Dalhousie Law Journal

Volume 9 | Issue 2 Article 3

6-1-1985

The Ascendancy of Legislation: Legal Problem Solving in Our Time

Frank P. Grad

Recommended Citation
Frank P. Grad, "The Ascendancy of Legislation: Legal Problem Solving in Our Time" (1984-1985) 9:2 DLJ 228.

Frank P. Grad*

The Ascendancy of Legislation: Legal Problem Solving in Our Time

I. *Introduction*

Law making in our time depends on legislation, and our primary reliance on statutory law is being increasingly recognized, even though, as James Williard Hurst recently put it, "Judge-made law is still the darling of legal philosophers."[1] It has also remained at the misplaced center of much of our legal education.[2]

I hope to trace the movement toward the full acceptance of statutes as a source of law, including brief notes on early twentieth century efforts to salvage the common law through the machinery of law revision commissions and through the Restatements developed by the American Law Institute. The New Deal Legislation of the 1930's not only applied legislation to the solution of the economic, social, and, ultimately legal problems of its times, but it also changed the very nature of the legislative product. The ascendancy of legislation resulted not only in a far greater legislative output, but also in the development of massive programmatic legislation, unique in its character and different in kind from the narrow, limited statutes that had preceded it. So significant is this new form that some of the older rules of statutory construction seem hardly relevant in their application. But the new legislative approach, here referred to as programmatic legislation, imposes a responsibility for legal training which develops to the fullest the ability to use legislation as the way to solve today's legal problems.

---

*Joseph P. Chamberlain Professor of Legislation, and Director, Legislative Drafting Research Fund, Columbia Law School. The author gratefully acknowledges the research assistance of David Novello, Columbia '83; Marc R. Packer, Columbia '83; Roy Pulvers, Columbia '83; John Daly, Columbia '85; and Lisa Robinson, Columbia '85. Most of the students named were Kenneth V. Santagata Research Assistants of the Legislative Drafting Research Fund. The text is a slightly revised version of the Tenth Horace E. Read Memorial Lecture delivered at Dalhousie Law School on Thursday, September 20, 1984.

1. J.W. Hurst, DEALING WITH STATUTES 1 (1982).

2. *See, e.g.*, R. Williams, *Statutory Law in Legal Education: Still Second Class After All These Years,* 35 Mercer L. Rev. 803 (1984).

II. *The Waning of the Nineteenth Century*

The ascendancy of legislation in the twentieth century has not been exactly a triumphal march. Although there had been some interest in codification in the early eighteen hundreds,[3] and although the Field Codes drew some favorable, as well as critical, attention to legislation in the 1870's and 1880's,[4] judicial hostility to legislation around the end of the nineteenth century had reached outrageous proportions,[5] as had academic hostility, personified to some extent in Professor Langdell who celebrated the spirit of the common law by actively opposing the introduction of courses in legislation both at Harvard and at other places where he could assert his influence.[6]

There were several reasons for hostility to statutory law. There was the general intellectual and historical commitment to the common law — a belief that it was capable of such flexibility and adaptability

---

3. *See* J. Bentham, Codification and Public Instruction 30-33 (1817); J. Story, *Report on the Codification of the Common Law,* in The Miscellaneous Writings of Joseph Story 698 (1852).

4. D.D. Field, *Reasons for Codification,* in 3 SPEECHES, ARGUMENTS AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD 239 (L. Coan ed. 1884-90); J. Carter, THE PROPOSED CODIFICATION OF OUR COMMON LAW (1884); L. Friedman, A HISTORY OF AMERICAN LAW 351-55 (1973).

5. Courts not only applied the strict construction doctrine, but sometimes simply disregarded relevant statutes, citing case law as if the legislation did not exist. Pound, *Common Law and Legislation,* 21 Harv. L. Rev. 383, 385-6, (1908); H.F. Stone, *The Common Law in the United States,* 50 Harv. L. Rev. 4, 12-14 (1936). *See also* G. Gilmore, THE AGES OF AMERICAN LAW 63-64 (1977). *See* Friedman, *supra* note 4 at 314-318, commenting in some detail on the "randomly and irresponsibly" exercised judicial power as applied to late nineteenth century public health and labor legislation. Among other examples, Friedman refers to *Godcharles* v. *Wigeman,* 113 Pa. St. 431, 6 Atl. 354 (1886) which required mining companies to pay their employees at least once a month, and in cash, not in scrip. Invalidating the statute, the court had referred to the interference with freedom of contract, and added that the law "was an insulting attempt to put the laborer under a legislative tutelage, which is not only degrading to his manhood, but also subversive of his rights as a citizen of the United States." *Id.* at 315.

6. Williams, *supra* note 2, at 805-806. For a discussion of Langdell's influence on the legal thinking of the time, see Gilmore, *supra* note 5, at 42-48, 57-65. Professor Gilmore describes Langdell as a stupid man who had a single good idea which he rode all his life, rather successfully, because it came at the right time and provided great support for the conservatism of the age, and for the development of American law schools. *See also,* K. Llewellyn, JURISPRUDENCE, REALISM IN THEORY AND PRACTICE 379, recounting an incident before the founding of the Chicago Law School, when Langdell and Dean Ames of Harvard became exercised over the proposed teaching of legislation in Chicago by Ernest Freund and came close to stopping Professor Joseph Beale, who was then on leave from Harvard, from going to Chicago to become its first dean.

as to respond to all emerging legal problems.[7] There was also a sense that its seamless web would be rent and ravelled by the intrusion of discordant statutory prescriptions.[8] There was also the strong sense that common law development had stood the country and its people in good stead, and had contributed to the entrepreneurial spirit of America.[9] In the last part of the nineteenth century, legislation was perceived as an instrumentality to advance dangerous and unhealthy tendencies. State interference in the affairs of people would sap their strength by obstructing their right to contract freely, and providing unwarranted protection for persons who either were, or should be,

---

7. James Carter, then President of the American Bar Association, the chief opponent of the codification proposals of David Dudley Field, strongly argued this position. *See* Carter, *supra* note 4, at 29-40. The position is stated, discussed and refuted in Freund, *Jurisprudence and Legislation,* in 7 Congress of Arts and Science, Universal Exposition, St. Louis 1904 (1904). For an animated discourse in praise of the evolutionary nature of the common law, *see Law Making,* Address by Hon. John W. Griggs, Governor of New Jersey 10-13 (August 26, 1897) at the 1897 Annual Meeting of the American Bar Association. For a contemporary discussion of the issue, *see* Hurst, *supra* note 1, at 11-12 26.

8. Gilmore, *supra* note 5, at 61-64; Friedman, *supra* note 4, at 17. The notion was best expressed by Mr. Justice Frankfurter who commented on the view of legislation "as willful and arbitrary interference with the harmony of the common law and with its rational unfolding by judges."

9. *See* Glasgow, *A Dangerous Tendency of Legislation,* 37 Am. L. Rev. 845, 845 (1903). The article consists of an address delivered by the author, of Roanoke, Virginia, before the 1903 meeting of the American Bar Association in Hot Springs, Virginia. The author decries "the present tendency of legislation" to threaten the "independence of the individual" by reliance on "a paternal government." (At 845) The address celebrates the spirit of Robert E. Lee, making the point that "The highest type of man is not produced by the aid of a paternal government, but by assurances of protection in his natural rights, with encouragement to individual character." (At 851) For further discussions of the relationship between nineteenth century laissez-faire philosophy and judicial hostility toward legislation, *see* Gilmore, *supra* note 5, at 65-66; M. Horwitz, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 at 258-59 (1977).

able to take care of themselves.[10] If the nineteenth century warning against the excesses of legislation was couched in language both pious and pompous, it probably reflected the spirit of the times.

The hostility to statutory law was often expressed in terms of support for the common law and the system of case law development.[11] The strength of the common law, then as now, requires little explication. It provides a jurisprudence firmly rooted in the realities of a particular controversy between parties, and it has little of the civilian theorizing.[12] In the hands of good judges, it is capable of flexible adjustments by the wider or narrower restatement of the earlier rule, and the clever manipulation of what is found to have been holding, and what dictum, in earlier cases. One of its great strengths from a conservative point of view is that it does not look to the future, but is invariably retroactive in pronouncing the law to resolve a legal problem which has already occurred, and whose significant events are safely in the past. While the decision of a case may state the law for the future, it does so only as an incidental result of

---

10. *See* Glasgow, *supra* note 9, at 845-51. In Slaymaker, *Labor Legislation — Its Scope and Tendency,* 64 Albany L.J. 227 (1902), the author decries the use of the police power to define the hours of labor; freedom of contract means that if a person wants "to sacrifice a degree of health to the attainment of laudable ends, the state can not restrain him." (at p. 229) While women and children may need protection, men "deal at arms' length" and need no law to even out purported social inequalities. So, too, in Austin, *Legislation Adverse to Railroad Corporations,* 11 American Lawyer 341 (1903), the argument is made that corporations and natural persons have equal rights before the law, and courts are not "justified in sustaining statutes imposing new and additional burdens upon railroad corporations under the so-called police power of the state." The article complains that new requirements imposed on railroads which involve additional capital expenditures are deprivations of property without due process, cutting off the possibility of payment of dividends. *See, also,* Warren, *Massachusetts as a Philanthropic Robber,* 12 Harv. L. Rev. 316 (1898). For a more generous 1887 view, *see* Field, *The Needs of Legislation,* 35 Albany L.J. 84 (1887), which advocated limited government and the right to be left alone, but supports tenement laws and child care laws that provide protection against social disruption without interference with others. *See also* Friedman, *infra,* note 15.

11. *See, e.g.,* Carter, *supra,* note 4 and note 7; Griggs, *supra,* note 7, at 10-13; Gilmore, *supra,* note 5, at 62-64.

12. Hurst, *supra* note 1, at 26; R. Pound, THE FORMATIVE ERA OF AMERICAN LAW (1938) at 46, comments on the fact that the "common law has never been at its best in administering justice from written texts." Historically, he believed, common lawyers found it difficult to reason from statute by analogy, as did the civilians.

deciding a case whose facts are in the past.[13] The common law system has been developed successfully in private law, but support for case law approaches need not have resulted in such overwhelming opposition to legislation.

The hostility to statutes at the turn of the century was so shrill and intemperate, however, that it calls for an explanation. The legal establishment at the turn of the century hated statutes because it was afraid of them, and because it was afraid of the people who passed them. Contemporary writings of the 1890's abound in expressions of concern that legislation was going too far in giving new rights to employees and in undermining the sanctity of contracts. Legislation would be used to unsettle society — by depriving the well-to-do of their legal protections. It would substitute statutory requirements of job safety and would impose minimum wage requirements and place a limit on hours worked, in lieu of the freedom of contract which would allow laborers to "agree" on such matters with their rather more powerful employers. Thus, the emphasis was on the protection of freedom of contract, though not on the protection of employees.[14]

The fear of legislation and its uses was parelleled by the fear and antagonism toward legislators. Common law was developed by judges, and judges were — and are — professionals with solid, reliable, well-educated backgrounds, persons generally part of the established order and protective of its interests. While some legislators shared the same origins and commitments, as a group they were quite different. They represented a far more aggressive, economically far less secure group than the judges. Indeed, part of the reason for the distrust of legislators in the late nineteenth century was that they were the most likely group to try and take it all away from the group

13. Hurst, *supra* note 1, at 26; Pound, *supra* note 12, at 121-125; Friedman, *supra* note 4, at 18.

14. Friedman, *supra* note 4, at 489-91. *See also supra* note 5 and 10. For a contemporary constitutional analysis of statutes regulating wages, *see* Myrick, *Statutory Regulation of Wages,* 65 Central L.J. 468 (1907).

at the top.[15]

The sentiment against statutory law of the 1890's recognized a unique characteristic of legislation — its capacity for making major changes in the existing social order. Common law is private law. Legislation opens the field of public law.[16] No judicial decision on a work place injury can have as far-reaching effects as the legislative establishment of a workers' compensation system. As noted, case law is limited by the nature of the case that gave rise to the decision, and even landmark cases will not have an impact beyond a fairly limited legal field. The decision of a case may have significant and direct impact on the law, but it is not likely to have any such direct impact on the social order.[17] The legislation to establish workers' compensa-

---

15. For expressions of distrust of the qualifications of legislators, *see* Carter, *supra* note 4, at 88-90; Griggs, *supra* note 7, at 5. For a somewhat later, 1907 comment on legislation and legislators, *see* McLean, *The Evolution of State Legislative Methods,* 15 American Lawyer 78 (1907), in which the author notes that it needs "able men" for legislation to become a "harmonious system of jurisprudence," that "the stupid legislature has barely enough wit to provide a commission of able men" when an important piece of industrial legislation is demanded; that "Of all the impotent institutions that have found a place in free governments, our state legislatures are the most stupid and venal." He recommends that "The State Legislature as it now exists should be abolished, and the duties of legislatures should be entrusted to a body of men like the members of our supreme court." *See also* Pound, *supra* note 12, at
In commenting on judicial attitudes in the late nineteenth century, Friedman notes that judicial hostility to legislation and particularly to social legislation was not universal, but it was widespread and unpredictable:
"Judges, after all, were members of the same society as their litigants. They shared the general outlook that American life was a zero-sum game. Their business was the rule of law, legal tradition, adjudication. Legislation, whatever its subject, was a threat to their primordial function, molding and declaring the law. Statutes were brute intrusions, local in scope, often short sighted in principle or effect. Particularly after 1870, judges may have seen themselves more and more as guardians of a precious and threatened tradition. The clash of interests, the warfare of classes brutally destroyed time-honored values. The judges read their constitutions as instruments of caution, delay and honest doubt; they read them as instruments that preserved historic truths, about democratic society and right reason; they read them as middle-class texts, embodying middle-class values, striving toward middle-class goals... Their taste for power was general, but the prejudices of the judges — predominantly old-American, conservative, middle-class — dictated where the effects of their power would fall."
Friedman, *supra* note 4, at 316-317.

16. Hurst, *supra* note 1, at 2-29. For an earlier expression of the relationship of statutes to public law, *see* Carter, *supra* note 4, at 16-21.

17. Hurst, *supra* note 1, at 26; O. Kraines, THE WORLD AND IDEAS OF ERNST FREUND 25-27 (1974) (discussing E. Freund, STANDARDS OF AMERICAN LEGISLATION (1917)).

tion had an impact on employer-employee relations which was not only different in degree, but different in kind from the impact of even the most significant decisions in individual cases on employer liability for workplace accidents. A case establishing a pharmacists' liability for improperly labelling a medication, however influential in the law of product liability,[18] is quite different in its impact from a comprehensive food and drug act, which sets labelling requirements prospectively.[19]

In recognizing the potential impact of legislation on society, the legal establishment of the nineteenth century anticipated and paralleled the fears of later years as well. In the 1970's and 80's too, we have been told that there is too much legislation and that it interferes with industrial development and advances "big government" at great cost to individual initiative and to a free economy. The capacity of legislation to cause change has always troubled conservatives, and the insistence that new legal and social problems can be dealt with by the common law may generally be regarded as a polite way of urging that nothing be done about the problems at all.

The turn of the century was a time of change. To be sure, there were many expressions of hostility to legislation in legal publications and by leading members of the bar,[20] but there also began significant efforts to collect and catalogue new laws passed by state legislatures,[21] and bar association committees were formed to compile and report on significant state legislative developments.[22] Moreover, the development of legislation as a source of law was advanced during that time by the professional contribution of a small number of brilliant and visionary academics.

While conservative members of the profession were decrying the excesses of legislation, such men as Roscoe Pound, Ernst Freund, Joseph P. Chamberlain, James Landis, and later Dalhousie's Dean Horace E. Read noted and described legisltive developments and sought ways of advancing them. As early as 1908, Roscoe Pound, in *Common Law and Legislation* described and criticized hostility to

---

18. *Thomas and Wife* v. *Winchester,* 6 N.Y. 397 (1852).
19. 21 U.S.C.A. §352.
20. *See e.g.,* Griggs, *supra* note 7; Glasgow, *supra* note 9.
21. *See e.g.,* Whitten, *Trend of Legislation in the United States,* New York State Library Bulletin 399 (1900).
22. American Bar Association, Committee on Noteworthy Changes in Statute Law, 1915 Annual Report (1915).

statutes.[23] Pound was an early supporter of the legislative development of public law, and supported the codification movement.

Another contemporary critic of the emphasis on case method teaching, and one of the important early contributors to the literature of modern law-making and legislative research and drafting was Ernst Freund. In his book on *Standards of American Legislation,*[24] published in 1917, he set forth a number of concrete proposals for the development, and the improvement of the quality of legislation.

One of the major interests of Ernst Freund was the analysis of the increasing interaction between the legislature and the executive — in the form of developing administrative agencies. This interest was shared by others in the early part of the twentieth century, and became a most active one, clearly, during the 1930's, following the beginning of the New Deal era.[25] Some of this pervasive interest of the time is reflected in the writings of Joseph P. Chamberlain,[26] who, in 1911, founded the Legislative Drafting Research Fund at Columbia Law School, laying the groundwork for the first course in legisla-

---

23. Pound, *supra* note 5, at 383-85. Pound's contributions to jurisprudence, and his contribution to what he called "sociological jurisprudence" require little documentation. Throughout his long career, he strongly supported codification. Pound, *The Advisability of Codifying Anglo-American Law,* in R. Pound, 3 JURISPRUDENCE, 732-738 (1959); Pound, *Sources and Forms of Law,* 22 Notre Dame Lawyer, 1, 71-79 (1946).

24. E. Freund, STANDARDS OF AMERICAN LEGISLATION (1917). The work focussed largely on the obstacles created for legislation by narrow and unreasonable interpretation of due process and other constitutional protections. He strongly supported codification, the development of public law through legislation, and the development of administrative delegation. *See also* E. Freund, *The Problem of Intelligent Legislation,* Proceedings of the American Political Science Association at Its Fourth Annual Meeting held at Madison, Wisconsin, December 27-31, 1907, Vol. IV, 1907, pp. 69-79 (The Waverly Press, 1908). *See* discussion in Kraines, *supra* note 17 at 25-27.

25. Felix Frankfurter gave recognition to the modern development of Administrative Law and advanced notice of its New Deal expansion in *The Task of Administrative Law,* 75 U. Pa. L. Rev. 614 (1927) in which he also paid tribute to the contributions of Ernest Freund at Harvard and Frank J. Goodman at Columbia. For a significant historical review of the development of Administrative Law, before and after the New Deal, *see* K.C. Davis, ADMINISTRATIVE LAW TEXT, §1.04, Historical Development (3rd ed. 1972), and W. Gellhorn, *Changing Attitudes Toward the Administrative Process,* in INDIVIDUAL FREEDOM AND GOVERNMENTAL RESTRAINTS 3-22 (1956).

26. Among his numerous works on aspects of legislation, Professor Chamberlain's book on THE JUDICIAL FUNCTION IN FEDERAL ADMINISTRATIVE AGENCIES (1942), and his earlier LEGISLATIVE PROCESS: NATIONAL AND STATE deserve special mention. Both of these works are cited frequently still and continue as significant contributions.

tion at any American Law School, providing the impetus which led to the establishment of the Congressional drafting services, the Offices of the House and Senate Legislative Counsel, and establishing the first, oldest and still ongoing University-connected "clinical" institute in legislative research and drafting, employing and teaching law students in the requisite skills.[27]

Your own Dean Horace E. Read also recognized the need for professional teaching in legislation and in the professional skills necessary to advance the cause of sound and responsible law-making.[28] As the need for responsive legislation grows, and as the solution of more complex problems demands more informed and skillful legislation, legal education will have to respond more vigorously, and in an intellectually generous manner.

III. *Efforts to Rescue the Common Law; Law Revision Commissions and Restatements*

The ascendancy of legislation in the twentieth century was marked by several efforts to repair the common law to enable it to cope with new problems. These efforts, which began in the 1920's, included the creation of a number of law revision commissions, starting with the New York Commision, established in 1934, and the American Law Institute Restatement movement.

The first of the law revision commissions is historically the most interesting. Its beginnings can be traced back to an article in the 1921 Harvard Law Review by Benjamin Cardozo, who was one of New

---

27. *See* THE LEGISLATIVE DRAFTING RESEARCH FUND OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK, 1911-1971: A BRIEF HISTORY OF THE FIRST SIXTY YEARS (1972). This publication, prepared by the Director on the occasion of the sixtieth anniversary of the Fund, incorporates the earlier account by Professor John M. Kernochan, *A University Service to Legislation: Columbia's Legislative Drafting Research Fund,* 16 La. L. Rev. 633 (1956). On the origins of the Offices of House and Senate Legislative Counsel, *see* F. Lee, *The Office of Legislative Counsel,* 29 Colum. L. Rev. 381 (1929). *See also Middleton Beaman: Doctor of Laws,* 35 A.B.A.J. 778 (1940).

28. Among the many contributions of Dean Read was the authorship, together with John W. MacDonald, of the first edition of the leading coursebook on legislation. Now in its fourth edition, Read, MacDonald, Fordham and Pierce, MATERIALS ON LEGISLATION still retains its place as the standard teaching tool in its field, setting a standard of excellence, breadth of scope and depth of insight for later works. Dean Read's work in establishing the Nova Scotia Legislative Research Centre, and his development of such a Centre at the Minneapolis Law School as part of his legislation course there, have stimulated similar efforts at other law schools.

York's great common law judges before he joined the U.S. Supreme Court. The article, *A Ministry of Justice*[29] dealt with issues in the administration of justice, and particularly with the lack of communication between the courts and the legislature. "Courts and legislatures work in separation and aloofness,"[30] he wrote. The result of this "proud and silent isolation"[31] was an inability to deal effectively with anachronisms and defects which had developed in the law. On the one hand, the process of judge-made law, and more particularly *stare decisis,* severely inhibited the ability of the courts to escape an impasse in the course of justice; both the difficulty of breaking with long-established precedent and the decreased role of judicial creativity in the face of ever-increasing statutory solutions contributed to the view that the legislature was the "chief hope of law reform."[32] On the other hand, the legislature was equally incapable of effecting useful law reform in the field of private law, because the information upon which it was to act was simply insufficient, in his view, to perform the job satisfactorily. As Cardozo observed:

> . . . the legislature, informed only casually and intermittently of the needs and problems of the courts, without expert or responsibile or disinterested or systematic advice as to the workings of one rule or another, patches the fabric here and there and mars often when it would mend.[33]

A new agency was therefore required to assure adequate and impartial communication between the courts and the legislature. "This task of mediation is that of a ministry of justice."[34] Citing the views of other noted legal scholars, both American and European, Cardozo saw the function of such a group as to observe the private law in operation and to report to the legislature such changes as are necessary when this operation is deranged. The cure would not be a code, which Cardozo viewed as a "slow and toilsome process."[35] Rather, what was needed was simply a change in direction, a break in the logic of *stare decisis,* to free judges from anachronisms and

---

29. Cardozo, *A Ministry of Justice,* 35 Harv. L. Rev. 113 (1921).
30. *Id.*
31. *Id.* at 114.
32. Report of the Commission on the Administration of Justice in New York State, Leg. Doc. No. 50 at 51 (1934) [hereinafter cited as Main Report].
33. Cardozo, *supra* note 29, at 113-14.
34. *Id.* at 114.
35. *Id.* at 117.

defects in judge-made law. "Often a dozen lines or less will be enough. . . ."[36]

Cardozo explained the function of a ministry of justice by analogy. He expressed amazement that the fields of private law[37] did not have a caretaker similar to the Attorney General with respect to Workman's Compensation Law. When a defect occurs in the operation of this law, the Attorney General immediately presents a case for amendment to the legislature. Thus, it is this "public officer, whose duty prompts him to criticism and action,"[38] which Judge Cardozo felt lacking in the fields of private law. Perhaps it should be added that this model system was abandoned long ago.

The "Ministry of Justice," named New York Law Revision Commission, was established following the report of a Commission on the Administration of Justice, created earlier by the legislature.[39] The Law Revision Commission proposal was supported by the Commission, which, however, expressed doubts "whether law schools and other educational institutions [would] be able to carry on research which has a practical utility in the training of lawyers."[40] This concern stemmed from the unanimous view that a true ministry of justice would require contributions from law faculty and students, because its function would be primarily one of research. Another concern, in 1930, was whether the state could afford to fund an agency whose work might take years to produce, or might never become effective, either because in the interim other events would relieve the problem, or because the legislature rejected the proposed solution.[41]

The final report on the proposal for a Law Revision was presented to the Legislature in 1934. It emphasized the critical role of the legislature in the process of reform:

> We rely upon legislation to meet new conditions, and to correct existing evils, Courts may play a part in these processes by inter-

---

36. *Id.*
37. In Judge Cardozo's view, "private law" was to be distinguished from his example of Workmen's Compensation in that the former deals only with the distribution of justice "between man and man." *Id.*
38. *Id.*
39. Act of April 23, 1930, ch. 727, 1930 N.Y. Laws 1326 (continued by amendment in 1931, 1932, and twice in 1933). Preliminary Report of the Commission on the Administration of Justice in New York State, Leg. Doc. No. 92 (1932) [hereinafter cited as Preliminary Report].
40. *Id.* at 26.
41. *Id.* at 26.

> pretation of statutes and by development of the Common Law, but still their function is essentially the administration of law and not its making.[42]

The report on the proposal for a Law Review Commission stressed the need for a commission to devote itself to the revision of the field of *private* law.

The Legislature enacted the bill establishing the first Law Revision Commission in the nation in 1934. The purposes of the Commission were set out as follows:

> 1. To examine the common law and statutes of the state and current judicial decisions for the purpose of discovering defects and anachronisms in the law and recommending needed reforms.
>
> 2. To receive and consider proposed changes in the law recommended by the American Law Institute, the commissioners for the promotion of uniformity of legislation in the United States, any bar association or other learned bodies.
>
> 3. To receive and consider suggestions from judges, justices, public officials, lawyers and the public generally as to defects and anachronisms in the law.
>
> 4. To recommend, from time to time, such changes in the law as it deems necessary to modify or eliminate antiquated and inequitable rules of law, and to bring the law of this state, civil and criminal, into harmony with modern conditions.
>
> 5. To report its proceedings annually to the legislature. . . and, if it deems advisable, to accompany its report with proposed bills to carry out any of its recommendations.[43]

The New York Law Revision Commission released its first report in 1935.[44] It shows that the Commission remained true to its mandate of improving the common law. It examined the decisions of New York's highest court "for the purpose of disclosing cases in which the Court exhibited a reluctance to follow precedent."[45] In its first report, the Commission noted that "A survey of the working of existing rules of law is an essential part of this program as a continuing body serving the Legislature in an advisory capacity. . . ."[46] The Commissions' recommendations have all been legisla-

---

42. Main report, *supra* note 32, at 53.
43. N.Y. Legis. Law §72 (Consol. 1979).
44. Report of the Law Revision Commission, Leg. Doc. No. 60 (1935) [hereinafter cited as First Report].
45. *Id.*
46. *Id.* at 15.

tive recommendations, relying on the legislature to provide a quick fix for problems which the common law had failed to resolve. The recommendations — with one exception — have never consisted of substantial codifications, nor of substantial proposals for the systematic reform of an entire substantive area, nor the development of new programs. The one exception was the study, commencing in 1953, of the Uniform Commercial Code. The record of the Law Revision Commission shows that it focussed on private law, common law, problems, including such matters as the attribution of a parent's negligence to an infant too young to be capable of such negligence[47], the abolition of the rule that a cause of action for personal injuries was lost if either the plaintiff or the defendant died before judgement[48]; the abolition of the rule of the denial of recovery for prenatal injuries, and for provisions limiting the significance of the seal in written contracts.[49] All of these were worthwhile patches on the fabric of the common law, and the account of the New York Law Revision Commission's first thirty years shows other examples,[50] but during that same period, from 1934 to 1955, the Federal Congress had enacted the Social Security Act, the Fair Labor Standards Act, the Securities Exchange Act, and the Federal Food, Drug and Cosmetic Act, to mention just a few.

The New York Law Revision Commission was the first. Some other States eventually followed suit.[51] The other most populous state in the United States did not establish its Law Revision Commission until 1953.[52] Relying on the successful New York experience of nearly twenty years, the California law used almost identical language in setting out the purposes of California's commission. But twenty years

47. Leg. Doc. No. 60(c) (1935) (Recommendation and Study made in relation to Imputation of Negligence to Infants).
48. *Drabner* v. *Peters,* 232 N.Y. 220 (1921).
49. *Id.;* First Report, *supra* note 44, at 13.
50. MacDonald, J. *Legal Research Translated into Legislative Action; The New York Law Revision Commission, 1934-1963,* 48 Cornell L. Q. 401 (1963). The author had a long association with the Commission, including a long term as its Executive Secretary and Director of Research, 1934-56, as a Commissioner from 1956, and he became its Chairman in 1958. He was also one of the authors of the coursebook on Legislation, Fordham, Read and MacDonald, CASES AND MATERIALS ON LEGISLATION (1959).
51. *E.g.,* Florida, established 1967; Illinois, established 1951; Michigan, established 1965; New Jersey, established 1951.
52. Cal. Gov't Code §§ 10300 - 10340 (West 1980 & Supp. 1984).

later the language had assumed different implications, because California has dealt almost exclusively with statutory problems,[53] focussing primarily on procedural issues.[54] It seems that the fifties saw a somewhat similar change of direction in New York as well, reflecting, perhaps, a turning away from common law priorities.

The reference in the New York Law Revision Commission statute to work emanating form the American Law Institute is more than fortuitous. It demonstrates that the need to rescue the common law was widely recognized. The efforts to authorize the establishment of the Law Revision Commission were contemporaneous with efforts to establish the American Law Institute, and some leaders of the bar were involved in both causes:

In the early years, the notion of an American Law Institute and of a Restatement of the Law were synonymous. The original proposal dates back to the 1914 Report of the Association of American Law Schools, in which appeared papers submitted by Professors Hohfeld of Yale and Beale of Harvard, suggesting a reexamination of the law, for purposes of readjustment and necessary reform.[55] The War intervened and the suggestion was not revived until 1921-22, when a "Committee on the Establishment of a Permanent Organization for the Improvement of the Law" was formed, chaired by Elihu Root and consisting of a number of distinguished members of the Bar, judges and law teachers. The Committee's report led to the meeting on February 23, 1923 at which the American Law Institute was founded. The reports of the Committee which led to the formation of the Institute express the sense that the common law was in trouble, its rules complex, its terms uncertain, and its development unsys tematic.[56] There was a sense that the problem was acute, undermining public confidence in the rule of law and confusing even able practitioners.[57] The Restatement movement, Professor Yntema noted, had two sources, "the academic theory that the common law is a body of

53. In the reports of its first three years, contained in one volume, the Commission covered not a single common law issue.

54. *See, e.g.*, Cal. Law Comm., Rec. and Study relating to Retention of Venue for Convenience of Witnesses (February 1, 1957); Rec. and Study relating to Bringing New Parties into Civil Action (February 21, 1957).

55. 1914 Proceedings of the American Association of Law Schools, at 31, 34 (Joseph H. Beale); at 76, 137 (Wesley N. Hohfeld).

56. Report to the Committee on the Establishment of a Permanent Organization for the Improvement of the Law Proposing the Establishment of an American Law Institute (1923) (hereinafter cited as *Root Comm. Rpt.*), at 1,8.

57. *Id.* at 1.

scientific principle and the very practical demand of the Bar for greater simplicity and uniformity in the enormous mass of the sources of American Law."[58]

There was substantial agreement that the work of the ALI was to simplify, clarify and make changes to adopt the law to life, and to distill from it the "body of scientific principles which has been adapted in each of the common law jurisdictions in this country, as the basis of its law."[59]

It has been noted that the notion of the common law as a body of scientific principles accorded nicely with the principles of *stare decisis* and the doctrine of judicial supremacy, and with the need for uniformity among jurisdictions. It also agreed nicely with the case law emphasis of American law schools dominant since Professor Langdell's days in Harvard.[60]

The early history of the ALI and the Restatement movement also make it abundantly clear that the purpose was to preserve the common law — to give a role to lawyers in saving *their* law, in the areas of their special expertise,[61] an expertise which was viewed as separate and distinct from that of the legislature.[62] Indeed, it is clear that statutory law, legislation, was to remain outside the scope of the Restatement,[63] and at most, the ALI was to concern itself with the *form* in which public law was expressed, and not with its substance. The role of the ALI was not to promote — or obstruct — political, social or economic change, but simply "to enable the legal profession. . . to carry out its public obligation to improve the law."[64] The law to improve was, of course, the common law.

There was explicit agreement that even though changes in the law might have broader policy implications of a political, economic or social nature, the Restatements should not consider "Changes in the law which are, or which would, if proposed, become a matter of great public concern and discussion. . . ."[65]

---

58. Yntema, "The American Law Institute," Legal Essays in Tribute of Orrin Kip McMurray, at 671 (1935).
59. Beale Report, *quoted in* Yntema, *supra* at 658.
60. Yntema, *supra,* at 659.
61. *Root Comm. Rpt.* at 4; An Account of the Proceedings at the Organization of the Institute in Washington D.C., on February 23, 1923 (1923) (hereinafter cited as *1923 Proceedings*) at 81.
62. *1923 Proceedings* at 40, 41.
63. *Root Comm. Rpt.* at 4, 29, 41.
64. *Id.* at 41.
65. *1923 Proceedings* at 15.

> "The Institute must not only ascertain what the law is but what it ought to be, bearing in mind that the changes advocated should be confined to those designed to carry out policies which are generally admitted to be desirable and which do not touch subjects of general public controversy."[66]

The Restatement not only sought to stay away from contentious issues more appropriate to legislatures, perhaps, but the ALI was also clear that the Restatements were not intended as a codification of the law. While there was an assertion that the Restatements would stand alongside the Codes of Justinian and Napoleon as the third great attempt in history to state the law,[67] unlike these earlier efforts, the Restatements were not envisaged as statutes, even though the first set of Restatements, published without supporting citation or research or other supporting material, looked uncomfortably similar to statutes. The initial committee chaired by Elihu Root had warned against drafting the Restatements in statute-like form. Such an approach was unwise in the Committee's view, because it would reflect a lack of flexibility inimical to the common law.[68] The general hostility of early Restatement proponents to legislation is reflected in a number of comments,[69] though other views should be noted. Dean (later Justice) Stone indicated that the Restatements would move in the direction of reform, "without waiting for the sporadic and unrelated enactments of the legislature."[70] Stone did recognize that with the Restatements the ALI was indeed performing a quasi-legislative task. While he had serious doubts about codification,[71] he believed that some sort of legislative approval would assure the attention of the courts. He proposed that state legislatures adopt the Restatements not as laws but as statements of principle, allowing the courts "to accept and follow any of the precepts in the Restatements when they conflict with precedents but without making such action mandatory."[72] However, Stone's proposal was not adopted — nor was it

---

66. *Root Comm. Rpt.* at 55, 56.
67. *1923 Proceedings* at 93 (Speech of Gov. Hadley); Honorable Jefferson B. Brown, The ALI: Its Organization and Purposes, 1923 Address to the Sixteenth Annual Meeting of the Florida State Bar Association (1923) at 16.
68. *Root Comm. Rpt.* at 19.
69. *1923 Proceedings* at 90.
70. Harlan Fiske Stone, *Some Aspects of the Problem of Law Simplification,* 23 Colum. L. Rev. 319, 336-37 (1923).
71. *Id.* at 329-30.
72. H. Wechsler, *The Course of the Restatements,* 55 A.B.A.J. 147, 335 (1969).

rejected — by Root's Committee. Cardozo, in 1921, expressed doubt about the support ALI would get if it moved in the direction of codification,[73] but in 1931 Williston expressed has belief that a code would evolve, and that the Restatement would "serve as a better foundation for a code, if one should be needed, than any country has had before."[74]

The American Law Institute's Restatement efforts beginning in the 1920's form a significant chapter in the ascendancy of legislation. Clearly conceived as an institute to help salvage the common law, the American Law Institute developed its excellent Restatements with the aid of the foremost experts in the nation, and, as time went on, seemed to be increasingly less sure whether the Restatements were a source of law, a reflection of the best of the existing common law, or a projection of what (code-like?) the common law ought to be.

Whatever the Restatements have achieved, they have not aided the common law by reducing the number of its authoritative sources. In addition to the usual case law authorities, courts now cite the Restatement, and in some instances both the Restatement and the Restatement (Second). In the case of strict liability for certain risky activities such as the disposal of hazardous waste, an area in which I have recently worked, courts quite commonly cite *Rylands* v. *Fletcher,* the state's cases which have followed *Rylands* v. Fletcher, followed by the first Restatement analysis of what constitutes "ultrahazardous activity," followed by reference to the definition of "abnormally dangerous" activities in Restatement (Second). Finally, and not uncommonly, the court, having stirred the doctrines thoroughly, will render a decision without indicating which doctrine it has selected as its basis for decision.[75].

It is part of the story of the ascendancy of legislation that the American Law Institute began to change its course around the time when Professor Herbert Wechsler became the Reporter for the Model

---

73. Benjamin Cardozo, Address to the Association of American Law Schools at the Annual Meeting in 1921, at 118 (1923).

74. S. Williston, *Written and Unwritten Law,* 17 A.B.A.J. 39, 41 (1923).

75. For comment on the multiplicity of sources problem in the specific area of strict liability, *see* Superfund Section 301(e) Study Group, INJURIES AND DAMAGES FROM HAZARDOUS WASTES — ANALYSIS AND IMPROVEMENT OF LEGAL REMEDIES, A Report to Congress in Compliance with Section 301(e) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (P.L. 96-510), 97th Cong., 2d Sess. (September 1982), Serial No. 97-12. See discussion of *Strict Liability,* at 95-109. The author was a member and the Reporter of the Study Group.

Penal Code in 1960. Today, in 1984, the ALI still does Restatements, but it has increasingly turned its attention to model codes, such as the Model Penal Code, the Federal Income Tax Project, and even to codes that reflect substantial private law interests such as the Model Land Development Code.[76]

IV. *Changes in Attitudes of Statutory Construction*

Roscoe Pound, writing in 1908 gave an exhaustive listing of the various ways in which courts could act in dealing with legislation, ranging from ignoring it altogether to giving it full scope, treating it as a source of law for all purposes.[77] Pound noted that considerable progress had been made, though some courts still seemed to take pride in construing statutes out of existence.[78] The courts' tolerance of statutes has improved since then, though progress has been intermittent and not continuous. While occasional relapses may be noted, courts today rarely engage in the cat-and-mouse game of interpreting legislation in such a way as to frustrate its main purpose. Courts no longer do this because, in most cases they cannot, even if they wanted to. It would be difficult to interpret major programmatic legislation — such as the Social Security Law,[79] the Clean Air Act[80] or the

---

76. The change of direction began in 1948-49, when Judge Learned Hand chaired a committee to take stock and look to the future of ALI on the occasion of its twenty-fifth anniversary. The report reflected the recognition of the increased role of model legislation. By 1981 Judge Hand considered model codes to be the most important aspect of the work of the ALI. Professor Herbert Wechsler has strongly emphasized the role of legislative reform of the law during his directorship of the ALI. *See* J. Wechsler, *The Course of the Restatements,* 55 A.B.A.J. 147, 148 (1969), and *Restatements and Legal Change: Problems of Policy in the Restatement Work of the ALI,* 13 St. Louis U. L. J. 186-7 (1969).

77. Pound, *supra*, note 5, at 385-6.

78. *See, e.g., Johnson* v. *Southern Pacific Co.* 196 U.S. 1, 25 S. Ct. 158, 49 L. Ed. 363 (1904) reversing the Court of Appeals which had totally emasculated an Act of Congress "To Promote the Safety of Employees and Travellers Upon Rail Roads by Compelling Common Carriers Engaged in Interstate Commerce to Equip their Cars with Automatic Couplers and Continuous Brakes. . . ." after hundreds of railroad workers had been killed or maimed in the absence of such equipment, The Circuit Court applied the most limited of constructions because the law was in derogation of common law assumption of risk rules, and because the law was regarded as penal since it had a penalty for violations. The Supreme Court, in reversing, said: "We are unable to accept these conclusions, notwithstanding the able opinion of the majority, as they appear to us to be inconsistent with the plain intention of Congress, to defeat the object of the legislation, and to be arrived at by an inadmissible narrowness of construction."

79. 42 U.S.C.A. §§301-1397 (f).

80. CAA §§101-406, 42 U.S.C.A. §§7401-7642.

Black Lung Act,[81] in this hostile fashion because their main purposes are explicit, and though "strict construction" may reduce their full effectiveness, their main thrust is difficult to avoid.

The late 19th Century technique of hostile statutory interpretation, requiring great specificity in the wording of laws, particularly in the case of statutes in derogation of the common law, has left its mark on the field of legislative drafting. While the civil law countries were developing a drafting style which was generic and expansive,[82] draftsmen in common law countries were obliged to anticipate hostile interpretations, and to make their drafts narrowly specific. This tight, cramped draftsmanship resulted in statutes which had to be lengthy, prolix and fussy, full of minute and express inclusions, exceptions and provisos, if they were to cover more than a very narrow field. To make sure that the draft would successfully hit the target, the draft had to forego including any peripheral or analogous areas. The heritage of the past is still with us — our drafting style has not recovered from its late nineteenth century efforts to stave off judicial nullification by compulsive attention to detail, and by never relying on the pronouncement of broad legislative mandates.[83]

Though courts in the 1980's generally do not approach statutes with outright hostility, their degree of acceptance differs. The federal courts in the United States live easily with statutory law. This is not surprising because there is very little federal common law, and they deal with common law only in diversity of jurisdiction cases when state law is applied. The federal courts have dealt almost exclusively with statutory issues, and, with the usual number of exceptions, have managed well with problems of interpretation. They seem to have

81. Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C.A. §§801 *et seq.*.

82. R. Schlesinger, COMPARATIVE LAW: THE CODE SYSTEM 174-198 (1959). *See also,* R. David and H. deVries, THE FRENCH LEGAL SYSTEM 12-15 (1958) commenting on the drafting of the Code Napoleon as code writing of universal application — *i.e.*, the exposition of principles and rules good for the ages.

83. *See, e.g.*, Anton, *Legislation and Its Limits,* 5 Dalhousie L. J. 233, 241-242 (1979); Glendon, *The Sources of Law in a Changing Legal Order,* 17 Creighton L. Rev. 663, 669 (1984). *But see* Hammond, *Embedding Policy Statements in Statutes: A Comparative Perspective on the Genesis of a New Public Law Jurisprudence,* 5 Hastings Int. & Comp. L. Rev. 323 (1981), on the increased reliance on broad policy statements in recent legislation in the U.S., Canada and Great Britain.

overcome the strictures of the plain meaning rule,[84] and they no longer balk at the use of extrinsic sources.[85] The nature of the statutes they have had to deal with has also changed; these statutes form the core of the programmatic legislation which characterizes the legislation of our time.[86]

One test of the degree of judicial resistance to statutes is the reliance on the rule of strict construction of statutes in derogation of the common law. In the federal courts, there have been very few instances of reliance on the doctrine, and hardly any in the past twenty years, except in state diversity cases when the federal court relied on the rule applied in a particular state. In the case of *Falwell* v. *Penthouse International,*[87] a federal district court found that the Reverend Falwell had not met the requirements of a Virginia invasion of privacy statute:

> Virginia has never recognized a common law cause of action for invasion of privacy. Because the Virginia statute is in derogation of the common law, it must be strictly construed.[88]

In the state courts, the doctrine is more heavily relied on — or cited — in some, rejected in other, and regarded as one of several canons of construction in a third group of states.[89] The rejection or abandonment of the doctrine was the result of *legislation,* rather than court decision, in California,[90] Idaho,[91] Pennsylvania[92] and Texas.[93]

---

84. There are complaints of specific failures of interpretation, but there seem to be no complaints of the courts' general attitude to statutes. *See* A. Murphy, *Old Maxims Never Die: The "Plain Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts,* 75 Colum. L. Rev. 1299 (1975). The particular instance of the interpretational outrage was reversed by the Supreme Court. *Train* v. *Colorado Public Interest Research Group, Inc.* 426 U.S. 1, 96 S. Ct. 1938, 48 L. Ed. 2d 434 (1976).

85. *See, generally,* J. Kernochan, *Statutory Interpretations: An Outline of Method,* 3 Dalhousie L.J. 333 (1976).

86. *See infra,* text at note 109 *et seq. See also* Chayes, *The Role of the Judge in Public Law Litigation,* 89 Harv. L. Rev. 1281 (1976); Hammond, *supra* note 83 at 326-7.

87. 521 F. Supp. 1204 (W.D. Va. 1981).

88. *Id.* at 1210.

89. This analysis resulted from reviewing 373 cases decided by the highest state courts, and some 88 federal cases obtained through a LEXIS search.

90. Cal. Civ. §4 (West 1982).

91. Idaho Code §73-102(1) (Supp. 1982).

92. Pa. Cons. Stat. Ann. Tit. 1, §1928 (Purdon Supp. 1982-83).

93. Tex. Civ. Code Ann. Art. 10(8) (Vernon 1969).

The Idaho statute is an example:

> The rule of the common law that statutes in derogation thereof are to be strictly construed, has no application to these compiled laws. The compiled laws. . . are to be liberally construed, with a view to effect their objects and to promote justice.[94]

(There is a question, of course, whether the Idaho statute, being in derogation of the common law, should not be strictly construed. The courts have not entertained this question, and have fully accepted the new legislative direction!)

New York, which has no statutory provision on the subject, has placed limited reliance on the statutes-in-derogation doctrine. A notable 1982 Court of Appeals decision relating to construction of a statute allowing the admission of a lost will to probate mentioned the doctrine but did not appear to rely on it exclusively.[95]

A few states still place considerable reliance on the doctrine, even though there have only been a few cases of this kind in recent years. A 1978 Illinois case,[96] which involved the tort liability of public utilities, relied on the doctrine, and the highest court of the state states the doctrine, sparing none of its implications:

> The rule of Illinois is that statutes in derogation of the common law are to be strictly construed in favor of the person sought to be subjected to their operation. The courts will read nothing into such statutes by intendment or implication.[97]

A third category of states appear to place some reliance on the doctrine. These states, standing midway between the rejection and strong reliance position, evidence a range of application. Some merely pay lip service and use it as a make-weight,[98] while others may rely on it as one of several significant reasons for decicion.[99]

Some examples are worth noting for their special treatment of the strict construction doctrine. One such case is *Wis. Bankers Ass'n.* v. *Mutal Sav. & Loan Ass'n.*.[100] The decision is noteworthy because it sets out explicit guidelines for application of the strict construction doctrine. The court was asked to decide the validity of a hybrid bank account under the state's savings and loan statutes. Relying on

---

94. Idaho Code §73-102(1) (Supp. 1982).
95. *Matter of Kleefeld,* 55 N.Y.2d 253, 433 N.E.2d 521, 448 N.Y.S.2d 456 (1982).
96. *Barthel* v. *Illinois Cent. Gulf. R. Co.,* 74 Ill.2d 213, 84 N.E.2d 323 (1978).
97. 74 Ill.2d at 220.
98. *See e.g., McNeal* v. *Allen,* 95 Wash.2d 265, 621 P.2d 1285 (1980).
99. *See e.g., Roe* v. *Lewis,* 416 So.2d 750 (Ala. 1982).
100. 96 Wis.2d 438, 291 N.W.2d 869 (1980).

secondary sources, the court set forth the following framework:

> For the rule to apply, (1) there must be a common law doctrine in existence, or potentially in existence relevant to the issue presented by the parties; (2) the statute in issue must be one which, construed as the party pleading it contented, would operate to change the common law; (3) the statute must be ambiguous on its face. These three shown, a court was then warranted in proceeding to interpret the statute narrowly, to have as little effect as possible in altering the common law.[101]

Oddly enough, the case did not rely on the strict construction doctrine, since the court found no clear common law rule which would be transgressed by statute.

A Delaware case, *Colonial Sch. Bd.* v. *Colonial Affiliate, Etc.*[102] sets forth a theoretical justification for the strict construction doctrine. In *Colonial,* the court narrowly construed a statute which authorized the school boards to engage in collective bargaining, limiting the permissible subjects of such negotiation to those expressly enumerated in the statute. In so doing, the court placed about equal emphasis on the strict construction doctrine and the legislative intent. Moreover, the court suggested that the reason the doctrine was "axiomatic," was that

> the General Assembly is presumed to have been aware of two facets of existing law when it enacted The Professional Negotiations and Relations Law in 1969:
>
> First, at common law, public employees had no right to collectively bargain. . . .[103]

In other words, the statute should be strictly construed as in derogation of the common law because the enacting legislature is charged with knowledge of the common law. Thus, a clear intent to override the comon law would be necessary to make the canon inapplicable.

One last case worth taking note of here because it demonstrates the interaction of the strict construction doctrine with another principle of statutory construction — the canon that remedial statutes should be liberally construed. In *Albuquerque Hilton Inn* v. *Haley,*[104] the Suprme Court of New Mexico found *both* doctrine applicable. There the issue before the court was whether a statute limiting a

---

101. 291 N.W.2d at 877. The court relied on Page, *Statutes in Derogation of Common Law: The Canon as an Analytical Tool,* 1956 Wis. L. Rev. 78, 87.
102. Dela., *supra,* 449 A.2d 243 (1982).
103. *Id.* at 247.
104. 90 N.M. 510, 565 P.2d 1027 (1977).

hotelkeeper's liability applied in a case where luggage was lost not in, but on the way to the hotel. The court acknowledged the force of the strict construction doctrine, but went on:

> However, this statute was obviously enacted to ameliorate the effect of the harsh common law rule, and as a remedial statute in derogation of the common law a different rule applies.

The proper analysis in the case where a statute is both remedial and in derogation of the common law, said the court, was to "construe strictly the question of whether it does modify the common law, but its application should be liberally construed."[105] The court went on to find the statute applicable under the circumstances, and the hotel keeper was held liable for the loss of luggage in transit.

Judicial treatment of statutes in derogation of the common law shows that in some courts, the restrictive attitudes to legislation persist to some degree. Nationwide, in the U.S., there has been significant improvement.

The acceptance of legislation, as noted before, has not progressed in a straight and continuous line. There is not, as yet, full acceptance of statutes as a source of law by analogy, in cases beyond their specific terms, though there, too, progress has been made.[106] But there have also been setbacks. Just a few years ago, the courts would find an implied right of private action for damages when the plaintiff had been injured by the violation of a statute intended to protect the group or interest to which he belonged. In the leading case of *Cort* v. *Ash,*[107] for instance, such an implied private right action was recognized and criteria were articulated for its application, though the statute did not expressly authorize such private causes of action. In a number of cases in the past few years the U.S. Supreme Court has effectively put a stop to this development, though it has never said so

---

105. 90 N.M. at 512, 565 P.2d at 1029.

106. For a recent analysis and account of some progress, *see* Williams, R. *Statutes As Sources of Law Beyond Their Terms in Common Law Cases,* 50 Geo. Wash. L. Rev. 554 (1982). For an early treatment of the subject, *see* R. Pound, *supra* note 4 at 385-86; and J. Landis, *Statutes and the Sources of Law,* HARVARD LEGAL ESSAYS 213 (1934). Also note comments on the judicial failure to use statutes in this manner by H.F. Stone, *The Common Law in the United States,* 50 Harv. L. Rev. 4 (1936).

107. 422 U.S. 66, 95 S. Ct. 2080, 45 L. Ed. 2d 26 (1975). The court developed a four-step test for the availability of implied civil remedies. For an early grant of such remedies, *see Texas Pacific Railway Co.* v. *Rigsby,* 241 U.S. 33, 36 S. Ct. 482, 60 L. Ed. 874 (1916).

expressly.[108] Those of us who have confidence in legislation as a source of law must see to it that the statutes say it clearly — and say it all.

V. *The Development and Prevalence of Programmatic Legislation*

The significant change in the twentieth century is in the character of the laws. The dominant form of legislation today, starting with the New Deal legislation of the thirties, is what I shall call *programmatic legislation.* It is a new form which responds to new needs. During much of the nineteenth century, legislation had limited targets, and much state legislation was of a limited remedial nature — to remedy problems of private law which common law decisions had created, or which common law decisional approaches were unable or unwilling to resolve. A great deal of that legislation, it appears, dealt with matters that could have been resolved by decisional law *if* an appropriate case for such a decision had emerged, or *if,* having emerged, the courts had been willing to create new case law for the future. There was also a great deal of private, local, and special legislation, and there was very little public law, and even less legislation that created any public programs.[109]

Programmatic legislation is precisely the kind of legislation the eighteen nineties would have been afraid of. It consists of public law that cannot be formulated or promulgated by the courts. In essence, programmatic legislation creates a governmental program — its usu-

---

108. *Cannon* v. *University of Chicago,* 441 U.S. 677, 99 S. Ct. 1946, 60 L. Ed. 2d 560 (1979); *La Touche Ross & Co.* v. *Redington,* 442 U.S. 560, 99 S. Ct. 2479, 61 L. Ed. 2d 82 (1979); *Transamerica Mortgage Advisers, Inc.* v. *Lewis,* 444 U.S. 11, 100 S. Ct. 242, 62 L. E d. 2d 146 (1979); *Middlesex County Sewage Authority* v. *National Sea Clammers Association,* 435 U.S. 1, 101 S. Ct. 2615 (1981). *See also,* Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation In the Supreme Court,* 95 Harv. L. Rev. 892 (1982), which notes a current trend toward literalist statutory construction by the U.S. Supreme Court.

109. *See* Hurst, *supra* note 1 at 9-10, commenting on the limited scope of general legislation during the first three quarters of the nineteenth century. *See also* Mowry, *The Growing Complexities of Legislation,* 40 American Law Rev. 212, 68 Albany L.J. 112, (1906) which criticized the growth of narrow, local legislation in state legislatures, blamed local political machines for this growth, and proposed procedural reform. *See also Address of Honorable Moorefield Storey,* 53 Albany L.J. 117 (1896), which supported the need for special legislation. There was beginning reliance on legislation in the last quarter of the nineteenth century some of which produced the strong opposition referred to earlier. Friedham, *supra* note 4 at 311-318.

al patterns is the establishment or designation of an agency, and the assignment of a task. Frequently, the task is broadly defined, leaving the agency with the obligation to articulate the details of its own mandate.[110] The breadth of the delegation grows out of the complexity of the assigned task. If the statute is to provide substantial schemes of social insurance, or sound regulation of hazardous or toxic pollutants, or decent controls on the distribution of sophisticated medical technology, it must delegate the details of eligibility requirements, technical details of health and safety requirements, or details of economic controls over scarce medical resources to agencies that have been provided with the means and expertise to carry out their legislatively defined task. It should be added that programmatic legislation uses the tools of administrative law because it must.[111] Administrative law, which has many other applications, does not, however, define the field of programmatic legislation.

Other recurring aspects of programmatic legislation may be noted. Generally, in establishing a new program, the legislature seeks to occupy the entire field it regulates, leaving no room for other lawmaking in the area.[112] This feature of programmatic legislation has resulted in formidable, lengthy, detailed and complex statutes, because it usually takes a lot of law to cover a field. The development of good programmatic legislation requires a thorough knowledge of

---

110. *See, e.g., Ethyl Corp.* v. *EPA,* 541 F.2d 1 (D.C. Cir. 1976), where Skelly Wright, J. reviewed the highly technical evidence supporting new lead additive regulations under the Clean Air Act, and commented that in assessing risks to public health in setting the standard, the Administration was called upon to make "essential legislative policy judgements. . ." (at 26).

111. *See* Friedham, *supra* note 4 at 590 recounting the effect of the New Deal on the development of administrative agencies and administrative law. He notes, too, that although the creation of the Interstate Commerce Commission in 1887 is taken as something of a beginning of administrative law, in fact there had been many administrative agencies on the state and federal level before then "The administrative agency was a child of necessity. Big government and positive government meant a government which divided its labor among specialists and specialized bodies." *Id.* at 384. *See also* K.C. Davis, *supra* note 25, at §1.02.

112. The point is illustrated in an unusual context. In *City of Milwaukee* v. *Illinois,* 451 U.S. 304, 101 S. Ct. 1784, 68 L. Ed. 2d 114 (1981), the Court held that in the total rewriting and restructuring of the earlier, far more lenient water pollution control act, Congress had fully occupied the field, and that the comprehensiveness of the Clean Water Act left no room for reliance on the federal common law of nuisance recognized earlier. Compare Estreicher, *Judicial NullificationL: Guido Calebresi's Uncommon Common Law for a Statutory Age,* 87 N.Y.U. L. Rev. 1126, 1132 (1982) where the point is made that judges should not be able to treat obsolescent public law statutes like obsolete common law cases since the whole point of the "statutory scheme is its radical disjuncture with the common law trend."

the area to be regulated, and the interplay between factual background — be it technical, scientific or economic — and the necessary legal analysis is always part of the process of shaping statutes to resolve complex contemporary problems.[113]

While programmatic legislation was the New Deal's response to a great crisis, and while it may be associated by its origins with the welfare state, the examples that follow show that programmatic legislation is not so limited. Programmatic legislation in environ mental law, or in the area of product controls is not necessarily "tainted" by the social attitudes of the welfare state.[114]

I submit that programmatic legislation is truly a new form engaged in new tasks, tasks that are new both in their dimensions and complexity. The earliest category of programmatic legislation included modern social insurance legislation, such as social security legislation, legislation providing for work-related injuries, unem ployment insurance, health benefit programs, pension programs, and the like. It also included social welfare programs that are not work-related, such as old-age insurance, and a variety of protections against illness and accident.

Programmatic legislation establishes social insurance programs, as well as direct service programs for the rendition of health care, from well-baby clinics to crisis management centers, mental health community centers and drug and alcohol treatment facilities. In the United States such federal programs are frequently grant-in-aid programs, and in accordance with basic federal requirements, they may be administered by the states with federal assistance; they often require the provision of matching state funds.[115] To define program-

---

113. For an early account of the need for substantive knowledge of the field in drafting programmatic legislation, *see* Landis, *The Legislative History of the Securities Act of 1933,* 28 Geo. Wash. L. Rev. 29 (1959). The article includes a description of the staff work and the collection of factual data which preceded the drafting of this significant example of New Deal legislation.

114. *But see* B. Ackerman and W. Hassler, *Beyond the New Deal: Coal and the Clean Air Act,* 89 Yale L.J. 1466 (1980) which examines the failure of the Clean Air Act to deal adequately with choices relating to the accomplishment of sulphur dioxide standards. The article considers the basic administrative scheme a New Deal approach would have followed. It also considers the outcome of an ends-oriented "agency forcing" effort which pushed the administrative process beyond the New Deal and strayed from earlier tenets of sound legislative and administrative decisionmaking.

115. *See e.g.,* Clean Water Act, §§201-202, 33 U.S.C.A., §§1281-1282 which provides for federal support for public waste treatment works, on condition of state contribution, raised to forty-five percent in 1982, effective 1984.

matic legislation in terms of grant programs is too limited, however. Programmatic legislation may also include significant regulatory elements. Housing legislation involves both grants to states and localities, and the subsidization of persons unable to afford privately built housing. But it also sets standards for compliance with a variety of building and housing code requirements. Grants for hospital construction, for instance, involve both a grant program and physical facility, staff and service requirements for the institution to be subsidized.

I would include in my category of programmatic legislation the statutes which authorize regulations of such breadth as to require major governmental organizations to render them effective. Modern food and drug regulation falls into this category,[116] as do the vast statutory and administrative structures for environmental pollution control.[117] A sophisticated, modern system of regulation that subjects new drugs to pre-market testing, that provides for the experimental use of drugs under controlled conditions, or that limits the use of certain drugs to specific conditions is so different from the old prohibitions on the sale of "poisons" without proper labelling as to amount to a generic difference in the legal approach itself.[118] The environmental law area provides similar examples. A modern law that provides for effluent limitations and for the setting of detailed ambient water quality standards is so different from older laws that prohibit the fouling and pollution of streams as to be barely comparable — we truly speak of legislation of a different kind.[119] For another instance, compare the old municipal ordinances that prohibited "loud and unnecessary noise"[120] with the modern noise pollution control codes, particularly the federal Noise Control Act of 1976 which does not control noise directly but which creates a program for

116. *See e.g.,* Federal Food, Drug and Cosmetic Act, *supra* note

117. *See, e.g.,* Clean Air Act, 42 U.S.C.A. §7401, *et seq.*; Clean Water Act, 33 U.S.C.A., §1521 *et seq.*; Resource Conservation and Recovery Act (Solid Waste) 42 U.S.C.A., §6901 *et seq.*.

118. *See supra* notes 18 and 19.

119. Compare the 1899 Refuse Act (Rivers and Harbors Act of 1899), which prohibits the discharge or deposit of "any refuse matter of any kind or description shatever" in any navigable water of the U.S., and the Clean Water Act, 33 U.S.C.A. §301, with its highly technical and detailed provisions for the promulgation of a variety of effluent limitations.

120. Grad and Hack, *Noise Control in the Urban Environment,* 1972 Urban Law Annual 3, 10-12.

the control of the noise-producing product![121] Another favorite example of mine is the old New York City Sanitary Code provision prohibiting the discharge of "dense smoke," applied in 1937 against the Queen Mary anchored in New York Harbor,[122] compared to the complex provisions relating to the emission of sulfur dioxide and suspended particulates administered under the necessarily detailed administrative scheme of the Clean Air Act.[123]

Another area of major programmatic legislation, of growing importance and impact, is the area of product controls. Closely related at times with environmental and health controls, product controls should receive special attention because they operate so directly on our industrial and commercial life.[124] Major programmatic legislation emphasizing product controls include the relatively early 1938 Federal Food, Drug and Cosmetic Act (FFDCA),[125] the Federal Insecticide, Fungicide and Rodenticide Act (FFRA),[126] first enacted in 1947, the 1976 Toxic Substances Control Act TOSCA)[127] and the 1972 Consumer Product Safety Act (CPSA).[128] These laws share a concern for public health and safety, to be advanced by the regulatory control of potentially dangerous products, generally in advance of their use or application by the public to whom they are sold. The Federal Food, Drug and Cosmetic Act, for instance, imposes health and safety controls on the substances it regulates, imposing the requirement of pre-marketing demonstration of safety only on new drugs. An older law, it places the burden on the Federal Food and Drug Administrtion to show hazard or damage before the distribution of a product may be limited. In the drug area, the manufacturers have the burden, however, of showing both effectiveness and freedom from hazard before a new drug may be registered and

---

121. Noise Control Act of 1972, 42 U.S.C.A. §4901 *et seq.*, especially NCA §6, 42 U.S.C.A. §4905, Noise Emission Standards for Products Distributed in Commerce.
122. *People* v. *Cunard White Star Ltd.*, 280 N.Y. 413, 21 N.E. 2d 489 (1939). The case involved the application of the New York City Sanitary Code §211 (now obsolete) to ocean liners in foreign commerce.
123. Clean Air Act, 42 U.S.C.A. §7401, especially CAA §109, 42 U.S.C.A. §7409, National Ambient Air Quality Standards, and CAA §110 (a) (2) (B) referring to emission limitations applied by way of state implementation plans.
124. *See, generally,* Grad, F. TREATISE ON ENVIRONMENTAL LAW, §4A.01, Toxic Substances and Hazardous and Toxic Wastes — Overview of Major Legislation.
125. 21 U.S.C.A. §301 *et seq.*.
126. 7 U.S.C.A. §136 *et seq.*.
127. 15 U.S.C.A. §2601 *et seq.*.
128. 15 U.S.C.A. §2051 *et seq.*.

placed on the market.[129]

All of this product safety legislation is complex, lengthy and detailed. It reflects the technical complexity and scientific sophistication of the fields which it regulates. It is largely prospective in operation. It bears only remote similarity in the nature of its controls to the common law requirements applicable to manufacturers of hazardous substances, and it has major impact on our society in the organization of significant parts of our economic life and in the distribution of the costs of consumer protection. Each of the mentioned statutes requires the establishment of a program and an administrative structure for its effectiveness.[130]

The prevalence of programmatic legislation is not limited to the United States. Canada, too, has had similar developments in such fields as the Old Age Security Act, Old Age Assistance Act, and the more recent Canada Pension Plan and Assistance Plan, was well as in the advanced Health Insurance and Diagnostic Services Act. Canada, too, has developed substantial programs in environmental protection. It is not surprising that we, in America, share substantial legislative developments. We also share the increasing complexity of our industrial and commercial life, and the growing expectation that the state will protect our health and safety. Not surprisingly, we share the need for massive government programs and for new forms of legislation to create them.

Programmatic legislation is here to stay, and though there may be occasional setbacks in social insurance and other benefit and service programs, and though there may be budget cutbacks in programs for the protection of health and safety, it is not likely that major social insurance programs or major service or regulatory programs will be dismantled even by a change to a more conservative government that is philosophically opposed to such state involvement.

It is unavoidable that some of the discussion of programmatic legislation verges on the political issues of our time, on the proper role of government, and on the future prospects for the welfare state. Legislation has always been a political subject, and the style of legislation necessarily reflects the political realities of an age. Just as late nineteenth century legislation emphasized minimal interference with the common law notions of individual property rights and freedom of contract, so does the programmatic legislation of the

129. 21 U.S.C.A. §355.
130. *See supra* note 111.

twentieth century mirror the concerns of our age. Besides, the current opposition to "big government" legislation, and the effort to discredit welfare and social insurance legislation in the name of promoting self-reliance and industry bears an uncanny similarity to the turn of the century opposition to the "excesses" of legislation.

I believe that programmatic legislation is a new kind of legislation, which differs in significant ways from earlier statutes in its form and its approaches. There have been earlier examples of programmatic legislation, but as a general phenomenon programmatic legislation is distinctly characteristic of the twentieth century. It is a functional response to the unique and uniquely complex problems of our times. As in other fields, form follows function, and the complexity and technical detail, and the delegation of responsibility for their resolution, reflect the tasks the legislation must fulfill. When opponents of such legislation voice formal objections to its complexity and to its detail, when they advocate leaving the resolution of problems to common law, or when they urge statutory simplification, they reflect their nostalgia for a past when life was less complicated and the resolution of problems called for simpler responses, statutory or otherwise.

The interpretation of programmatic legislation would seem to present relatively few problems, *if* the courts and administrative agencies give full recognition to the statutory scheme. Such legislation is clearly in derogation of the common law, just as it is clearly remedial in scope. When applied to three volumes of social security legislation, or to the two hundred pages of the Clean Water Act, the application of restrictive rules of construction seems strangely out of place. What is called for is purpose interpretation, and the rule in *Heydon's Case* — decided in the Court of Exchequer in 1584, exactly three hundred years ahead of our time — would seem to do nicely. As *Heydon's Case* puts it, the court's job is as follows:

> "And it was resolved by them, that for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law) four things are to be discerned and considered:—
>
> "1st. What was the common law before the making of the Act.
>
> "2nd. What was the mischief and defect for which the common law did not provide.
>
> "3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth.

> And 4th. The true reason of the remedy; and then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and *pro privato commodo,* and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico.*"[131]

I believe that the fourth paragraph wisely instructs us to give force and life to the statute, and to give it in full measure. Whenever a question arises of the proper interpretation of the statute in a particular case, that interpretation should be preferred which advances the program established by the legislature *as a whole,* as determined from the statute itself and its legislative history. The emphasis should be on the advancement of the program *as a whole,* and not on eking out evidence of specific intent relating to the application of one of its subsidiary provisions. The rule in *Heydon's Case* has been submerged far too long in the debris of strict construction.

Viewed simplistically, this would seem to leave little room for the court's interpretation of statutes. This is clearly not the case as current decisions on a variety of laws will show. The broad programmatic nature of such contemporary legislation requires the delegation of certain definitional matters, and matters of inclusion or exclusion to the agency charged with the law's administration. From early workers' compensation statutes on, the courts have had to deal with such problems of broad delegation. Workers' compensation entitle the worker to certain benefits whenever he or she suffers a "work-related injury." A worker suffers a heart attack at the workplace while working on his usual, not particularly stressful task. Is the heart attack a "work-related injury?"[132] Or take the Clean Air Act. The Administrator of the Environmental Protection Agency (EPA) must set standards of performance for new sources which "shall reflect the degree of emission limitation and the percentage reduction which (taking into consideration the cost of achieving such emission reduction, any non-air quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated."[133] The usual canons of construction are impossible to apply. When a particular standard is challenged as too

---

131. 3 Coke 7a, 76 Engl. Rep. 637 (Court of Exchequer, 1584).
132. *E.g., Windust* v. *Department of Labor and Industries,* 52 Wash. 2d 33, 323, P. 2d 241 (1958).
133. CAA §111 (1), 42 U.S.C.A. §7411 (1).

stringent or too lenient, the question for the court is to inquire whether the particular technical or scientific resolution of the problem by the Administrator meets the terms of delegation of the statute in the light of its general purpose.[134] The court's task under such legislation has surely changed — but the court retains its earlier, ultimate responsibility for statutory construction, and it need not fear displacement.

VI. *Conclusion*

If further developments in the direction of more, and more advanced programmatic legislation are likely, the implications for legal education should be significant. Those of us who teach not only legislation, but also legislative research and drafting, have long been dissatisfied with law school curricula which emphasize case law skills, such as the fine art of distinguishing earlier cases, of telling holding from dictum, and other case law skills, mistakenly believed to constitute the spirit of the common law. Too many law schools still offer no courses in legislation, and give inadequate attention to the subject of reading statutes. As a result, too many lawyers do not know how to read a statute and would not be able to tell modern programmatic legislation from any other kind. Whether or not you agree that there is anything distinctly new and different in programmatic legislation, law schools which have not done so already must remedy the statutory illiteracy of students. Complex modern programmatic legislation requires a facility for dealing with statutes. If possible, lawyers should be trained to enjoy the well-crafted structure of a lengthy and detailed statute, and to recognize and comprehend the interrelationship of its parts. They should at least be able to read it in its entirety and with an understanding of how its parts contribute to the operation of the whole.

There is probably no better way to learn how to read a statute than by learning to draft one. The development of extensive statutory schemes is increasingly paralleled by detailed policy studies by trained staffs. Such staffs must be capable not only of legal research, but also of relating their legal studies to the practical knowledge of the field, so as to be in a position to ask for and to receive policy instruction from the responsible policymakers. In addition, lawyers trained in legislative research and drafting should also be in a position to pro-

134. *E.g., National Lime Association* v. *EPA*, 627 F. 2d 416 (D.C. Cir. 1980). *See also, supra* note 110.

vide the policymakers with an analysis of the range of policy alternatives, and of alternative sanctions and remedies to achieve the major purposes most effectively.

Today, the overwhelming number of cases decided involve statutes, and the legislative output of the national legislatures, and of the state and provincial legislatures in Canada and the U.S. increases steadily. Not only is most of our law statutory, but the nature of our statutes has changed. Our statutes are increasingly more comprehensive, technically more complex, and employed in the establishment of significant programs. They are instrumental not only in changing our private law but also in creating vast new fields of public law, which restructure our society and our institutional and legal relationships.

It has taken some time for legislation to achieve its dominant position as a source of modern law. The ascendancy of legislation is likely to be permanent, and it is also likely to persist in the new forms of programmatic legislation seeking to cope with the complexities of our age.