The Use of Extrinsic Aids in Determining Legislative Intent in California: The Need for Standardized Criteria

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Comments

The Use of Extrinsic Aids in Determining Legislative Intent in California: The Need for Standardized Criteria

"Must we concert ourselves with the meaning of the bills we pass, gentlemen? . . . I understand it is the duty of the Supreme Court to interpret them! . . ." *

* GRIN AND BEAR IT by George Lichty © 1955 Field Enterprises, Inc. courtesy of Field Newspaper Syndicate.
California courts, like all other common-law courts, are called upon frequently to interpret the law as set down by the legislature. Certain basic principles guide the court in this endeavor. The purpose of statutory interpretation is said to be the ascertainment of legislative intent in order to effectuate the purpose of the law.\(^1\) When attempting to determine the intent of the legislature, a court will turn first to the words of the statute;\(^2\) further, a court is required to apply the statutory language to promote rather than defeat the objective of the law.\(^3\) In interpreting a statute, a court may look beyond the wording of the statute itself; indeed, judges are to take into account such matters as the object in view, the evils to be remedied, the legislative history, public policy, and contemporaneous administrative construction of the statute.\(^4\) An additional rule of statutory construction requires that a statute in derogation of the common law be strictly and narrowly construed,\(^5\) although California does not always follow this mandate. Given a mandate to explore all possible sources,\(^6\) the appellate courts recently have located evidence of legislative intent from many sources outside the literal wording of the statute.\(^7\) This comment will examine a model for determining the relative merits of extrinsic aids. Sources currently used in California will then be analyzed under this model. An analysis of the

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5. See CAL. CIV. CODE § 4. When the legislature attempts to formulate new law that is totally divorced from previous common law tenets, such as family law or community property, extrinsic aids arguably form an even more meaningful background for statutory interpretation, because legislative intent stands alone without the benefit (or hinderance) of prior common law principles. See generally Big Sur Properties v. Mott, 62 Cal. App. 3d 99, 132 Cal. Rptr. 835 (1976).

6. It appears to be a well-settled rule that "courts may and should have recourse to available extrinsic aids in order to discover the meaning and purpose of legislation." Shafer v. Registered Pharmacists Union Local 1172, 16 Cal. 2d 379, 383, 106 P.2d 404, 405-06 (1940).

recent case of People v. Tanner will demonstrate the current confusion of California courts in their use of these outside sources. Finally, this comment will conclude that the use of the model will enable the courts of California to utilize various extrinsic aids in a more efficient manner when determining legislative intent. For purposes of this comment, the assumption is made that a court is faced with a situation in which extrinsic aids will assist the court in its interpretation or construction of a given statute; hermeneutics and the “plain meaning rule” will not be discussed since their relationship to the use of extrinsic aids is tangential at best. With these limitations in mind, this comment will turn to a discussion of the theoretical model to be used in the analysis of these extrinsic aids.


9. Many commentators have asserted that the entire notion of a collective legislative intent is highly artificial and perhaps nonexistent. Professor Max Radin has stated, for example, that legislative intent is “... a queerly amorphous piece of slag.” Radin, Statutory Interpretation, 43 Harv. L. Rev. 863, 872 (1930)

This comment will not address the issue of one person’s opinion reflecting the intent of the entire legislature. For a detailed discussion of this area, see 2A Sutherland, Statutory Construction §45.06 (4th ed. 1972) [hereinafter cited as Sutherland].

10. “Interpretation” and “construction” will be used interchangeably in this comment. One commentator has said that

interpretation and construction have often been distinguished by the courts; but for all practical purposes they may be regarded as synonymous terms, for the point at which the former ends and the latter begins is not possible of exact determination. de Sloovere, Preliminary Questions in Statutory Interpretation, 9 N.Y.U.L.Q. 407, 411 (1932). See generally Sutherland, supra note 9, at §45.04.

11. Hermeneutics, the science of the interpretation of words, is usually considered a frustrating and inconclusive exercise by the leading commentators. See generally, Frankfurter, supra note 2. California courts, by way of example, have recently been determining the meaning of such words as “amend”, see Card v. Community Redevelopment Agency of South Pasadena, 61 Cal. App. 3d 570, 573, 131 Cal. Rptr. 153, 156 (1976); “public entity”, see Vallas v. City of Chula Vista, 56 Cal. App. 3d 382, 387, 128 Cal. Rptr. 469, 473 (1976); and “whenever”, which turns out to mean “if”, see People v. White, 77 Cal. App. 3d Supp. 17, 22, 144 Cal. Rptr. 128, 131 (1978).

12. The “plain meaning” rule and the “clear and unambiguous language rule” appear to be inextricably woven together in the California courts. See Great Lakes Properties, Inc. v. City of El Segundo, 19 Cal. 3d 152, 155-56, 561 P.2d. 244, 246, 137 Cal. Rptr. 154, 156 (1977); Teacher’s Management & Inv. Corp. v. City of Santa Cruz, 64 Cal. App. 3d 438, 445, 134 Cal. Rptr. 523, 528 (1976). Courts have also examined outside aids even though there was no ambiguity, in order to avoid absurd results. See Leffels v. Municipal Court, 54 Cal. App. 3d 569, 572, 126 Cal. Rptr. 773, 775 (1976). But see Regina v. Ojibway, 8 Crim. L. Q. 137 (Toronto, 1965). The defendant was convicted of violating the Small Birds Act by shooting his hopelessly injured horse, the horse having a down (feather) pillow on its back at the time of the shooting. The court decided that, for purposes of the Small Birds Act, which prohibited the killing or injuring of birds, (1) a horse with feathers on its back was a bird, and (2) the act of killing a lame horse with feathers on its back therefore constituted a violation of the Act. This writer (and hopefully the reader) tends to doubt the validity and seriousness of the opinion from its beginning, which states that the author of the opinion is Blue, J.

Indeed, the California Supreme Court has stated that the altering of statutes should not occur if the purpose of the statute does not appear on the face of the statute or from its legislative history. Estate of Kramme, 20 Cal. 3d 567, 572, 573 P.2d 1369, 1272, 143 Cal. Rptr. 542, 545 (1978) (emphasis added). This statement would seem to imply that an “either/or” situation exists between an examination of the statute itself and the legislative history of its passage.
BUILDING A THEORETICAL MODEL

A fundamental difficulty with statutory interpretation by California courts appears to be that a particular source will be used without an examination of its relative merits. As early as 1962, concern was voiced that "the [California] courts have not fixed on any criteria for determining relevancy, materiality, and probative value . . ." of extrinsic aids to the process of statutory construction. It has been suggested that all extrinsic aids may be evaluated by the presence of four common factors. These factors, which have been postulated to evaluate a given extrinsic aid, are credibility, contemporaneity, proximity, and context. By applying these elements to a particular source, the relative weight that should be accorded to a given extrinsic aid may be judged. No single element will determine the validity of a given source; rather, these elements will invariably overlap at numerous points. The reader is therefore cautioned at the outset that, although these factors are somewhat general, all of them should be used in the analysis of any outside materials to estimate fairly the value of those sources.

A. Credibility

An initial examination of an extrinsic aid should include a determination of its credibility, which includes an inquiry into whether a given source is a reliable indicator of legislative action or understanding. Another relevant point of inquiry in this area would include whether the material is analytical or explanatory, as opposed to politically or otherwise potentially biased. Generally speaking, the more explanatory and analytical an aid is, the more credible it is. At the same time, the character of the source of the extrinsic aid is an important consideration. For example, material from a respected source such as the Cali-

14. Transcript of Proceedings on the Subject of Legislative Intent (Los Angeles, December 6, 1962) at 112 (testimony of Arvo Van Alstyne, Professor of Law, U.C.L.A.) [hereinafter cited as TRANSCRIPT].
15. See Rhodes, White, & Goldman, The Search for Intent: Aids to Statutory Construction in Florida, 6 FLA. ST. L. REV. 383, 403 (1978) [hereinafter cited as Rhodes]. This article was written by two Florida attorneys and a former director of a Florida legislative committee staff.
16. Rhodes, supra note 15, at 403-04. It should be noted that the authors of this article on Floridian sources of legislative intent attempted to briefly define these four terms. This comment will adopt these terms and seek to more fully explain them in the context of the extrinsic aids that are being evaluated. Although adopting these terms, this comment may differ in its perceptions of the precise definitions given those terms by the authors of the Florida article.
17. See Rhodes, supra note 15, at 403.
fornia Law Revision Commission would generally be given greater credibility than a letter from a group having no interest in the bill and no connection with the legislature at all. Impartiality in an extrinsic aid is said to contribute to its credibility as well. Finally, the value of the source of the extrinsic aid, as measured by the legislators themselves during the decision-making process, is considered an important part of the source's validity.

A distinction between credibility and the motives of an organization in promulgating a given aid must be made because of possible confusion in this area. Motives, or the stimuli prompting a person or organization to act in a certain way, may be varied and conflicting, as well as unrelated to the process of interpreting a statute. Although the words and background of the source are presumably before the legislature during consideration of a particular bill, motives may not be known to those actually enacting the legislation. For example, a legislator might in a later court proceeding testify with respect to his or her motive in submitting a bill for consideration, even though he or she remained silent on this point at the time the bill was considered by the legislature. Hence motives, and particularly individual motives, are not considered as evidence of legislative intent.

B. Contemporaneity

The contemporaneity of a source relative to the creation and enactment of a bill will be a factor in determining the worth of the source. This concurrence between the bill and the outside material should generally be close so that the extrinsic aid actually plays a part in the thinking process of the legislators during the enactment process. An analysis of contemporaneity should include a determination of whether the aid in question reflects the final form of the statute or is just an opinion of a provisional version of the bill. If the material sought to

20. See notes 79-90 and accompanying text infra.
22. See In re Clerkship of Circuit Court, 90 F. 248, 251 (1898); de Sloovere, Extrinsic Aids in the Interpretation of Statutes, 88 U. PA. L. REV. 527, 544 (1940); SUTHERLAND, supra note 9, at §48.17.
25. See Rhodes, supra note 15, at 403.
27. The Rhodes article includes this analysis under the development of the context factor.
be introduced as evidence of legislative intent was created prior to or during the movement of the bill through the legislature, amendments subsequent to its publication must be studied in order to ascertain the continued vitality of the material. 28 Thus, an aid should be available to the legislature before enactment; the publication of material after enactment would reflect the tenor of the new law rather than influence the passage of a bill through the legislature. 29 Consequently, the longer the passage of time between the instant of enactment and the development or publication of the extrinsic aid, the less the aid reflects the true intent of legislature during the lawmaking process. 30

C. Proximity

The third element, proximity, has been defined as the closeness of the aid to the "essence of the legislative action." 31 Generally, the closer the origins of the aid are to the legislative process, the more weight the source is given. 32 For example, a legislative committee that considers the bill would tend to be closer to the legislative process than an outside organization such as the State Bar. 33 An examination of any extrinsic aid, then, should include a discussion of its origins and the proximity of these origins to the functions of the legislature. 34

D. Context

The final criteria for judging the value of an extrinsic aid is the context of the aid as it relates to the legislative process. 35 This element is concerned with the historical circumstances surrounding the passage of a new statute and the purposes for which the extrinsic aid was promulgated. 36 Such evidence has long been considered helpful to the courts in interpreting legislation 37 although one Supreme Court Justice has

This author feels that there is a more logical connection to a correct and timely promulgation of an extrinsic aid through a contemporaneity analysis rather than an analysis of the actual influence of the aid upon the legislature. See Rhodes, supra note 15, at 404.
30. See Rhodes, supra note 15, at 403.
31. See Rhodes, supra note 15, at 403.
32. See Rhodes, supra note 15, at 403-04.
33. See generally Rhodes, supra note 15, at 404. See notes 46-55 and accompanying text infra.
34. See generally Frankfurter, supra note 2, at 537-38.
36. See Rhodes, supra note 15, at 404. The increasing frequency of a particular crime is an example of the historical background relevant to the passage of increased penalties for that crime. See People v. Tanner, 24 Cal. 3d 514, 557, 596 P.2d 328, 352-53, 156 Cal. Rptr. 450, 474-75 (1979).
attacked the extensive use of legislative history, urging "analysis of the statute instead of . . . psychoanalysis of Congress." Further, an examination of the context of the aid is imperative in determining the importance attached to the source by the legislature in shaping a consensus on the statute. The necessity of discovering the collective awareness of the legislative, and therefore the effect of the aid on the legislative process, has been said to depend on the "atmosphere in which it [the statute] was enacted as derived from circumstances relevant to its evolution. . . ." The opinions or recommendations exposed in the extrinsic materials can assist in the satisfaction of the context requirement if found to be incorporated in the final version of the bill.

The preceding discussion suggests a significant overlap in the preceding four elements of the model, even in terms of definition. Every one of these factors is of singular importance, however, as each contributes to the total validity of a given extrinsic aid. Moreover, it appears that the terms themselves imply a "sliding scale" within which each aid would be analyzed. All of the criteria, then, must be examined to discover the weight to be given the extrinsic aid in ascertaining its probable impact on the legislature. While finding a "perfect aid" is not the goal when examining the various extrinsic sources, more weight should be given to the source that better meets the preceding criteria of the model.

The four factors should serve as a starting point for the analysis of extrinsic aids. The following sections of this comment will focus primarily upon the specific sources of the various aids. One should note that extrinsic aids themselves do not originate as indicators of legislative intent. Rather, they are initially promulgated by various sources to influence or inform the legislature as it considers a particular bill. The status of the aid as evidence of legislative intent is always in doubt.

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39. See Rhodes, supra note 15, at 404. See generally White, Sources of Legislative Intent in California, 3 Pac. L.J. 63, 65 (1972). For example, when the author of a bill writes to the governor, rather than to a fellow legislator to explain the intent of the legislature in passing the bill, the California Supreme Court will delineate that evidence as too "remote" to be of use as an indicator of legislative intent. See Royal Globe Ins. Co. v. Superior Court, 23 Cal. 3d 880, 887, 592 P.2d 329, 334, 153 Cal. Rptr. 842, 847 (1979). See notes 158-161 and accompanying text infra.
42. Interview with Edgar Kerry, who heads the Legislative Office of the Judicial Council of California, September 18, 1980 (notes on file at the Pacific Law Journal) [hereinafter cited as Kerry Interview].
until the bill is actually enacted into law because the bill may not be enacted at all. Thereafter, the weight of the aid as evidence of intent should be determined using the basic model. Because of the flexibility of the criteria and the possible overlap of the factors, however, any examination of the various aids must be undertaken with the realization that no precise "rating" will result.

**ANALYSIS OF EXTRINSIC AIDS UNDER THE MODEL**

The various extrinsic aids will be grouped according to their origins for purposes of this comment. The first set of extrinsic aids considered will consist of those materials originating from groups outside the legislature. The second type examined will be those aids emanating from within the legislative process itself and will focus on only three groups within that process: the Office of Legislative Counsel, the standing committees, and the legislative offices of research. The third set of extrinsic aids in this analysis concerns individual statements and legislative history.

**A. Organizations Outside the Legislature**

Many individuals and groups not officially connected with the California Legislature make proposed changes in the law to a particular legislator. This legislator will then "carry" the group's bill through both houses. All of these organizations cannot be examined within the parameters of this comment: consequently, a representative group of highly visible organizations will be analyzed. Although at least one commentator contends that these organizations represent a part of legislative history, this comment will examine these entities emphasizing their lack of official connection with the California Legislature. The final organization to be discussed in this section will be the California Law Revision Commission, which retains aspects of both a private, independent commission and a dependent legislative entity.

**1. The State Bar**

The State Bar of California submits yearly recommendations for

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43. Although party political caucuses are a substantial part of a legislature's existence, no formal report guiding "legislative intent" has been found to warrant the inclusion of these groups into this comment. See notes 17-24 and accompanying text supra.

44. "Carrying" a bill is generally understood by members of the legislature to mean the introducing and shepherding of the bill through the legislative process.

45. See generally, R. Dickerson, The Interpretation and Application of Statutes 137-97 (1975).
changes in the law. This public corporation, through a Board of Governors and various specialized committees, analyzes the need for legislation and drafts specific proposals. The State Bar is also required to assist the California Law Revision Commission "in any manner the Commission may request within the scope of its powers or duties." These proposals, as drafted by the State Bar, would presumably be an accurate reflection of the intent of that entity since all recommendations are analyzed by its committees and transmitted with each proposal. These analyses, however, must be examined individually to determine whether they are objective enough to satisfy the credibility element of the model. The requirement of proximity might not be satisfied because the State Bar would seem to be removed from the essence of the legislative process. Since the resolutions of the State Bar are distributed to all of the legislators, these documents are available to influence the legislature. The context element may then be satisfied.

The contemporaneity element appears to pose the greatest difficulty because these proposals are promulgated before the legislative session in which they are introduced. Thus, scrutiny must be paid to whether the legislation as enacted bears a close resemblance to the original proposal. If the bill was not substantially amended before passage the intent of the State Bar arguably is reflected by the legislature when the bill was enacted.

The task of differentiating a substantial change from a mere cosmetic change involves evaluating the overall purpose of the bill and the possible changes in that purpose. No recognized test exists for determining the effect of any particular change on a bill. Thus, one should

46. For example, 49 bills were proposed for the 1975 legislative session. See Hufstadler, Annual Report of the Board of Governors, 49 Cal. St. B.J. 607, 619 (1974).
48. This is in accordance with the Board of Governors' power to "aid in all matters pertaining to the advancement of the science of jurisprudence or to the improvement of the administration of justice..." Id. §6031. For example, the State Bar proposed the most recent change in the rape statute to prohibit spousal rape. See State Bar of California, 1978 Conference Resolution 12-3-78.
50. Committees within the State Bar and the various local bar associations will focus on the area of their expertise in drafting legislation. See generally State Bar of California, 1979 Conference Resolutions.
51. For example, the 1979 Conference Resolutions were drafted for use in the 1980 legislative session on September 15, 16, and 17 of 1979 in Los Angeles. See id. (cover).
52. See note 51 supra.
54. This is one the basic tenets of statutory construction. See generally Turner v. Board of Trustees, 16 Cal. 3d 818, 548 P.2d 1115, 129 Cal. Rptr. 443 (1976); Clean Air Constituency v. California State Air Resources Bd., 11 Cal. 3d 801, 523 P.2d 617, 114 Cal. Rptr. 577 (1974).
55. A bill may sometimes be so amended that it is passed enacting the opposite law desired
begin with the original State Bar recommendation and examine the final version of the new law to determine the similarities and differences between the two; if there exist major differences, the significance of the comments of the State Bar would be diminished.

2. The Judicial Council

Created in 1926 by constitutional amendment, the Judicial Council performs many functions, including the recommendation of specific changes in the law through the development and sponsorship of legislation. The Council is composed of the Chief Justice of the California Supreme Court, who acts as chairperson, one other supreme court justice, three justices of the courts of appeal, five superior court judges, three municipal court judges, two justice court judges, four members of the State Bar, and one member each from the state Senate and Assembly. The Council not only makes recommendations in proposal form, but also analyzes proposed legislation from other sources that affects the judicial system.

The reports and recommendations of the Judicial Council would appear to be credible because of their explanatory and analytical nature. Since two of its members are legislators and most of the others are judges, the proximity element would seem to have been met because of the closeness of the two legislators to the essence of the legislative process. Additionally, context is present at least when a legislative member sponsors and carries the bill; he or she speaks for the bill as an advocate of its passage for both the Judicial Council and in his or her capacity as a legislator. Again, the contemporaneity of the bill, focusing on the differences between the proposal and the enacted legislation as amended, will contribute to the amount of weight to be given a Judicial Council report or proposal.

The courts of California recognize the importance of the Judicial Council in their search for legislative intent. In Hohreiter v. Garrison, the First District Court of Appeal was confronted with the task of inter-
interpreting Government Code Section 11517, which relates to administrative procedure and the powers of an administrative hearing officer. The court found that the report of the Judicial Council was "a most valuable aid in ascertaining the meaning of the statute." Indeed, the Judicial Council was recognized as "a special legislative committee" because the Council drafted the act at the request of the legislature. Finally, the court "assumed that the Legislature adopted the proposed legislation with the intent and meaning expressed by the Council in its report." Sections of the Council's report were quoted extensively in the opinion, and the court noted no substantial change between the report and the enacted statute.

In Hohreiter, the use of the report of the Judicial Council was apparently correct under the model analysis. The legislature was aware of the Council's report, and in fact requested that the Council study and propose new law in this area. Thus the report would be in very close proximity and context to the legislative process. Because the report was adopted by the legislature without substantial changes, the report would seem to satisfy the contemporaneity element of the model as well. Further, while the court did not mention it specifically, the report was most likely submitted with the proposal, further satisfying the requirement of contemporaneity. Finally, the credibility of the Council's report may be inferred from the report's analytical and unbiased nature, as cited by the Hohreiter court. The report of the Judicial Council, then, was used correctly in the case and in accordance with the model.

3. The Attorney General

The Attorney General, as head of the Department of Justice, recommends changes in the law to the legislature and often analyzes the potential impact or import of a particular bill. Legislative proposals
by the Attorney General that have been enacted include amendments to the credit-discrimination laws,\textsuperscript{74} and more recently, the denial of probation to persons convicted of using firearms while committing specified felonies,\textsuperscript{75} which was the source of the famous \textit{People v. Tanner} decisions.\textsuperscript{76}

Under the model analysis, the promulgation of legislative materials by the Attorney General reflects the possibility of bias affecting his or her credibility because it is the duty of the Attorney General to enforce the law, but not to enact it.\textsuperscript{77} Because of this primary duty to enforce the law and the remoteness from the essence of the legislative process, the Attorney General’s recommendations and opinions may also be suspect in the proximity area. The date of the source and the degree of change undergone by the bill subsequent to the recommendation or opinion must be examined closely to determine its contemporaneity and its continued vitality. The context element may be met if the source is actually available to the individual legislators. Overall, however, the Attorney General’s office would appear to be a questionable source of legislative intent, given the problems raised by the credibility and proximity factors of the model.\textsuperscript{78}

4. The California Law Revision Commission

The California Law Revision Commission, which replaced the old Code Commission\textsuperscript{79} in 1953,\textsuperscript{80} includes among its duties the recommendation of reforms that the legislature deems necessary.\textsuperscript{81} The Commission includes one state senator and one assembly member, with gubernatorial appointees comprising the rest of the body.\textsuperscript{82} When a major revision of the law is proposed, a study of the area must be conducted; such a study must be authorized by a concurrent resolution in the legislature.\textsuperscript{83} The legislature thus controls the topics to be reviewed and analyzed by the Law Revision Commission. This organization appears to be independent in the scope of its recommendations; the legislature does not always agree with the Commission’s recommendations.\textsuperscript{84} Still, the legislative record of the Commission is

\begin{itemize}
\item \textsuperscript{74} See Cal. Civ. Code §1812.30.
\item \textsuperscript{75} See Cal. Penal Code §1203.06.
\item \textsuperscript{76} See text accompanying notes 178-209 infra.
\item \textsuperscript{77} See generally Henke, supra note 56, at 181-84.
\item \textsuperscript{78} Further discussion of the Attorney General’s opinions and recommendations will take place in the analysis of \textit{People v. Tanner}. See text accompanying notes 194-200 infra.
\item \textsuperscript{79} See Cal. Stats. 1929, c. 750, §2, at 1427-28.
\item \textsuperscript{80} See Cal. Stats. 1953, c. 1445, § 2 at 3036; Cal. Gov’t Code §§10300-10340.
\item \textsuperscript{81} See Cal. Gov’t Code §10300. See generally Henke, supra note 56, at 192-93.
\item \textsuperscript{82} See Cal. Gov’t Code §10301.
\item \textsuperscript{83} Id. §10335.
\item \textsuperscript{84} For example, the Commission has been active in the reform of California’s non-profit
\end{itemize}
phenomenal; as of the 1979 legislative session, 102 of the 114 bills proposed by the Law Revision Commission, or 90 percent, were enacted in whole or in substantial part.\textsuperscript{85}

The credibility of the Law Revision Commission appears to be reflected fairly in the analytical nature of its reports and its record of impact in the legislature.\textsuperscript{86} Likewise, proximity is achieved by the legislative membership on the Commission and legislative control of the Commission's activities. Contemporaneity is found in the lack of substantial change that usually occurs in a bill recommended by the Commission, although this absence of change does not take place on every recommended bill. The reports and recommendations are usually published in conjunction with the bill and subsequent statute when it is enacted, and every legislator has a copy of these materials. Thus, the context element of availability is satisfied.

California courts have generally depended heavily on the Law Revision Commission materials, when available, for evidence of legislative intent.\textsuperscript{87} In fact, the California Supreme Court has stated that the Commission's comments \textit{were} the intent of the legislature.\textsuperscript{88} Further, the United States Supreme Court has used the official commentary of the Law Revision Commission to find a section of the California Evidence Code the "considered choice by the California legislature."\textsuperscript{89} When the legislature does not change the language of a section proposed by the Commission, the Commission's comments are at the very least a strong indication of legislative intent.\textsuperscript{90} Because of its credibility, its legislative roots, and its past record, the California Law Revision Commission may be the best indicator of legislative intent outside the chambers of the legislature.

Other organizations too numerous to mention recommend legislation and give opinions regarding legislative action. These groups, including state agencies and departments, labor unions, trade associations, and other special interest groups\textsuperscript{91} will also require an analysis under the model. Generally, however, if a particular bias can be shown regarding the organization's analysis of a bill the credibility of that organization can be challenged. Further, a substantially amended bill may cause a

\textsuperscript{85} \textit{See} CAL. LAW REVISION COMM'N, ANNUAL REPORT 210 (1978).
\textsuperscript{86} \textit{See id.} \textit{See note} 84 \textit{supra}.
\textsuperscript{87} \textit{See} Van Arsdale v. Hollinger, 68 Cal. 2d 245, 249, 437 P.2d 508, 511 (1968).
\textsuperscript{88} \textit{See} People v. Williams, 16 Cal. 3d 663, 667-68, 547 P.2d 1000, 1003, 128 Cal. Rptr. 888, 891 (1976).
\textsuperscript{90} \textit{See} Mann v. State, 70 Cal. App. 3d 773, 778-79, 139 Cal. Rptr. 82, 85 (1977).
\textsuperscript{91} \textit{See generally} HENKE, \textit{supra} note 56, at 196-223; Steck, \textit{California Legislation: Sources Unlimited}, 6 PAC. L. J. 536, 560-63 (1975) [hereinafter cited as Steck].
group’s analysis to lose its contemporaneity. Thus each group must be examined using all of the four proposed criteria to gauge the recommendations and opinions in terms of their worth as extrinsic aids in the determination of legislative intent.

B. Entities Within the Legislature: Legislative Committees, the Legislative Counsel, and the Offices of Research

The legislative committees, the Legislative Counsel, and the Senate and Assembly Offices of Research in the respective legislative bodies are integral parts of the legislative process. Their work is immediately available to individual legislators; indeed, these organizations are comprised either of legislators themselves or of persons who report directly to legislators. In addition to these attributes, two of these entities, the Legislative Counsel and the committees, are being cited extensively by California courts today as indicators of legislative intent. These organizations must be examined under the model to determine their worth as extrinsic aids to the process of finding legislative intent.

I. Legislative Committees

Legislative committees often do the majority of the work in formulating amendments to proposed legislation in California, as well as in most other states and the United States Congress. Because a committee presumably has specialized knowledge and expertise, a legislative body usually defers to the findings and recommendations of a committee. The various committees have staff consultants who prepare analyses of each bill that are circulated within the committee prior to its consideration of the bill. These analyses frequently note possible problem areas with the bill, propose changes to correct those problems, and include an opinion regarding the changes that the bill will bring about.

These committee analyses are clearly proximate in origin to the legis-

93. See Steck, supra note 91, at 557-58.
95. See generally Jones, supra note 41; de Sloovere, Extrinsic Aids in the Interpretation of Statutes, 88 U. Pa. L. Rev. 527 (1940).
96. See generally Jones, supra note 41.
97. A committee analysis report was included in the decision of the Tanner case. See notes 178-209 and accompanying text infra.
lative process. The potential aids must be examined then in terms of their contemporaneity: does the analysis concern a bill that has not been acted upon for a substantial period of time? Another relevant inquiry regarding this element is whether the bill has been substantially amended later in other committees or by either house of the legislature; a past committee analysis of a subsequently amended bill may be useful to a court only for limited provisions of the bill. A key inquiry in the investigation of credibility concerns the scope of the analysis. Of particular relevance is the determination of whether the analysis is cursory as opposed to a fully developed in-depth analysis of the provisions of the bill. The analytical and unbiased nature of the bill analysis should likewise be examined thoroughly to ascertain its credibility.

The context of the analyses and the fact that these analyses are not generally circulated and used by all members of the legislature appear to diminish the potential evidentiary value to be gained from this source. The committees of the California Legislature usually report out a bill with the notation “do pass” or “do pass as amended” and nothing else.

An example of the use of a legislative committee analysis as a source of legislative intent is found in the case of *Southern California Gas Company v. Public Utilities Commission*. The statute under scrutiny by the California Supreme Court concerned the implementation of home insulation financing programs by utility companies. At issue was whether the provisions challenged were permissive or required by the terms of the statute. The court used two committee analyses to decide that the programs were permissive, with the justification that “[s]tatements in legislative committee reports concerning the statutory objects and purposes which are in accord with a reasonable interpretation of the statute are legitimate aids in determining legislative intent.” The court's approval of the use of the committee reports under this cursory examination under any perceived guidelines makes

98. It should be noted that the time span may have been caused by any number of factors, including the postponement of a bill over to the next legislative session. Other questions concerning the bill may have arisen in this intervening period also.
99. Bias should be examined in certain cases also; for example, when the author of the bill is also the chairperson of the committee, the analysis of that committee may not be as neutral as an uninterested committee performing the same task. Additionally, analyses may vary from committee to committee, and some reports may not be strictly analytical. *Kerry Interview, supra* note 42.
100. *See REPORT, supra* note 29, at 10.
103. 24 Cal. 3d 653, 596 P.2d 1149, 156 Cal. Rptr. 733 (1979).
104. *Id.* at 655-56, 596 P.2d at 1150, 156 Cal. Rptr. at 734.
105. *Id.*
106. *Id.* at 659, 596 P.2d at 1152, 156 Cal. Rptr. at 76.
it readily apparent that the model analysis could have been employed profitably in the case.

The committees of the California Legislature also issue formal reports on various topics, including proposed legislation that is before the committee.\(^ {107}\) While formal committee reports have been suggested as a useful additional source of legislative intent,\(^ {108}\) such formal reports tend to be issued rather infrequently.\(^ {109}\) When available, such formal reports would be credible because of their analytical nature. Likewise, a formal report submitted to the legislature more fully meets the context element than the usual committee analysis because its publication in the Assembly or Senate Journals increases its availability to the individual legislators.\(^ {110}\) The report, if published during the legislative process, must be examined in light of subsequent amendments to the bill which may destroy the contemporaneity of the report. The proximity of the report is established by the nature of the legislative committee as a part of the legislature. Because these factors may be more fully realized in the context of a formal committee report, the legislature might be inclined to adopt this type of reporting system to better publicize its reasoning to those interpreting statutes.

2. The Legislative Counsel

The Office of the Legislative Counsel, like the committees of the legislature, is a significant force in the shaping of California legislation.\(^ {111}\) Created in 1913,\(^ {112}\) the Legislative Counsel is charged with the duties of preparing legislation and assisting lawmakers in the initial drafting phase of the legislative process,\(^ {113}\) as well as rendering legal opinions on proposed legislation upon a legislator’s request.\(^ {114}\) The Legislative Counsel also publishes a short synopsis or analysis of every bill as it is

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107. See Report, supra note 29, at 45.
108. In fact, the Report of the 1963 Assembly Subcommittee on Legislative Intent recommended the “[a]doption of a system of standing committee reports, beginning with one or two committees on a trial basis . . . .” Report, supra note 29, at 45. The legislature has not attempted to adopt such a system as yet.
109. The California legislature has created many and varied committees and subcommittees that work on a wide range of subjects. Their findings and recommendations sometimes are published in the respective legislative journals. See Henke, supra note 56, at 160-61. These “reporting” committees handle the larger problems. On the other hand, the United States Supreme Court generally considers the Congressional committees as the “real” legislature on the strength of the committee reports, and, a fortiori, the intent of the committee is the intent of Congress. See O’Hara v. Luckenbach Steamship Co., 269 U.S. 364, 367 (1926). See generally Jones, supra note 41, at 746-50.
110. See note 100 and accompanying text supra.
112. See Cal. Stats. 1913, c. 322, §1, at 626; Cal. Gov’t Code §10200.
114. Individual opinions to legislators, however, are not publicly released unless the legislator chooses to release them. Id. §§10207, 10233. See Steck, supra note 91, at 556.
introduced or amended, called the Legislative Counsel's Digest, which precedes the text of every bill. The Legislative Counsel is also charged with other duties, such as assisting the drafters of initiative measures to be submitted to the voters, and advising the legislature of legislation needed to maintain a particular code or to codify a certain public policy.

The opinions of the Legislative Counsel's office to an individual legislator are protected by the attorney-client privilege and are not published unless the legislator chooses to release the opinion. Thus, these opinions may not be available to form a basis for legislative intent. Without the release and publication of a Legislative Counsel opinion normally only one legislator is aware of its contents and the opinion cannot influence other legislators. Because of their explanatory and unbiased nature, the opinions would appear to be credible. Proximity of these opinions is assumed because of the closeness of the Legislative Counsel to the essence of the legislative process. The opinions may not be contemporaneous, however, unless the individual lawmaker chooses to release the opinion during the consideration of the bill by the legislature.

While the "private" opinions of the Legislature Counsel are generally unavailable, the Legislative Counsel's Digest is readily accessible to all members of the legislature. If the legislator reads the bill, he or she is likely to read the digest as well. Thus the context element is apparently satisfied. Since the digest is prepared and released in conjunction with every new or amended bill, it would appear to be contemporaneous also. The possibility exists, however, that an overworked Legislative Counsel staff may be "much too busy during the final hectic days of that legislative session" to reword the digest thoroughly and carefully to reflect accurately the changed intent in the last-minute amendments, thus detracting from the credibility and contemporaneity of this source. Because of its analytical and apolitical background, the digest is credible.
then, appears to be a potentially viable extrinsic aid under the model.

The Legislative Counsel’s Digest has been used frequently by California courts to discern evidence of legislative intent. The digest analysis has even been used as evidence to imply the refusal of the legislature to enter a peripheral area of the law not covered by that analysis. This reliance of the courts upon the digest seems warranted, given the strong showing made by this source under the model.

3. The Offices of Research

Largely information disseminators, the Senate and Assembly Offices of Research assist their respective houses by analyzing amendments made in the other house, focusing on the differences between the final versions of the bill as passed by each legislative house. The Assembly Office of Research, for example, is required to prepare an analysis of each bill amended in the Senate or on the third reading file, and place this analysis “upon the desks of the Members. . . .” While not required to analyze every bill, the Senate Office of Research has the duty to assist its members in this area also.

Under the model analysis, the offices of research are credible because of their analytical and unbiased nature. Further, these entities appear to be in close proximity to the essence of the legislative process. The analyses promulgated by these research bodies, however, must be examined with care to determine their contemporaneity to the decision of the legislature. The only time that a legislator would have a research office analysis on his or her desk would be immediately prior to a final vote on a bill. This analysis may not be useful to a legislator who has already decided which way to vote on the proposed statute. Consequently, some or all of the legislators will not be influenced at all by the analysis, although it is available to them. Finally, this availability satisfies the context element of the model. Thus, although the bill analyses of the offices of research may be produced late in the legislative

125. See People v. Superior Court, 24 Cal. 3d 428, 434, 595 P.2d 139, 141, 155 Cal. Rptr. 704, 707 (1979). The California Supreme Court maintained that it was “reasonable to presume that the Legislature amended those sections with the intent and meaning expressed in the Legislative Counsel’s digest.”
126. Interview with Dorothy Graham, Librarian for Assembly Office of Research, Sept. 19, 1980 (notes on file at the Pacific Law Journal) [hereinafter cited as Graham Interview].
129. Graham Interview, supra note 126.
130. See generally Henke, supra note 56, at 173.
process, these analyses may be an effective tool for the courts in determining the intent of at least one house of the California Legislature in enacting a statute. 131

C. Legislative History and Individual Statements

Legislative history is maligned by some who criticize the tendencies of some courts to "rummage in the ash cans of the legislative process," 132 but it is generally considered a valid source of legislative intent. 133 Many potential sources of legislative history exist; 134 the courts have examined statements by legislators, 135 members of the executive branch, 136 and witnesses appearing before legislative committees 137 to assist them in determining the intent of the legislature. Legislative history and individual statements, then, must be analyzed using the four elements of the model.

I. Legislative History

Justice Holmes once said that it was "a delicate business to base speculations about the purposes or construction of a statute upon the vicissitudes of its passage." 138 Previous drafts of a bill arguably affect the final version of the bill 139 but may lack credibility because, while they are unbiased, they are also non-analytical in nature. These prior bills are not contemporaneous either since the prior versions of the bill are no longer under legislative consideration. Although clearly proximate to the legislative process, previously amended bills also encounter difficulty in the area of context, particularly with the inquiry into the effect of the prior bill on the subsequently enacted version. Again, since an individual legislator will only vote on the most recent amended version of a bill, the preceding drafts may not have an opportunity to affect his or her decision at all.

While California courts maintain that legislative history can not
override the unequivocal language of a statute and that unpassed bills usually have little value. They have also recognized that proposed legislative drafts "may be helpful" to discovering legislative intent. In some cases, the appellate courts have decided that the specific prior rejection by the legislature of a provision that is now sought to be included judicially into the statute may be persuasive in a decision to omit the provision. These particular decisions may be the only reasonable use for legislative history under the model's analysis since previous bills would arguably shed light only on what the legislature did not intend to pass.

2. Individual Statements

Courts have often examined the statements of individuals as another part of legislative history, whether they are statements from outside the legislature, statements by individual legislators or executive messages concerning the enactment of the new law. It then becomes necessary to examine the statements made under varied circumstances utilizing the model analysis.

a. Committee Testimony

The testimony of a witness before a legislative committee is one example of an individual statement used as an aid in deciphering legislative intent. Two recent cases dealing with individual statements as a part of legislative history reflect the haphazard approach of the California courts in permitting the introduction of such evidence. In Pennisi v. Fish and Game Department, the First District Court of Appeal permitted the trial testimony of persons charged with administering a new statute dealing with the appropriate size of commercial fishing nets.
Both the present and former directors of the Fish and Game Department testified at trial that the law sought to be enforced against the plaintiff had not been altered by a subsequent enactment closely related to it. The present director had also testified at the legislative committee hearing on the bill. The statements on appeal were found by the court to be relevant evidence of contemporaneous administrative construction which, as a rule of statutory interpretation, are entitled to great weight in determining legislative intent. The court concluded that the trial judge was "duty bound to admit the challenged extrinsic evidence to ascertain the true intent of the legislature and to effectuate the purpose of the law."

The directors' statements both at trial and at the legislative hearing may have been biased in favor of their interpretation and hence not credible under the model analysis. These two persons were the officials charged with carrying out the law; it even appears that one of the directors assisted in the drafting of the legislation. If the director's statement at the committee hearing was contemporaneous with the enactment—that is, the legislature subsequently passed the bill substantially intact in a fairly short period of time, the statements at the trial would be mere recitals of past testimony and therefore evidence of prior administrative construction. The committee testimony was in proximity to the legislative process since it took place during the consideration of the bill by the legislature. Context, however, presents the problem of whether sufficient numbers of legislators actually were aware that the administrative agency had construed the previous statute in the same manner. Since the committee hearing report was published after the passage of the bill, only word-of-mouth communication among those members present at the hearing and other legislators could have been responsible for any effect the statement may have caused. Furthermore, the statements themselves, like the ensuing report, were not available to all of the legislators. Thus, the statements appear to be deficient in their context as well as in their contemporaneity. As evidence of administrative construction, their use was arguably proper; as proof of legislative intent, however, these statements not ac-

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150. *Id.* at 273-74, 158 Cal. Rptr. at 686-87.
151. *Id.*
152. *Id.* at 273-75, 158 Cal. Rptr. at 686-87; *see* FTC v. Mandel Bros., 359 U.S. 385, 391 (1959); People v. McGee, 19 Cal. 3d 948, 961, 568 P.2d 382, 388, 140 Cal. Rptr. 657, 663 (1977).
153. 97 Cal. App. 3d at 275, 158 Cal. Rptr. at 688.
154. *See* id. at 273-74 n.4, 158 Cal. Rptr. at 686 n.4. Motive here may be discussed, but both the directors were state officials who were arguably explaining this particular legislation. See text accompanying notes 22-24 *supra.*
155. AB 574 became Chapter 136 on June 30, 1973. The committee report was published for general circulation approximately two weeks later.
ually affecting the shaping of legislative intent should have been given little weight. Although there is some authority to the contrary,\textsuperscript{156} most courts will not admit the statements of individuals testifying before a legislative committee.\textsuperscript{157}

California, however, has found even legislative inaction after committee testimony to be evidence that the new law should be construed in a given manner. In \textit{Royal Globe Insurance Company v. Superior Court},\textsuperscript{158} the California Supreme Court, in construing the Unfair Practices Act relating to insurance companies and third parties, concluded that a statement by an Insurance Department official at the committee hearing that the bill “could be construed to affect third parties”\textsuperscript{159} was admissible in evidence to prove legislative intent. This testimony, plus the failure of the legislature to amend the bill afterward, constituted “a reasonable implication that third party claimants were to enjoy the protection afforded by the bill.”\textsuperscript{160} Thus, this lack of action by the legislature was transformed by the court into an affirmative statement of legislative intent. Legislative inaction, however, at least in \textit{Royal Globe}, would make such a statement too much of a “slim reed upon which to lean in determining legislative intent.”\textsuperscript{161}

In essence, all individual statements purporting to embody total legislative intent are contradictions in terms. The only time that an individual may be reasonably sure that all the legislators are aware of a statement is if the individual is also a legislator and the statement is made during a floor debate. Statements made by legislators during floor debates, however, are almost universally discarded by modern courts because of the political nature of these debates;\textsuperscript{162} further, debates in the California Legislature are never officially recorded.\textsuperscript{163}

\textit{b. Communications from the Author of a Bill}

Statements by legislators have been allowed as evidence of legislative intent by California courts in recent cases. In the case of \textit{In re Marriage of Bouquet},\textsuperscript{164} the California Supreme Court was confronted with the

\begin{footnotes}
\item[156] See Jones, \textit{supra} note 41, at 744.
\item[157] See generally Sutherland, \textit{supra} note 9, at §48.10.
\item[158] 23 Cal. 3d 880, 592 P.2d 329, 153 Cal. Rptr. 842 (1978).
\item[159] \textit{Id.} at 888, 592 P.2d at 335, 153 Cal. Rptr. at 848.
\item[160] \textit{Id.} at 889, 592 P.2d at 335, 153 Cal. Rptr. at 848.
\item[161] Quinn v. State, 15 Cal. 3d 162, 175, 539 P.2d 761, 768, 124 Cal. Rptr. 1, 9 (1975).
\item[163] See generally Henke, \textit{supra} note 56, at 138.
\item[164] 16 Cal. 3d 583, 546 P.2d 1371, 128 Cal. Rptr. 427 (1976).
\end{footnotes}
issue of possible retroactivity of a community property statute. The author of the bill, an Assembly member, had sent a letter to the President Pro Tempore of the Senate that was subsequently incorporated into the Senate Journal, stating that the bill should apply retroactively. The court held that the statute was retroactive, relying on the letter on two levels.

The letter, although containing the personal views of the Assembly member, was said to be "quite relevant to the extent that it evidences the understanding of the Legislature as a whole." The Supreme Court adopted a test indicating that the testimony or statement of a bill's author must 1) not express the author's own opinion of the bill, and 2) be a mere recital of the events transpiring during the legislative process. Finding legislative intent in the letter, the court ultimately held that the provisions would be applied retroactively. An examination under the model, however, reveals the basis of the opinion to be questionable.

Given that the author's statement is in close proximity to the legislative process, the other three factors of the model must be applied. Although there is a great potential for bias here, the Assembly member's account of the path of the bill to enactment is arguably credible because it is analytical in nature. The letter in Bouquet, however, was not published until after the effective date of the amendment. The letter thus appears to be neither contemporaneous nor in the proper context of a reasonably acceptable extrinsic aid, because it had no opportunity to sway opinions or votes on the legislation. Although the Bouquet court admitted the letter as evidence of legislative intent, the letter's publication subsequent to the legislative process would probably make its effect on the other legislators minimal or nonexistent.

The use of these "elements" of the test may have been an attempt to legitimate the finding of the court. It is arguably very difficult for legislators to refrain from expressing their personal opinions about bills that they have authored in an attempt to secure the enactment of these bills.

The second level of the case deals with the motion of the President Pro Tempore of the Senate to print, and the subsequent printing of the letter from the Assembly member. The senator offered the letter as a "letter of legislative intent." This ex post facto effort to create legis-
lative intent, published after the bill was enacted, appears to be an attempt to manufacture legislative intent where there may not have been any. Any aid promulgated after the enactment of a bill would seem to lose contemporaneity according to the model, as well as any actual ability to be present in the minds of the legislators. And by occurring after passage, the statement contributes nothing in the way of assistance to legislators who have already made up their minds; thus there would arguably be a problem with the context factor in the model. Whether the author is credible or not will, of course, depend largely on who he or she is and in what esteem he or she is held by the legislature. While the President Pro Tempore is in close proximity to the legislature, problems with the other three elements that exist with a subsequent "expression of intent" outweigh this factor. The opportunities for abuse in this area are apparent. If subsequent expressions of legislative intent are relevant to an understanding by the legislature, then the possibility exists that additional resolutions or letters may lead to an erroneous construction of new law.

Individual statements, particularly those made by the author of the bill, are used by the California courts almost whimsically at times. One case will state that an author's trial testimony is "some indication" of legislative intent; another case will set up requirements for the individual's statement to be admitted; still another opinion will flatly refuse to consider the introduction of a letter by the author of the bill as evidence of intent; yet another decision will admit these types of letters to ascertain the intent of the legislature. While courts have often relied on individual statements as evidence of legislative intent, a careful analysis under this model is necessary to determine the relative weight to be given to that evidence.

A good example of the use and misuse of individual statements, as

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171. It is often agreed by all interested parties that a letter should be placed in the Journal to clarify the particular meaning of a word or phrase. Suppose, however, that a senator's favorite bill has just had the crucial language (that would have accomplished exactly what the senator wanted accomplished) amended out by a committee. The senator is very anxious to have the provision in the bill, so when the bill passes to the assembly, the senator writes a letter to a friendly assembly member, and asks him or her to introduce it into the Assembly Journal as a "letter of legislative intent". The letter is routinely printed, the bill is not substantially changed, and the result under Bouquet is the same whether or not the desired provision actually passed the legislature. See generally F. Newman & S. Surrey, Legislation: Cases and Materials 158-59 (1955).
172. See 16 Cal. 3d at 589, 546 P.2d at 1374, 128 Cal. Rptr. at 430.
173. See Transcript, supra note 14, at 36-39. The Report of the assembly subcommittee recommended that no individual statements by the author of a bill be used or printed. See Report, supra note 27, at 43.
177. See notes 194-200 and accompanying text infra.
well as other extrinsic aids, in determining legislative intent can be seen in the recent case of *People v. Tanner*.

**People v. Tanner: Use of Extrinsic Aids Runs Amok?**

The California Supreme Court found evidence of legislative intent from a plethora of extrinsic aids in the decision on rehearing of *People v. Tanner*. At issue was the interpretation of California Penal Code Section 1203.06, which on its face appears to forbid the judicial granting of probation to any defendant convicted of a felony in which a firearm is used. Tanner was convicted of armed robbery, and the trial judge granted him probation. The state subsequently appealed, arguing that Section 1203.06 allowed no exceptions to the provision.

The Legislative Counsel's digest, a senate committee staff analysis, the governor's press release after the enactment of the bill, an opposition letter sent to the governor and three legislators by the Northern California Chapter of the American Civil Liberties Union, and four letters sent by the Attorney General to the legislators and the governor were deemed "pertinent and timely expression[s] of legislative intent existing when Section 1203.06 was enacted." The press release, the Legislative Counsel's digest, and the senate committee staff analysis were used in Justice Clark's majority opinion, with the opposition letter by the ACLU being cited in a footnote in that opinion. All of these sources, with the exception of the digest, were also appended to the decision. The three documents cited in the text of the majority opinion will be analysed initially.

Under the model, the Legislative Counsel's digest would ordinarily represent a potentially helpful extrinsic aid. As Justice Newman pointed out in his concurring opinion, however, the digest remained the same throughout a period during which several substantial changes were made in the bill. Whatever the reason for the digest remaining the same, it was arguably no longer contemporaneous with the bill it sought to analyze. Thus, the court may have erred in relying upon the digest to the degree evidenced in the opinion.

The bill analysis prepared by the Senate Judiciary Committee was apparently used by the majority to bolster the evidentiary value given to the Legislative Counsel's digest. Here, the substance of the

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179. See CAL. PENAL CODE §1203.06.
180. 24 Cal. 3d at 520, 596 P.2d at 330, 156 Cal. Rptr. at 452.
181. Id. at 520, 596 P.2d at 330-31, 156 Cal. Rptr. at 452-53.
182. Id. at 551-67, 596 P.2d at 339-46, 156 Cal. Rptr. at 461-68.
183. See notes 111-123 and accompanying text supra.
184. See 24 Cal. 3d at 540-42, 596 P.2d at 345, 156 Cal. Rptr. at 467 (Newman, J., concurring).
185. See id. at 540, 596 P.2d at 345, 156 Cal. Rptr. at 467 (Newman, J., concurring).
186. See id. at 520, 596 P.2d at 331, 156 Cal. Rptr. at 453.
analysis was examined and Justice Newman found "the writer of the Senate committee memo, like the Legislative Counsel, was concerned with § 1203 only." Further, the analysis by the senate committee does not indicate that anyone on the committee, including the staff, had any knowledge of or any concern for any other Penal Code section allowing probation. The implication would seem to be that the legislature passed the bill without knowledge of the other sections relating to probation, which in turn would diminish the significance of the senate committee staff memo. Like the Legislative Counsel's digest, the analysis does not take into account the subsequent amendments to the bill; it may therefore lack contemporaneity also.

Executive messages to the legislature have occasionally been used to construe a particular piece of legislation, although not in California. In Tanner, however, the governor's message included by the court as evidence of legislative intent was a press release, not a message to the legislature. A press release upon the signing of a bill evidences only the governor's belief in the meaning of the bill, not that of the legislature. The press release was published after the bill was passed; thus it could not be contemporaneous. Further, context is lacking since this subsequent source was unavailable to affect the vote on the bill in any way whatsoever. The press release may also be suspect under a credibility analysis because of bias; since the bill had been passed already, there was arguably no need to inform the legislature about legislative intent. While the press release is somewhat proximate to the legislative process, this proposed extrinsic aid probably should not have been used by the Tanner court. Indeed, Justice Newman noted that the governor's press release did not evidence any knowledge of the crucial phrase of the newly enacted law. As Professor Sutherland wrote, "[w]hether a message (by the executive) addressed to someone other than the legislature should be considered depends on whether it is reasonable to believe that the legislature knew about it." The Tanner court also found legislative intent in letters written to the legislators by then Attorney General Evelle Younger. While it is a

187. Id. at 543, 596 P.2d at 346, 156 Cal. Rptr. at 468 (Newman, J., concurring) (emphasis in original).
189. 24 Cal. 3d at 543, 596 P.2d at 346, 156 Cal. Rptr. at 468 (Newman, J., concurring).
190. See United States v. Silk, 331 U.S. 704, 710 (1946). Executive messages, including veto messages and proclamations, are regularly printed in the respective legislative journals. See HENKE, supra note 56, at 180.
191. See 24 Cal. 3d at 520, 596 P.2d at 331, 156 Cal. Rptr. at 453.
192. Id. at 543, 596 P.2d at 346, 156 Cal. Rptr. at 468 (Newman, J., concurring).
193. SUTHERLAND, supra note 9, at §48.05.
fact that the Attorney General did draft the bill, the letters of the Attorney General regarding a bill constantly amended throughout its legislative history were used by the court. These letters, which were written to both assembly and senate members, are perhaps an excellent indication of what the Attorney General thought the legislature intended to do at the time of the introduction of the bill. The letters are not dispositive, however, of the legislators’ feelings toward the bill eventually enacted. As discussed earlier, opinions of the Attorney General must be scrutinized as an extrinsic aid in terms of contemporaneity once a bill is amended. The final two letters were sent by the Attorney General after passage of the bill by at least one house. Although the Attorney General made it clear that the legislative history of the bill was known to him and that he still supported the legislation, his letters represent just another outside analysis of the bill, albeit a well-reasoned and insightful one that was of some influence in the legislature. Proximity to the essence of the legislative process is still not achieved, therefore. The context element is satisfied by the influence known to be exerted by the Attorney General and his staff on behalf of the bill. Thus, the Attorney General’s letters represent an analysis of a bill by an outside source that may not have been proximate or contemporaneous with the legislative process; the Tanner court may have mistakenly admitted this evidence of legislative intent also.

Finally, the majority opinion cites to an opposition letter by the American Civil Liberties Union of Northern California (hereinafter referred to as ACLU). Although this reference is contained in a footnote in the opinion, the text of the letter nonetheless is appended to the case, possibly as further evidence of the understanding of all the parties concerning the bill. The court notes that the letter is “[i]llustrative of legislative intent” although the letter was written only to the governor and three legislators. The letter would appear to lack sufficient context with the legislative process to establish the ideas expressed therein. The ACLU letter also may fail under the proximity test since the ACLU, absent heavy lobbying efforts on its part, would seem to be removed from the essence of the legislative process. Further, the

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195. Id. at 551, 596 P.2d at 339, 156 Cal. Rptr. at 461.
196. See id. at 561-67, 596 P.2d at 343-46, 156 Cal. Rptr. at 465-68.
197. See notes 72-78 and accompanying text supra.
199. See id. at 561-68, 596 P.2d at 354-57, 156 Cal. Rptr. at 476-79.
200. The influence is indicated by the letters to all the legislators and the Governor. See id. at 561-67, 596 P.2d at 354-57, 156 Cal. Rptr. at 476-79.
201. See id. at 520 n.4, 596 P.2d at 330 n.4, 156 Cal. Rptr. at 452 n.4.
202. Id. at 559-60, 596 P.2d at 353-54, 156 Cal. Rptr. at 475-76.
203. Id. at 520 n.4, 596 P.2d at 330 n.4, 156 Cal. Rptr. at 454 n.4.
204. See id. at 560, 596 P.2d at 354, 156 Cal. Rptr. at 476.
The ACLU letter was not contemporaneous with the enactment of the bill; the letter was dated September 18, 1975, and the legislature passed the bill and sent it to enrollment on September 11, 1975, seven days before the date of the ACLU letter. This potential aid, then, could not have affected the vote of the legislature and should not have been used as a source of legislative intent by the Tanner court.

Under the preceding analysis of the extrinsic aids utilized in the Tanner decision, it may be seen that any of the four elements of the model can be used in justifying or discrediting the validity of specific extrinsic aids. In Tanner, the Legislative Counsel’s digest of the bill did not incorporate significant subsequent amendments to the bill and the Senate committee memorandum never considered other probation statutes. The individual statements, including the governor’s press release, the ACLU letter, and two of the Attorney General’s letters had no actual opportunity to aid or influence the legislature in its decisionmaking process. Additionally, all of the Attorney General’s letters are removed from the essence of the legislative process, and must be examined only as another organization outside the legislature interested greatly in promulgating its own legislation.

CONCLUSION

The Tanner case in particular illustrates the need for a rational and objective means of evaluating the relative values of the multitude of potential extrinsic aids modernly available to the courts of California. In determining legislative intent, each of these extrinsic aids should be examined under the four elements of the model to develop the approximate worth of the outside source. By using these four elements, a more thorough analysis of proffered evidence of legislative intent can be accomplished, one that will hopefully be more reliable. There can be no absolute test in the area of legislative intent. Analysis must proceed on a case-by-case basis because of the rich and varied potential sources of legislative intent available to the courts of California. These sources, when scrutinized under the model, may serve as a clearer window into the shadowed world of legislative intent.

Walter Kendall Hurst

205. Id. at 565, 596 P.2d at 355, 156 Cal. Rptr. at 475.
206. CALIFORNIA LEGISLATURE, 1975-76 REGULAR SESSION, SENATE FINAL HISTORY 161 (1976) (history of SB 278, which amended Penal Code Section 1203.06).
207. See notes 183-189 and accompanying text supra.
208. See notes 189-206 and accompanying text supra.
209. See notes 194-200 and accompanying text supra.