was that historical evidence should not be ignored.

> [The "plain and unambiguous" rule] and similar formulations are often recited, but in practice they do not and should not confine the court to historically blind exegesis . . . . When one side to a dispute over the meaning of a public law urges a court not to look at or consider materials presented by the other side for its reading of the law, this only invites doubt whether the materials might show that the "plain meaning" is not so plain after all. That is the case here.[50]

Ordinarily a memorandum by a proponent of a bill that accompanied the bill in the legislature would, in Oregon, be indicative of the legislature's intent. But a court should not blindly adhere to background materials relevant to the enactment of a law. Justice Linde recognized that all sources have to be weighed in terms of their contribution to the legislature's consideration.[51]

For example, in *Jones v. Wallace*, the issue raised was whether a 100% quorum requirement adopted in a corporate bylaw—rather than in the corporate articles of incorporation as statutorily required—could be enforced as a binding agreement among the shareholders.[52] In tracking the history of the Oregon statute at issue, Justice Linde found an explanatory memorandum by the Corporate Division of the State Department of Commerce (the proponent of the bill),

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47. *Id.* at 944-46.

48. *Id.* at 943-46.

49. *Id.*

50. *Id.* at 946.

51. Justice Linde wrote: "A legislative body adopting the bill is assumed to endorse the accompanying explanations and interpretations of the committee that reports the bill. . . . The strength of the assumption depends on the extent to which the committee's understanding of the bill is made available to the other members before the vote . . . ." Chapman Bros. v. Miles-Hiatt Inv., 580 P.2d 540, 544 n.4 (Or. 1978).

52. 628 P.2d 388 (Or. 1981).

accompanying the bill.[53] Unfortunately, the memorandum contained a misstatement.[54]

Justice Linde dissected the legislative process and determined that the memorandum did not garner the attention of the legislative committees and that anyone who examined the memorandum would have spotted the error.[55] By understanding the legislative process, Justice Linde could put legislative historical material in context and give the material appropriate weight. In that case, a memorandum that ordinarily would be viewed as helpful was disregarded.[56]

In another case, *State v. Woodley*, the court had to determine whose sense of "intimate parts" matters when an accused is indicted for violating the law proscribing nonconsensual sexual contact with the "intimate parts" of a person.[57] Linde characterized the Criminal Law Revision Commission's summary explanation of its draft as "so brief as to obscure rather than enlighten thought."[58] The comments therefore got short shrift by the Justice.

Justice Linde rejected the Court of Appeals' attempt to define "intimate parts" as a matter of law but also rejected the idea of leaving the decision to an unguided jury's discretion or a search for a "community" definition.[59] Linde looked for an interpretation of the statute that would achieve the legislative goal and work well in the context of the criminal justice system and a jury trial.

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53. *Id.* at 390.

54. *Id.*

55. *Id.* at 391.

56. In disregarding this statement, Linde wrote:

> We often recognize as relevant legislative history the reports of the Criminal Law Revision Commission and its sources, the reports of the Commissioners on Uniform State Laws, and other preparatory materials, as well as individual testimony, if these have demonstrably had the attention of members of legislative committees who had responsibility for approving the bill. In this instance, there is no such indication with respect to the misstatement in the quoted memorandum . . . . The amendment was not enacted on its own but as one section of a larger revision. There is no reference to this amendment in the committee minutes. Any lawyer or lay legislator who examined the bill might simply have recognized that the Corporation Division's explanation of this detail was in error and said no more about it. This is not the kind of legislative history that might cause doubt whether a bill misplaced a phrase or chose faulty terms to carry out its apparent purpose. It creates no doubt that [the statute] still permits the majority quorum to be "otherwise provided in the articles of incorporation" but not in the bylaws.

Jones v. Wallace, 628 P.2d at 391.

57. 760 P.2d 884 (Or. 1988).

58. *Id.* at 886.

59. *Id.* at 887.

What parts of the body are "intimate" under the statute? Justice Linde's answer was the part must be subjectively intimate to the person touched and objectively known to be intimate by a reasonable person.[60] This interpretation was not rooted in the text of the statute per se and did not appear in any legislative materials the legislature considered. It was, however, an interpretation that gave effect to the statute and was a "judicially manageable" standard in a criminal trial.[61]

In more recent years, it seems that state supreme courts, including Oregon[62] and Wisconsin,[63] have at least in rhetoric moved away from Justice Linde's approach to statutory interpretation and are using the rhetoric of an originalist or textual or plain meaning "methodology" of statutory interpretation. Courts say they examine the text and the context and apply the rules of statutory interpretation. They spend a lot time examining dictionary definitions, engaging in what some have called "the battle of the dictionaries."

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60. *Id.*

61. Hans A. Linde, *When Initiative Lawmaking Is Not "Republican Government": The Campaign Against Homosexuality*, *reprinted in* INTELLECT AND CRAFT: THE CONTRIBUTIONS OF JUSTICE HANS LINDE TO AMERICAN CONSTITUTIONALISM, *supra* note 7, at 135.

62. P.G.E. v. Bureau of Labor & Indus., 859 P.2d 1143, 1145-46 (Or. 1993) (citations omitted).

> In interpreting a statute, the court's task is to discern the intent of the legislature. To do that, the court examines both the text and content of the statute. That is the first level of our analysis.
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> In this first level of analysis, the text of the statutory provision itself is the starting point for interpretation and is the best evidence of the legislature's intent. In trying to ascertain the meaning of a statutory provision, and thereby to inform the court's inquiry into legislative intent, the court considers rules of construction of the statutory text that bear directly on how to read the text. Some of those rules are mandated by statute . . . . Others are found in the case law . . . .
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> Also at the first level of analysis, the court considers the context of the statutory provision at issue, which includes other provisions of the same statute and other related statutes. Just as with the court's consideration of the text of a statute, the court utilizes rules of construction that bear directly on the interpretation of the statutory provision in context. . . .
>
> If the legislature's intent is clear from the above-described inquiry into text and context, further inquiry is unnecessary.
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> If, but only if, the intent of the legislature is not clear from the text and context inquiry, the court will then move to the second level, which is to consider legislative history to inform the court's inquiry into legislative intent. When the court reaches legislative history, it considers it along with text and context to determine whether all of those together make the legislative intent clear.

63. *See*, *e.g.*, State ex rel. Kalal v. Circuit Court for Dane County, 681 N.W.2d 110 (Wis. 2004); Maile Gradison, *Recent Decisions of the United States Court of Appeals for the District of Columbia Circuit: Administrative Law*, 74 GEO. WASH. L. REV. 619, 631 (2006).

If the legislature's intent is clear from a limited inquiry into text and context, the court that follows this methodology then announces that further inquiry is unnecessary. The court states it will not examine the historical considerations surrounding the statute, including legislative purpose, legislative history, and the consequences of alternative interpretations including ease of administration of the statutory scheme. The court seemingly takes a pledge against use of sources extrinsic to the text, such as legislative history, except in emergencies. The emergency is often defined by labeling the statute as "ambiguous."

Underlying these statements of textual interpretation is the court's unwillingness to admit that most statutes that courts meet up with are open to alternative interpretations and that courts have to use judgment in deciding the statutory interpretation that best fulfills the legislatively adopted policy.

Statutory interpretation is not an easy task and does not flow directly and simply from a dictionary. I do not understand why courts deliberately deprive themselves of the opportunity to examine material that might assist their difficult task of discovering and abiding by the legislature's instructions. From my perspective, and I think Justice Linde's, judges are not to shut their minds to materials available to help determine what the statute aims to accomplish. Rather, judges are to keep their minds wide open and evaluate the significance of the materials to the legislature when using these materials in statutory interpretation.

Judicial rhetoric is important. A court's rhetoric reflects the justices' state of mind and is therefore influential in how the court interprets statutes. Nevertheless, despite the "textual" rhetoric, many courts are, I believe, still looking at all material available to them in determining the meaning of a law, even if they do not always "fess up" to what they are doing. In Wisconsin, the court permits itself to use extrinsic sources—including legislative history—to support the textual interpretation, but not to undermine the textual interpretation. That means, of course, that the court and the law clerks are examining legislative history before the final decision is reached about the meaning of the statute.

I recently interviewed a young man for a law clerkship position who told me about his law school research paper. He had studied the Wisconsin Supreme Court's statutory interpretation cases at several time intervals. His preliminary finding is that even though the Wisconsin court has adopted a textual approach, its use of legislative

history has increased in recent years.[64]

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Justice Linde teaches us that granting respect to legislative bodies does not signify a weak court. Justice Linde's approach is a worthy attempt to enable the judiciary to address the complexities of the regulatory and statutory state of the law.

I have touched upon only a small portion of Justice Linde's writings and ideas. There is much more. Even today's seminar will not plumb the depths of Hans Linde's contributions. Judge Wald wrote that Justice Linde is "undoubtedly one of the greatest state-court judges our republic has seen . . . . [He] evades classification along ideological lines. . . . [He has given our profession] a "multitude of marvelous insights and provocative solutions."[65]

Shirley S. Abrahamson, C.J., concurs.

64. Judge Jack Landau of the Oregon Court of Appeals argues that the intention of the legislature was originally regarded in nonsubjective terms, using the language of the enactment and general historical circumstances. The subjective intentions of the legislators as would be found in the legislative history were regarded as irrelevant and immaterial. Landau, *supra* note 43, at 48.

65. *See* Wald, *supra* note 7, at 234.