

# LEGISLATIVE INTENT AND THE AUTHORITY OF LAW<sup>1</sup>

The role of intentions in interpretation has been discussed from different perspectives and in various contexts. At the more abstract level, I have argued for a distinction between the role intentions play in determining the content, as opposed to the identification, of that which is a possible object of interpretation. Applying this distinction to the law, I have argued that the authoritative nature of law accounts for the conceptual role intentions play in identifying legal norms as such, which still leaves open the question of whether the legislator's intentions have any particular role to play in the interpretation of statutes. It is this question which I shall try to answer here.

Although the topic is familiar, a few introductory remarks are in order; these will form the chapter's first section. The following two sections will then concentrate on the attempt to clarify the intentionalist's thesis irrespective of its validity. The fourth and last section is devoted to the question of justification. In other words, I shall attempt to elucidate the conditions under which it would be reasonable for judges to defer to the legislature's intentions in statutory interpretation.

## 1. WHAT IS THE ISSUE?

Should legislative intent play a role in statutory interpretation, or indeed can it play any such role? This is one of the age-old questions of common law jurisprudence. Yet as is often the

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<sup>1</sup> A note on the revision: the first edition of this chapter has been subject to various critical essays, most notably, by Waldron (1999: chapter 6). Since I have already responded, in some detail, to Waldron's critic (see Marmor, 2001: chapter 5), I have decided to change very little in the content of this chapter and confined my revisions to matters of style and some clarifications which were needed.

case with such philosophical stalking-horses, some of the issues involved are muddled by a lack of clarity in the definitions of the pertinent questions. It is the task of clarifying the issue which I intend to address first. The most immediate difficulty encountered stems from the plurality of views under consideration. Roughly speaking, we can, of course, identify two main camps: those who favour deference to legislative intent, under certain circumstances, referred to below as intentionalists, and those who oppose such deference. Yet each standpoint actually comprises a very wide range of positions. In fact there is hardly any position which has not been argued for by one scholar or another, from outright sceptics, who claim that 'there is no such thing as a legislative intent', to those who claim that legislative intent is the only legitimate source for statutory interpretation.

I shall not attempt a survey of all these positions. Instead, I will begin the discussion with a general and rough outline of the thesis I wish to examine here. In outlining a position that favours deference to legislative intent, one which is at least initially plausible, I shall also be pointing out the kinds of obstacle such a thesis would have to overcome, thus providing an effective framework for the subsequent discussion.

The kind of a plausible doctrine I have in mind here would comprise the following general theses: first, it would hold that laws, at least in certain cases, are enacted with relatively specific intentions, and that this is a matter of fact which is discernible through an ordinary fact-finding procedure. Second, that in certain cases the presence of such a fact, namely, that the law was enacted with a certain intention, provides judges with a reason to decide the legal dispute in accordance with the legislative intent.

The characterization of a plausible version of intentionalism in terms of these two theses aims at clarifying that intentionalism faces a dual task which is both explanatory and justificatory. First, intentionalism must face the kind of skepticism which argues that—as a matter of fact—there is no such thing as legislative intent, at least not in any helpful sense. Second, intentionalism must answer those who claim that even if legislative intent were a discernible fact, it *should* not constitute a reason for judicial interpretations of statutes.

Each of these tasks comprises various sub-questions. At the descriptive level, the intentionalist must show that it is possible to identify both the 'legislator' whose intentions are meant to count, and the kind of intentions which are potentially relevant to statutory interpretation. (These two questions will be addressed in the next two sections, respectively.) At the level of justification, there is, of course, the first and main question of why is it ever a good reason to defer to legislative intent, even if there is one. But in addition to that, two further questions arise: one regarding the scope of the doctrine, and the other, its alleged force. The first is the question of whether the doctrine's applicability is confined to certain kinds of case, or applies whenever a legislative intent bearing upon the issue at hand can be discovered. The second, the question of the doctrine's force, is as follows: granted that legislative intent constitutes a reason for decision in a given case, how strong of a reason is it? Should it replace all other, potentially conflicting, reasons for decision, only some of them, or none? How should it be weighed against such other, potentially conflicting, reasons for the decision—is it a very weak reason, binding upon judges only in the absence of other good reasons for decision, or is it a very strong one, not easily overridden by other types of reason?

Thus, to reiterate, we can say that the question of justification comprises three main issues: why should legislative intent be a reason for decision, in which cases, and to what extent? Needless to say, although these are conceptually separate questions, their answers are likely to be intermixed in various ways, depending on the particular doctrine espoused.

Finally, to complicate matters a bit further, it should be noted that the very nature of the justificatory question is itself subject to controversy. This is an issue I would like to address before going on to examine the other questions in detail. Both proponents and foes of intentionalism sometimes conduct their arguments as if the issue is to be determined on the basis of considerations pertaining to the concept of law. Others, denying this, contend that the issue can be resolved satisfactorily, only if it is first recognized as thoroughly dependent on moral and political arguments. Both positions are confusing, however, as both are partly right and partly wrong. This is so as there are at least two ways in which intentionalism can be

claimed to be a matter of law, and at least two ways in which it can be claimed to be a matter of morality.

Intentionalism can be a matter which falls within the realm of law if, and to the extent that, some of the questions mentioned above are determinable, and determined, by legal practice. In certain legal systems, for instance, the question of whose intentions count as the intentions of the legislator might be determined by legal practice, in which case it is trivially a matter of law. Yet intentionalism can be claimed to belong to the concept of law in a much stronger sense. It may be construed as a doctrine which claims that deference to legislative intent is always a matter of law, as deference to legislative intent forms part of what it is to follow the law. I hope it is evident from my arguments in the previous chapter that this is not a plausible view; I have argued there that the existence of easy cases is made possible not by the fact that the legislator's intentions are clear and decisive, but by the fact that rules can often be simply understood, and then applied, without the mediation of interpretation. Hence, it will be presumed here that intentionalism, like any other interpretative strategy, pertains to the kind of reasons judges should rely upon when deciding *hard cases*; that is, when the issue is not settled by the existing legal standards, and interpretation is required to determine the appropriate solution of the case.

This assumption about the role of intentionalism also clarifies why there are two possible ways in which it can be a matter of moral and political argument. Granted that judicial decisions of hard cases often make a moral difference, proposing deference to legislative intent as a source of decision-making in such cases is, *ipso facto*, morally significant. Yet it does not follow that the considerations capable of supporting intentionalism are necessarily moral ones. As they pertain to the reasons that judges should rely on when confronted with hard cases, such considerations are bound to be based on evaluative judgements of various kinds, moral and political ones possibly included. But they are not thus included because the judicial decision makes a moral difference. We have already seen that considerations supporting interpretative strategies are bound to be sensitive to the purposes and values one finds embodied in the relevant enterprise. However, it would be a mistake to

identify these evaluative judgements with the particular effects of a given interpretation as compared with an alternative one of the same object. Such an identification would constitute the double confusion of identifying any evaluative considerations with moral ones, and identifying reasons purporting to support a given interpretative strategy with its likely effects. In both cases the latter form part, but not all, of the former. Hence, I will presume that the debate over the desirability of intentionalism in law is bound to be affected by various evaluative considerations. Whether these are primarily moral and political is something which remains to be seen.

## 2. WHOSE INTENTIONS?

The argument over the role of authors' intentions in interpretation is not, of course, unique to law. Art critics, to take one familiar example, often debate a very similar point. Yet there is one general problem which is unique to law, and which art critics are usually spared. I refer to the problem of identifying the author. Works of art, like most other objects of interpretation, are typically created by a single 'author'. Even if the historical identity of the author is in doubt, it is usually the case that there is such an author, and that it is a person to whom one can attribute intentions. On the other hand, statutory interpretation in a modern legal system presents a special problem in this respect, as 'the legislator' is often not a single person, but a whole legislative body composed of numerous members. Hence the question: Can we attribute an intention to a group of people, often numbering several hundreds?<sup>1</sup>

Lawyers, in particular, would not find it difficult to answer this question, as they would point to the fact that we often do attribute such intentions in similar situations. For instance, we attribute intentions to corporate bodies, such as commercial corporations, trade unions, cities, etc., on the basis of what can be called, the concept of *representative intentions*. That is, by means of identifying certain individuals whose intentions would *count as* the

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<sup>1</sup> I am ignoring an additional complication here: even with respect to a single legislator, it is not always clear whether he has formed a certain intention in his official capacity or not. A legislator might hold certain intentions, or rather hopes, unofficially, as it were. Can we say that in this case he has the intention that his intention not be taken into account by the courts?

intentions of the corporate body itself. This does not involve a kind of fiction, as is sometimes suggested by lawyers, but rather a set of established rules or conventions which determine these matters. We are vindicated in attributing intentions to the corporate body because rules or conventions determine that the intentions of certain individuals are *considered*—within certain established limits — *as the intentions of the corporate body itself*. Hence also, when these people act in their official capacity, they normally know and take into account that they act on behalf of the corporate body.

It should be noted that rules or conventions have a twofold function here: both of establishing the practice and of allowing for the identification of the particular instances falling under it. That is, rules help us explain how actions and intentions can be attributed to a corporate body at all, while also serving to identify the particular instances of such actions and intentions of the corporate body. In other words, it is characteristic of the concept of representative intentions that the rules which vindicate the attribution of intentions are constitutive of the practice. The situation here is no unlike other, more familiar instances, where certain actions gain their social meaning, as it were, only on the basis of certain rules or conventions. To give one closely related example: numerous speech-acts—like issuing a command, or uttering the words 'I do' in the appropriate circumstances of a marriage ceremony, etc.- would not have the social effects they do outside the rule or convention governed practices of which they are parts. Hence each and every performance of such a speech-act involves an implicit invocation of the appropriate conventional practice which is taken to determine the social meaning of the speech-act in question (that is, of course, apart from the conventions determining the literal meaning of the words used by the speaker).<sup>2</sup> In a familiar sense, this is true of legislation as well. The performance of certain actions counts as an act of legislation if and only if these actions are carried out in accordance with (and as an instance of following) certain rules or conventions. Hence, these rules or conventions must

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<sup>2</sup> See Austin (1955). Notably, Austin seems to have maintained that all the speech-acts for which he coined the phrase 'illocutionary acts' are essential conventional in this way. But Strawson's (1964) illuminating account of the issue makes it clear that only certain types of illocutionary act are essential conventional, while the performance of others involves no reliance on convention or rule-governed practices of any kind.

also determine whose actions are appropriate for the successful performance of an act of legislation and under what circumstances.

Unfortunately, however, at least in the common law legal systems, conventions do not extend so far as to determine whose *intentions*—amongst the various members of the legislative body— and in what combination, would count as the intentions of the legislative body itself.<sup>3</sup> In this, legislative bodies are quite unlike most other corporate bodies, where rules determine not only whose actions, but also whose intentions count as the intentions of the corporate body itself.<sup>4</sup>

Notably, most jurists seem to concede this fact.<sup>5</sup> Some, however, tend to reach sceptical conclusions at this point. The sceptic concludes that since there are no rule- or convention-governed practices of identifying the intentions of certain individuals taken to represent the intentions of the legislative body, attributing intentions to the latter is bound to be a fiction, a myth. There are actually two prevalent versions of this sceptical argument. As the more extreme one has it, legislative intent is a fiction due to conceptual considerations. The more moderate version of scepticism holds that even if we had an idea of what it meant for a legislative body to have an intention, its actual existence and discoverability would, at best, be a rare occasion.

Let us begin by taking a closer look at the more radical version of this sceptical stance. The following argument may be taken to be representative:

1. Intention is a mental predicate. It is only those possessing certain mental capacities who can be said to form intentions.
2. A group of people as such, as opposed to its individual members, does not possess a mind; only individual people have the requisite mental capacities to form intentions.

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<sup>3</sup> There is, of course, an underlying assumption that the actions of the legislators have been carried out intentionally. But this is not the relevant sense of 'intention' here, as it only says that something was not done by chance, or under the influence of drugs, etc. Needless to say, this is not the kind of intention which might have any bearing on statutory interpretation.

<sup>4</sup> Perhaps this is due to the fact that such rules would have to determine a hierarchical structure within the legislative body, something which is utterly opposed to our conception of representative democracy.

<sup>5</sup> See MacCallum (1968); Brest (1980:212), though, seems to suggest that those rules which determine whose actions, and in what circumstances, count as an act of legislation, also determine whose intentions count for the purposes of intentional-ism. But I could not find any arguments in the text which could be taken to support this claim. On his recommendation to follow the majority view, see text below.

3. Unless there are determinate ways of identifying certain individuals whose intentions represent the intentions of the group, no intention can be attributed to a group of people, as such.
4. On the assumption that the conditions of (3) do not obtain in the case of legislative bodies, these cannot be said to have any intentions whatsoever.

There is nothing wrong with the first two premises of this argument. The conclusion, however, does not follow because premise 3 is actually false. To see this, we must distinguish between the idea of a *group*-intention, which the sceptic rejects, and that of *shared* intentions, which is the relevant concept here. The former is purportedly the intention of a group, organization, etc., as such, which is somehow distinct from the intentions of any of its individual members. Presumably, the sceptic is opposed to the ontological perplexities raised by the potential reference of this concept. But the idea of shared intentions involves no such ontological perplexities. Even if you are a skeptic about the idea of group intentions, you cannot deny that it is possible for many people to have basically the same kind of intentions (or at least very similar ones). Arguably, this is often what we mean when we attribute intentions to a group of people (that is, in a non-representative manner). Consider, for example, the following kind of statements: ‘The “Red Socks” are desperate to win tomorrow’s game’; ‘The Palestinians want to have a state of their own’; ‘The Dada movement strove to challenge some of the most established conventions of European art’; etc.. In such cases, what we basically say is that a certain intention or aspiration or such is shared by all, or perhaps most, members of a certain group of people.

But this is not so simple. Attributing shared intentions to a group is not a purely quantitative matter of counting, as it were, how many members of a given group happen to share a certain intention. An additional element must obtain, namely, that there is a non-accidental connection between the identification of the group as a group of a certain kind, and the pertinent kind of intention. It is natural, for example, to speak of a nation aspiring to independence, as those who share the pertinent intention (and, perhaps, those who oppose it)



also share the expectation that this intention be held by their group, as such. The said intention is significant for them precisely (though not only) because they expect it to be shared by other members of the group, while even expecting membership in the group to be identified, in part, in terms of this and similar intentions.<sup>7</sup> Had we discovered, for instance, that the very same people also happen to share an extraordinary fondness for strawberries, we still would not say anything like, 'It is the nation's intention to eat great quantities of strawberries.' The affection for strawberries, even if it is shared by all the members of a certain nation, has nothing to do with the identification of the group as a nation. Only when the connection between the kind of intention in question and the nature of the group is somehow natural, or relevant, that an attribution of a shared group intention makes sense.

Now, let us return to law. Considerations mentioned so far seem to support what is usually called the *majority model* of legislative intent (cf. MacCallum 1968; Brest 1980). On the assumption that there is no particular reason why legislators cannot share certain intentions, it would be natural to maintain that legislative intent is present when most of the legislators share a particular intention *vis-à-vis* a law they have enacted. This leaves no place for doubt that perhaps the intention is only accidental to the identification of the legislative body as such. After all, it is the business of legislators to enact laws. Furthermore, at least within the present framework of our constitutional practices, the majority model seems particularly suitable. It is in accord with the rules which determine whose actions, and in what combination, count as an act of legislation. Ordinarily, this has to do with a majority vote. Thus, if it is normally the case that the actions of the majority are sufficient for the successful enactment of a law, it seems equally sufficient that the requisite intention be held by the majority of legislators (MacCallum 1968:263).

Hence, the majority model seems to offer a very plausible construct allowing for the attribution of intentions to the legislature, being an instance of one of the most common modes of attributing intentions to groups; that is, employing the concept of shared intentions. It is not surprising, however, that several difficulties arise with respect to the applicability of

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<sup>7</sup> Cf. Raz (1986b:208).

this model. To begin with, as has often been pointed out,<sup>8</sup> at times there is no majority view — at least not in any compelling sense — on the particular issue bearing upon the case before the court. Just as legislators can share intentions, they can also have conflicting and incompatible ones *vis-à-vis* a law they have enacted, each perhaps hoping (though often with no illusions) that his or her intention will eventually be realized in practice.

More problematically, the majority model is ambiguous. It is unclear whether the majority which it is based on comprises those who voted for or against the bill, or those who share an intention with respect to the particular issue at hand. This ambiguity is sometimes difficult to resolve. Consider the following example: suppose the issue before the court is whether or not a certain statute, *R*, applies to the case in question, say *x*. Let us assume that there are one hundred members of parliament, sixty of whom voted in favour of *R*, and forty of whom opposed it. Let us assume that the following facts are known: of the sixty members of parliament who supported the bill, thirty did so (partly or mainly?!) because they were convinced that *R* would apply to *x*, while thirty-five of those who opposed the bill did so because they thought the same, namely, that *R* would apply to *x*. Thus, we have a majority of members of parliament who thought that *R* would be taken to apply to *x*. But we also know that this is *not* the majority who would support the bill thus understood. Suffice it to say that in such cases there is a strong inclination to admit that either construal of the majority model would be utterly inadequate. Moreover, I do not believe that any single criterion is capable of removing all such cases of the ambiguity.

Nevertheless, the conclusion which emerges so far should not be overstated. True, it is sometimes embarrassingly difficult to answer the question of just whose intentions count. In such cases—and in so many others as we shall see shortly—the appropriate conclusion should be that the legislature had no particular intention with respect to the issues bearing on the case before the court. But it would be a great distortion to maintain that this is always the case. Suggesting that there are never, or almost never, cases where the majority of legislators share a certain intention *vis-à-vis* a law they have enacted would render the phenomenon of

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<sup>8</sup> See e.g. Dworkin (1985 :47).

legislation a rather mysterious achievement. After all, legislation is a complex political action which strives to bring about a certain change in the normative fabric of the law. It is the kind of action which is done with a purpose in sight, striving to achieve something. The fact that legislation in legislative assemblies is a complex and concerted action involving elaborate procedures does not undermine this simple fact. On the contrary: Unless we assume that the legislators have a pretty good sense of what it is that they strive to achieve by enacting a law, it would be very difficult to understand how they manage to achieve the act of legislation at all. A group of people who do not sufficiently share certain intentions would normally find it very difficult to achieve the kind of concerted action which is required in passing a law.

Let me conclude this section with the appropriate caution: the conceptual doubts about the possibility of ascribing intentions to the legislature do not seem to be well founded. However, it still remains to be explored whether the kind of intentions which we are likely to discover would be helpful in statutory interpretation. An attempt to provide some answers to this question forms the topic of the next section.

### **3. WHAT KIND OF INTENTIONS?**

Most of the non-trivial actions we perform are accompanied by a variety of intentions. If I decide to sell my old car, for example, it could be because I have a desire to buy a new one, and because I have promised my wife that I will no longer drive this old and unsafe car, and perhaps because I like change for its own sake. Sometimes such intentions combine to explain an action and motivate it, at other times, they may be quite separate and each one of them sufficient to explain or motivate the action in itself. A similar situation must be present in the case of legislation as well. Such a complex action as passing a law would often be accompanied by a whole range of intentions, hopes, motives, expectations and the like. And this brings up a whole array of difficult questions: Which intentions are potentially relevant and why? Are some of these legally relevant intentions more important than others? How

does one cope with the cases where various intentions are in conflict or otherwise incoherent?<sup>9</sup>

Before I venture to suggest some answers to these questions, let me emphasize that any classification of the various intentions with which a given act is being performed is necessarily limited and partial, as the possibilities of placing the dividing lines are almost endless. The distinctions must thus be guided by certain assumptions about theoretical relevance. In our case, they must be sensitive to the reasons one would have for assigning legal significance to the various types of intention.<sup>10</sup>

Bearing this qualification in mind, let me suggest the following distinction. At the most abstract level, it is useful to distinguish between what the legislator *aims* to achieve (or avoid) by enacting the law, and her thoughts (or assumptions, expectations, etc.) about its *proper application*.<sup>11</sup> I will consider each of these broad categories separately.

#### *Aims and Further Intentions*

When we ask ourselves what it is that the legislator<sup>2</sup> sought to achieve by enacting the law, we will always find that certain purposes are manifest in the language of the law itself, as a matter of logic, while others, though they exist, are not. Consider, once again, the 'No vehicles in the park' rule. Surely it must have been one of the intentions of the legislator that if anything is a vehicle it should not enter the park. The legislator cannot deny such an intention without breaching the rules of language or logic, or what speech-act theorists call the

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<sup>9</sup> Dworkin (1985 :52-4) rightly contends that one cannot answer these questions by relying on the intentions of the legislators themselves. Even if the legislators have an 'interpretive intention' (as Dworkin calls it) which consists in their intention with respect to the kind of intentions they intend to be relevant or dominant, this cannot be taken to solve any problem. An attempt to rely upon the interpretative intentions would only beg the question, 'Why are these interpretative intentions relevant?'

<sup>10</sup> For this reason, it would also be a mistake in the present context to attach too much weight to the analysis of the concept of intention, and its related notions, like motive, desire, hope, expectation, purpose, etc.

<sup>11</sup> This distinction, though in various forms, has been long recognized. See MacCallum (1968:237).

<sup>2</sup> For the sake of simplicity, I will mostly talk about a single legislator in this section, assuming that the multiplicity of legislators should not alter any of the basic points made here.

condition of sincerity.<sup>12</sup> Admittedly, this is a rather trivial point, but trivialities sometimes tend to be forgotten, or muddled.<sup>13</sup>

Apart from the aims which are manifest in the language of the law itself, the legislators are likely to have had a variety of, what I shall call *further intentions*,<sup>14</sup> in enacting the law. Thus, to revert to our example, the legislator might have enacted the law in order to enhance the safety of people who use the park; to reduce the level of pollution in the vicinity; to protect the safety of squirrels in the park; and, let us also presume, to enhance his chances of winning the forthcoming local elections.

There are three points that I wish to emphasize about further intentions. First, it should be realized that hardly any act of legislation is performed without any such further intentions whatsoever.<sup>15</sup> Of course it is possible to enact a law without having any idea why such a law is required, but we may hope that this does not happen very often.

Second, it is often difficult to distinguish the further intentions with which an act has been performed from the agent's motive in performing it. Admittedly, motive is an extremely problematic concept,<sup>16</sup> and I cannot explore its various meanings here. Suffice it to say that there is often a substantial overlap between motives and further intentions. An agent may, for instance, be motivated by desire for revenge, while at the same time it may be the case that revenge was what this agent strove to achieve by his action. Likewise, certain moral convictions the legislator holds may explain both his motive in enacting a given law, and what it was that he strove to achieve by it. But this is not always the case. Furthermore, there

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<sup>12</sup> See Austin (1955 :15); Searle (1969:60).

<sup>13</sup> Dworkin's distinction between abstract and concrete intentions is a good example of how this triviality can be muddled. His notion of the abstract intention stands for the intention which is manifest in the law itself, and his notion of the concrete intention draws upon the legislator's thoughts about the proper application of the words used in the statute, which I shall dwell on in some detail below. The terminology would have been innocuous, had Dworkin not further maintained that the difference consists in different 'levels of abstraction' (1985 :48). This was bound to yield unnecessary questions e.g. 'Are there intermediary cases between the two?' 'Is the distinction a matter of fact or a question of theoretical convenience?' and the like. I believe that the following discussion will show this to be a superfluous complication.

<sup>14</sup> The terminology is borrowed from Moore (1985:344). On the notion of further intentions in speech-acts in general, see Strawson (1964:161-3).

<sup>15</sup> There is one general exception to this: when the intention which is manifest in the language of the law itself is held by the legislator to stand for an *ultimate* purpose, in which case the further intention is identical, as it were, with the intention which is manifest in the language of the law itself. Such laws are, however, quite rare.

<sup>16</sup> Cf. Anscombe (1956).

are motives which do not figure in any proper description of what the legislator sought to achieve by enacting the law (that is, in terms of further intentions). These are typically motives that the legislator is not (fully) aware of. The Marxist notion of 'class-consciousness' is often given as an example in this context.<sup>17</sup> An analysis of such hidden motives and their potential role in legislation is an interesting topic in its own right, but it has little bearing on our present concerns. It would be quite extraordinary if intentionalism were taken to extend to such hidden motives as well. In any case, I shall not dwell on this possibility.

The third, and perhaps most problematic point, stems from the distinction that we might wish to draw between further intentions which are legally relevant, and those which are not. It might be a good idea, for example, to enhance the safety of people who use the park, while protecting the squirrels may not be such a good idea. But if we think that there is any legal relevance to further intentions, both would seem to be potentially relevant. On the other hand, the legislator's intention of making himself more popular by enacting this law, is a kind of intention which, I take it, even enthusiastic supporters of intentionalism would be very reluctant to take into account. Is there any sense in which such intentions are not legally relevant, as opposed to just being morally problematic?

It is not always as easy to recognize the difference between relevant and irrelevant intentions as this example might be taken to suggest. It is even more difficult to specify any general guidelines according to which such a distinction could be substantiated. In particular, the main question is whether we can come up with a criterion which is independent of the content of the particular intentions in question, or will the line eventually be drawn only on the basis of moral and political considerations delineating a sphere of legitimate intentions with which laws should be enacted? There is perhaps at least a partial content-independent criterion, pertaining to the kind of speech-act performed. Certain types of speech-act, such as insinuating, deceiving, showing off, etc., have the rather unique feature that the speaker's further intention is *essentially non-avowable*; rendering it explicit would be self-defeating.

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<sup>17</sup> For a discussion of this point in the context of intentionalism in historical studies in general, see e.g. K. Graham, 'How Do Illocutionary Descriptions Explain?', in Tully (1988:153 ff.).

The whole point of insinuating, for instance, is that the hearer suspects, but only suspects, the intention to induce, for example, a certain belief. Once this intention is rendered explicit, the speech-act cannot remain one of insinuating (Strawson 1964:163). Similarly, when it is one of the intentions of the speaker to use a speech-act for purposes of manipulation, it is his intent that the former intention remain unrecognized by the hearer.

With due caution, this can be applied to our problem as well. It may serve as a *sufficient* (but not necessary) condition for the identification of further intentions which one would initially be reluctant to take into account, that the legislator himself is most likely to disavow them. More precisely, in such cases it is not part of the legislator's intention to secure the effect he strives to achieve through others' recognition of his intention to secure it. On the contrary, there is a strong element of self-defeat in rendering such intentions explicit. But of course, this is only a partial criterion, which will often require supplementation by other, primarily moral, considerations.

#### *Application Intentions*

Apart from their various aims in enacting a given law, legislators often have certain intentions or expectations as to the proper application of the law they have enacted. Let us term these the legislators' *application intentions*. Thus, to take a typical example, consider the question of whether or not the 'No vehicles in the park' rule also applies to bicycles. The following possibilities exist:

1. It is possible that the legislator has not given the question any thought at all; it simply did not occur to his mind.
2. The legislator may have thought about the question, but either failed to make up his mind or intended to delegate the decision to the courts, which practically amounts to the same thing.

3. Finally, there is the possibility that the legislator had a determinate intention that the rule should—or should not— apply to bicycles as well.<sup>18</sup>

Needless to say, the plausibility of intentionalism with respect to application intentions derives from the existence of the kind of intentions designated by option (3), whereby the legislator has had a determinate intention with respect to the issue bearing on the case before the court. Yet as the situations described in the former two options are not all that rare, advocates of intentionalism have often attempted to define their doctrine in such a way as to encompass situations of these types as well. There are two common views which aim to overcome the lack of a determinate legislative intent, as described in (1) and (2). The first is based on what might be called the idea of counter-factual intention. In situations such as these, it is argued, the judge must ask herself what it is that the legislator would have decided had he been directly confronted with the issue and a decision required of him. But how would one go about answering such a question? After all, it would prove extremely difficult to answer such a counter-factual question even with respect to one's own intentions. Furthermore, it is far from clear what kind of facts should be taken into account: should judges take into account only the explicitly stated aims of the legislator, or various presumed aims as well? Should the judge go to the trouble of finding out the legislator's personal inclinations too? Imagine, for instance, the judge saying something like this: 'I know this legislator, and I know that he takes a ride every morning in the park.' Is this the kind of fact judges should be allowed to consider? And if not, how is one to tell what the *legislator* would have intended? In short, the idea of a counter-factual intention is quite unhelpful, to say the least.

The second alternative sometimes suggested in this context is a recommendation to judges to ask themselves what it is that *they* would have intended had they been in the legislator's place. This, however, is ambiguous: either it is tantamount to the counter-

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<sup>18</sup> Note that the phrase 'not intending that  $x$ ' is ambiguous between having no intention about  $x$ , and intending that not  $x$ . The former is an instance of either (1) or (2) above, and the latter is an instance of (3).



factual thesis, in which case we are back with the same perplexities, or it is just an awkward way of saying that the judge should decide the case according to those kind of considerations which are expected of legislators. This, admittedly, is not a vacuous suggestion. It can be contrasted with other, potentially conflicting grounds for judicial reasoning, which are guided by the presumption that judges, *ex officio*, should adopt a point of view which differs from that of the legislature. But for our present purposes, this thesis is irrelevant, as the kind of reasoning suggested to judges on this option is indifferent to the actual intentions of the legislator. If I have to decide what it is that I would have done were I in place of *A*, there is nothing I need to know about the actual intentions of *A*. Hence also, according to the suggestion under consideration here, the correct decision can easily be at odds with the actual intentions of the legislator. It is thus advisable not to discuss this suggestion under the title of 'intentionalism' at all. In any case, I shall assume from now on that application intentions are potentially relevant only when, as a matter of fact, the legislator has had a determinate intention bearing on the issue before the court, and my discussion will be confined to this option.

There are two further points to be noticed about application intentions. First, they should not be confused with communication intentions.<sup>19</sup> An act of legislation, like any other speech-act, must be performed on the basis of an understanding that certain conventions and other states of affairs obtain. These necessarily include linguistic conventions which determine the meaning of the utterance in the given situation. And, of course, they also include a great deal of background knowledge—referring to conventions and other states of affairs—allowing for the successful performance of an act of communication. Thus, when a speaker expects to be understood, she must expect the hearer to share the pertinent knowledge of these conventions and states of affairs and be aware of the speaker's intention to rely on them. But such expectations can, of course, be

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<sup>19</sup> On the definition of communication intentions, see Ch. 2, sect. 2.

frustrated, and this is another sense in which we can speak of the potential frustration of the legislators' intentions. It should be realized, however, that in this case the frustration of the legislative intent is a standard instance of *misunderstanding*, and as such, has nothing to do with the question under consideration, that is of the appropriate interpretative strategy judges should adopt in the resolution of hard cases. As I have repeatedly argued in the previous chapters, understanding an act of communication, and interpreting it, are two separate things which ought not to be confused.

The second, and more important point, is this: between the legislators' application and further intentions (or the aims which are manifest in the law), means-ends relationship of sorts would typically have to obtain. Suppose a statute, *R*, was meant to achieve a certain purpose, say *P*. The application intention of the legislator that *R* should be taken to apply to *x*, for instance, would typically be based on his assumption that *R* thus applied is more likely to achieve *P*. Of course the legislator can be mistaken (or insincere), and as a matter of fact, applying *R* to *x* might be inconsistent with the intention of achieving *P*. But in this case, either the legislator would have to admit that his application intentions were inadequate, being likely to defeat his own purposes in enacting the law, and hence better ignored; or else he would have to admit that *P* was not an adequate formulation of his further intentions. In either case, however, the application intentions ought to be taken into account—from the legislator's own point of view—only if, and to the extent that, their realization is likely to enhance his further intentions.

It should be emphasized that this is not a matter of the intensity with which the legislator holds his various intentions, as it were, but a matter of logic. It very well might be the case that the legislator has a clearer or stronger sense that *R* should be interpreted to apply to *x* than any of his further intentions in enacting *R*. But in any case, his application intention must be indicative of his further intentions. The legislator cannot maintain, without being incoherent, that his application intentions ought to be assigned precedence to his further intentions. That would amount to the absurdity that when the means are inappropriate for achieving the ends, one should nevertheless stick to the means. On the other hand, when the

further intentions are assigned precedence over the application intentions with which they are inconsistent, no logical incoherence is attributed to the legislator, but only a factual mistake, as it were.<sup>20</sup>

To sum up so far: I have distinguished between three main types of intention that are potentially relevant from the legal point of view. Apart from the intentions that are manifest in the language of the law itself, legislators typically have further intentions in enacting a given law, and sometimes they would have certain intentions bearing on its proper application. I have also suggested that some of these further intentions may be essentially non-avowable, in which case they are rendered initially irrelevant. Finally, I have pointed out that considerations of consistency require that the legislator's application intentions be taken into account only if, and to the extent that, they are in accord with his further intentions.

#### **4. WHY SHOULD INTENTIONS COUNT?**

At long last, we arrived to the main normative question about the potential relevance of legislative intent in statutory interpretation, namely, the question of whether such intentions ought to be taken into account or not. That is, we must now turn to the question of the possible justifications of intentionalism. However, before taking up this task, two clarifications are called for.

First, I must emphasize that I shall not be concerned here with constitutional interpretation, nor do I intend my arguments to have any straightforward application to the latter. Constitutional interpretation will be discussed in the next chapter, and there we shall see that the interpretative problems and the moral concerns are quite different and thus yield different conclusions.

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<sup>20</sup> To be sure, legislative intent may turn out to be incoherent in many other ways than the one described here, e.g. when the legislator's further intentions or application intentions are internally inconsistent. However, as Dworkin rightly argues (1985:50-1) in such cases it would be impractical or even impossible to decide which intentions ought to be regarded as the dominant ones. Hence in such cases, the practical result is that the legislator had no intention with respect to the pertinent issue, as if she had not made up her mind.

The second clarification is this: considering the various justifications of intentionalism, I shall be assuming that there are no conventions, followed by the community at large, which comprise a general practice of reliance on legislative intent<sup>21</sup> for purposes of interpreting statutes. This assumption ought to be emphasized for the following reason: had there been such a conventional practice, judges would have had a reason to respect it on grounds of the ideal of protected expectations. If the parties to a legal dispute can show that they had a *justified* expectation that the relevant statute be interpreted according to the legislators' intentions (assuming the legislator had had such an intention bearing on the case), judges would normally be obliged—other things being equal—to respect these expectations. I shall assume, however, that at least in the common law legal systems there are no such conventional practices, that is, people do not normally expect statutes to be interpreted by the courts primarily according to the legislature's intentions.<sup>3</sup>

How can intentionalism be justified, then, if it is not supported by legal practice? The most popular line of thought, one which, I suspect, many lawyers, and perhaps even more laymen, find appealing, is the argument based on democratic principles. It is often stressed in this context that since judges are not democratically elected or politically accountable for their decisions, they ought to respect the choices of the elected representatives of the people.

One can readily concede that judges ought to respect the political choices of people's elected representatives. But this only begs the question: what is it that the representatives have *democratically* chosen? Opponents of intentionalism can plausibly argue that it is not accidental to democratic procedures that they result in authoritative texts, that is, in statutes. One of the main objectives motivating parliamentary debates to culminate in a vote on a particular text, is to establish, as precisely as possible, what it is that, agreed upon, is

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<sup>21</sup> For obvious reasons, I shall not be concerned with those intentions which are manifest in the language of the law itself. Generally, the frustration of such intentions would result in the breach of the rule in question. And in any case, the intentions which are manifest in the law itself are of little help to judges faced with hard cases.

<sup>3</sup> Even within common law systems there are differences in the conventions of statutory interpretation with respect to deference to legislative intent. For example, the US judiciary is much more inclined to look at legislative history than its British counterpart.

sufficient to gain majority support (Ely 1980:17). Hence, at most, respect for democratic procedures entails that judges should apply the law whenever this is possible. Perhaps it also entails that the *final say* on legal matters should rest in the hands of the legislative bodies. This, however, falls far short of admitting to the intentionalist's conclusions.

I suspect, however, that most of those who rely on the argument from democracy have a different thought in mind. Judges ought to respect the intentions of the legislature, they think, because such intentions are in line with the wishes of the majority. It is this principle of majority rule that often motivates intentionalism. But this line of thought is even less promising than the previous one. To the extent that judges ought to respect the wishes of the majority (and of course I am not assuming here that they ought to do so), they would be better to consult opinion polls, rather than the intentions of legislators. After all, there is no assurance that the legislators' intentions do adequately reflect majority opinion, particularly when the law is relatively old and may have been enacted in a very different social-political environment than the one which prevails during its interpretation by the court.

In other words, even if one could make sense of the argument from democracy, its applicability to any but contemporary laws would be utterly problematic. Suppose, for example, that when a statute, *R*, was enacted, say ten years ago, the majority's intention was that *R* should apply to *x*. Suppose further, that the constellation of the legislators' intention has changed since, and the majority now holds the opposite, namely, that *R* should not apply to *x*. Which constellation of the legislators' intention should the judge follow according to the democratic principle, the past or the present one? Relying on the principle of majority rule would force one to choose the contemporary constellation of the legislators' intentions as the one which should be followed. After all, what is the point in respecting the majority view if it is no longer the majority view? But this is a perplexing result. It entails that intentionalism is not limited to the legislators' intentions in enacting the law, but extends to intentions which have not been expressed in any institutionalized way. Needless to say, considerations belonging to the concept of law render this option unacceptable. The legislators' thoughts about how their subjects ought to behave are legally irrelevant, unless they have been

expressed, that is, communicated, in one of the established ways recognized by the legal practice. Thus, if intentionalism is to make any sense at all, it must be confined to the original intentions of those who enacted the law. But, as we have seen, whenever the latter is not in accord with the contemporary constellation of the legislators' intentions, the argument from democracy renders intentionalism quite unattractive on its own terms.<sup>22</sup>

Let me turn now to a different line of thought which I find much more promising. Generally, I will suggest that the primary way of justifying reasons for complying with the intentions of the legislator involves the very same considerations which are taken to vindicate compliance with an authority's directives in the first place. In other words, I will argue that the justification of deference to legislative intent must be derived from the conditions which can be taken to establish that one person should be acknowledged to have authority over another. These conditions have been discussed in Chapter 6, and I will not repeat them here. The present argument is confined to showing that the same analysis, based on Raz's conception of the concept of authority, can be employed to elucidate the conditions under which it would be reasonable to defer to the authority's intentions when assessing how to interpret his directives.

Generally, as we have seen, the legitimacy of a practical authority derives from its mediating role; that is, an authority should be acknowledged as a legitimate one if, and to the extent that, its alleged subjects are likely to comply better with the reasons for action which apply to them by following the authority's directives than by trying to figure out or act on those reasons by themselves. This is basically what Raz calls the 'normal justification thesis'. It is crucial to note, however, that this normal justification thesis is in fact compound, consisting of two distinct types of justification. In some cases, compliance with the authority's directives can only be justified on the basis of the assumption that the authority is likely to have better access to the right reasons bearing on the issue than its alleged subjects. In other words, the assumption here is that the authority knows better what ought to be done, as it were. I will call this the expertise branch of the normal justification thesis.

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<sup>22</sup> Cf. Gans (1988:105).

Relative expertise, however, is not the only way to meet the conditions of the normal justification thesis. At other occasions, it is enough to show that the authority is *better situated* than its alleged subjects to make the pertinent decision; that is, without thus being committed to the presumption that there are certain reasons for action, whose identification and ascertainment are more accessible to the persons in authority. By and large, this is the typical kind of justification available when the function of the authoritative resolution is to solve collective action problems, such as large scale coordination problems, prisoner's dilemma situations, and such. Roughly, then, I will presume that a problem of collective action arises whenever the fact of having an established and enforceable decision is more important (morally or otherwise) than the particulars of the actual decision taken (that is, within a certain, reasonable, range of options).<sup>23</sup> In situations such as these, the legitimacy of the authority in question derives from its ability to solve the collective action problem, an ability which does not involve expertise of any kind. This latter point is of crucial importance as it shows that the legitimacy of authorities to issue directives may be acknowledged even with respect to issues, or fields of conduct, where no possibility of expertise is recognized. (More on this point later.)

This distinction, between the expertise and the collective action theses, bears upon the plausibility of intentionalism as follows: the case for deferring to the authority's intentions — when its directives require interpretation — is typically much stronger in the case of expertise than in the case of collective action. When one's reasons for acknowledging the authority of another are based on the assumption that the authority is more likely to have a better access to the right reasons bearing on the pertinent issue, it would typically be most sensible to take the authority's intentions into account when her directives require interpretation. An example can illustrate this point. Suppose one acknowledges the authority of one's physician, considering her the best available expert on the relevant medical problems. Now, suppose that the doctor's medical prescription is ambiguous, as there happen to be two different medicines which fit it.

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<sup>23</sup> It is not part of my argument here that all collective action problems, as such, require an authoritative resolution; many collective action problems are efficiently settled by other means.

Under normal circumstances, attempting to clarify the physician's intention would be the most sensible thing to do.

On the other hand, if one's reasons for complying with an authority's directives are based on the collective action thesis, there is no need to presume that the person in authority is an expert in the pertinent field. Hence there does not seem to be any particular reason to defer to the authority's intentions in order to solve interpretative questions as, *ex hypothesis*, the person in authority was not presumed to have a better access than the subjects themselves to the reasons on which they should act.

Admittedly, in both cases, the task of filling in the gaps left by the need to interpret the authority's directives can be carried out by someone else who would thus have to be acknowledged as yet another authority. But there is this crucial difference: in the case of expertise, there would be reason to confer the discretion on the second authority only if, and to the extent that, the latter is believed to have at least equal expertise in the pertinent issue. On the other hand, an authority that was not presumed initially to possess any particular expertise on the question under consideration can be replaced by anyone else whose position enables him to solve the problem equally well.

Thus, when the expertise justification thesis is available, there is reason to take the authority's intentions into account when assessing how to interpret the latter's directives. But even in this case, the reasons do not carry absolute weight, as it were. When contrasted with other, competing considerations (for instance, the advice of another expert), their relative weight would have to be sensitive to the degree of likelihood that the authority indeed has better access to the right reasons bearing on the particular issue. The more reason one has to believe that the authority knows better what ought to be done in the circumstances, the more weight one would attach to the authority's pertinent intentions. Furthermore, one can see that deference to the authority's intentions should *replace* other reasons for decision only within the bounds of expertise considerations. One's reasons for complying with the judgements of one's physician are confined to those considerations which apply to the question of the most appropriate medical treatment. They should not include reasons which are not based on



expertise, like, for instance, the reasons involved in a decision not to take the treatment at all, or to commit suicide instead.

Now, it is being assumed here that the alleged legitimacy of the legal authorities derives from both sources. According to this assumption, legislatures exercise both types of authority, depending on various factors, like the particular realm of conduct, the nature of the decisions required, the kind of evidence available to the legislature, etc. Sometimes the legitimacy of their directives derives from the expertise justification thesis<sup>4</sup>, and at other times, it derives from the collective action justification thesis. And quite often, it may derive from both. A given statute may have certain aspects which are justified from the perspective of the expertise branch of the normal justification thesis, and other aspects may be justified because they constitute a solution to a collective action problem.

Thus, the conclusion I am driving at should be apparent by now. The intentionalist's thesis gains its plausibility from the availability of the expertise justification thesis, and its applicability is confined to those cases. When the legitimacy of the legislator's authority—in a certain realm of conduct—derives from the collective action justification thesis, judges have no particular reason to defer to the legislators intentions in filling in the gaps arising from the need to interpret their directives. This task can be performed equally well by the judges themselves, exercising their own authoritative role.<sup>26</sup> We have also seen that when there is reason to defer to the legislators intentions, the relative weight assigned to this reason must depend on the degree of relative expertise that the legislators are presumed to possess. Furthermore, this reason should not replace other reasons if the latter are not within the confines of expertise considerations.

At this point, though, one might raise an objection which runs along the following lines. Consider the role of authorities in the solution of collective action problems. Let us presume that potential litigants have a justified interest in avoiding litigation as far as

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<sup>4</sup> I should be kept in mind that the legislature is often an administrative agency (like the US FDA, or EPA, etc..) and those tend to possess a considerable amount of expertise.

<sup>26</sup> It should be remembered that judges themselves act in an authoritative capacity, and that in the case of higher courts, this authority often equals that of the legislators.

possible, and also that they have a justified interest in the predictability of the judicial decisions in case these are eventually required. Let us further assume that the dispute concerns the interpretation of a statute and that there is a legislative intent bearing on the case. Now, would the parties concerned not be better off relying on the relevant legislative intent when they plan their conduct? And, if the case eventually reaches the court, will the judges not have a strong reason to respect such expectations? In other words, it seems that in cases stemming from collective action problems, that is, within the bounds of the collective action justification thesis, intentionalism can be justified through reference to the values of stability and predictability.

The problem with this argument is quite simple: it is based on factual assumptions which do not happen to obtain. Stability and predictability require at least two conditions, neither of which obtains in the case of legislative intent. First, that there be an actual practice, conventionally entrenched, giving effect to a particular way of solving problems. Second, and perhaps more essential, that the relevant sources of decision-making be easily accessible to the parties concerned. As to the first condition, I have already mentioned that in the common law systems, people do not generally expect that statutes will be interpreted, at least not primarily, according to the intentionalist doctrine.

The presence of the second condition is even more doubtful: legislative intent is not easily accessible and ascertainable to the public at large or even, in fact, to most lawyers. In order to find out the relevant legislative intent, one typically needs a great deal of material on the legislative history of the statute; not to mention all the obstacles to extracting the legislative intent from the historical material, even if it is available. Hence the suggestion that courts should interpret statutes by deference to legislative intent, because this would enhance the stability and predictability of the law, is one which is not supported by facts.

Let us return to the thesis which I have advocated so far. One important implication of this thesis consists in the fact that internationalism is not a plausible option with respect to those domains in which it is not possible to recognize expertise. This is quite important because it is arguable that expertise is not available in the realm of morality. Since many acts

of legislation are based on moral reasons and purport to affect moral conduct, the practical significance of this problem is considerable. But why would we think that expertise is not applicable to the moral domain? There actually several reasons for denying the possibility of expertise in the realm of morality, none of which should rely on skepticism. On the contrary, those who think that there are moral truths, or that morality is an objective domain, would also tend to maintain that basic moral principles are epistemically transparent, just there to be seen, as it were, by anyone who cares to see. There is just nothing more to be known about morality than that which is clarified by reasoning from true premises. Another line of thought which leads to the same conclusion would be premised on the assumption that expertise requires the possibility of some verification procedures. Unless some people can be claimed to have better access to certain procedures which can be taken to verify the truths in a given domain, there is no reason to hold anyone an expert in the relevant field. Since morality is the kind of domain which admits of no verification procedures, there is no possibility of expertise there. Finally, it could be argued that the idea of expertise in morality is also morally objectionable as it would be inconsistent with the basic demands of moral autonomy. People are morally responsible for their choices and actions only if they are based on their own moral deliberation and ethical choices. So there seem to be host of epistemic and ethical considerations which count against the possibility of recognizing expertise in the moral domain. Therefore, it seems that laws which are based on moral reasons cannot be associated with the expertise branch of the normal justification thesis, and thus would not call for any particular deference to legislative intent.

We should be careful here. Even those who deny the possibility of expertise in morality can acknowledge the legitimacy of an authority in issuing directives on matters of moral significance. The legitimacy derives from the fact that even in the moral domain, often it is more important to have an established and enforceable authoritative decision than getting the details of the decision right. In other words, even in moral matters there is often a need to solve collective action problems and an authoritative decision might be justified on that ground. Hence it should be realized that there is no contradiction in acknowledging the

legitimacy of an authority in issuing directives on certain matters of moral significance, while at the same time denying the possibility of expertise in morality, and therefore also of the applicability of intentionalism with respect to these matters. That is so, because authoritative resolutions on certain issues of moral significance can be justified on the basis of the collective action thesis. For example, it is quite important to have a definition in the criminal code of what constitutes 'theft', and this is basically a moral question. But it may be more important for us to have an authoritative definition of 'theft' in the criminal code, than getting the details of the definition right (within a certain range of acceptable options, of course.)

I would like to mention some further implications of the thesis advocated here, even if only briefly. To begin with, once intentionalism is advocated on the grounds of the expertise justification thesis, we can see why judges should sometimes take account of preparatory material on the basis of which the law has been enacted, and not merely of the legislators' intentions. By the former I mean, for example, the opinions expressed in various commissions, the intentions of officials and experts who participated in the drafting process, and the like. Within the bounds of the expertise justification thesis, the opinions of these people, and the evidence they have relied upon, can shed light on the considerations bearing on the case before the court, and serve as valuable sources of decision-making. That is, both independently, manifesting expertise, and also as an indication as to the level of expertise the legislators are presumed to have. Such material enables judges to substantiate their assumptions on the legislators' expertise, and accordingly, to attach greater or lesser weight to their pertinent intentions.

Similar considerations pertain to the dimension of time: the older the law is, the less attractive intentionalism becomes. The reasons for this are obvious: expertise changes over time, due to the accumulation of experience and the available evidence, to progress in various sciences, and the like. Thus the natural conclusion, that the older a law is the more suspicious one has to be of the relevance of the legislators' intentions.

Finally, the expertise justification thesis makes allowance for a certain discrimination between the legislators' further and application intentions: typically, the latter would have to

be more suspect. The reason for this is as follows: recall that application intentions manifest one's thoughts on the appropriate *means* to achieve certain ends. Now, compared with judgements on the appropriate ends to be achieved (that is, further intentions), the former possess a greater degree of ascertainment; they are often verifiable in ways which are not equally available with respect to judgements about ends. Furthermore, as means tend to vary a great deal with the circumstances, legislators, or anybody else for that matter, should not be expected to be able to decide in advance on all the appropriate means for achieving a given end. Hence the legislators' alleged expertise, with respect to judgements about the appropriate means to achieve certain ends, can be more readily contested on the grounds of competing evidence. This entails, again, the rather natural conclusion that judges should be more cautious about the legislators' application intentions than about their further intentions; such intentions should be scrutinized meticulously, since independent reasons and evidence are typically more available in these cases.

The chapter cannot be concluded without mentioning the following objection to the thesis it espouses. It might be argued that the considerations mentioned so far actually prove the implausibility of intentionalism altogether, since, at least in the context of law, the expertise justification thesis is never available. Admittedly, if the reasons for acknowledging the legitimacy of legal authorities are only supported by the collective action justification thesis, intentionalism in law is indeed rendered vacuous; there would be no occasions for its application. I do not think that this is a correct view, but I would not try to argue against it here. The point I wanted to make is strictly conditional: if, and only if, a certain law is justified on the basis of the expertise branch of the normal justification thesis, then it would make sense to defer to the legislature's intentions in the interpretation of the law, that is, to the extent that such an intention can clarify something that needs clarification. It is not part of my argument to insist that this is likely to happen very often.