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.

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.

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.) (of thego5.2(Ue Linde turnt)6.o5.2(Uquesf libf the)5w4( )]TJ -15.76

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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 ap2 176.1cluns ot 4n tetaton silygutweepersonstenablgoveretatb dec naturclun

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."

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

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

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