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THE COMMON LAW OF LEGISLATION

FRANK E. HORACK, JR.†

STATUTE law has an unenviable reputation. The common-law lawyer has emphasized its unwholesome bulk,¹ and has alleged that its capricious and sporadic method² has infused illegitimate legal principles into an otherwise symmetrical jurisprudence.³ These attacks have discredited the statute books, and the negative implication of common law perfection has added disdain for the entire legislative method. And so commonplace have these assertions become that the temptation is to accept them without analysis. Analysis and comparison of the legislative and judicial processes, however, discloses surprising similarity. Indeed, if there is a common law of cases, there is equally a common law of legislation.

Stare Decisis v. Stare De Statute

The “perfection of human reason” long has been the glory of the common law. The doctrine of precedents has developed “perfect reason.”⁴ An authoritative sanctity shrouds every prior decision of the common law, and when occasion demands, there is always an arsenal of precedents from which by strictest logic a new decision may be predicted with unfailing accuracy. Of course, every lawyer knows that this is not true in practice—that in the difficult situations precedents usually are equal and judicial choice

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² "It seems scarcely appropriate to apply the term "law" to that which was one thing yesterday, another today, and still another tomorrow. It is hard to realize that what was proper yesterday can be very wrong today and all right tomorrow." Alter, Presidential Address, 1925 Pa. Bar Asso. 3.

³ Lord Coke once remarked "If I am asked a question of common law, I should be ashamed if I could not immediately answer it; if I am asked a question of statute law, I should be ashamed to answer it without referring to the Statute Book."

is guided but not restrained by prior decisions. Cardozo tells us that:

"within the range over which choice moves, the final principle of selection for judges, as for legislators, is one of fitness to an end. . . . Every judge consulting his own experience must be conscious of times when a free exercise of will, directed of set purpose to the furtherance of the common good, determined the form and tendency of a rule which at that moment took its origin in one creative act."

The twentieth century has seen a growing insistence upon the creative element in judicial decisions. Precedent has not been denied, but its complete authority has been shaken by an insistence upon the unlogical, practical element in law-creation. There is a growing recognition that case law "achieves that certainty and uncertainty that have been its eternal paradox."

The function of precedent in judge-made law has been discussed elaborately; its similar functions in legislation has been ignored. Nevertheless, legislation, like judge-made law, follows precedent. Save for formal differences of structure, legislation and adjudication spring from similar patterns of human conduct.

Habit and the essential caution of the human mind seek the easy comfort of past decisions and abjures responsibility for new determinations. Consequently, whether the decision involves changing the color of one's house, the breakfast menu, a judge-made rule of tort liability, or a statutory amendment, experience will find friendly reception. But the law of statutory precedents must be looked for, not in the courts, but in the legislative acts. The search is, of course, more perilous and the discoveries more difficult, for legislative assemblies have lost the art of argument and fail to "explain" their decisions. Their books have only the decisions, but behind each decision there will be found a reason.

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5 Cardozo, The Nature of the Judicial Process (1921) 103.


8 Statutes have suffered from the abandonment of the preamble. Only recently has the "policy section" reappeared to serve its function. Long ago Bentham suggested its importance. "My practice, . . . is to give to each enactment, or intimately connected with it, its own set of reasons . . . ." 3 Bentham Works (Bowring Ed.) 323.

9 "Legislators who, having freed themselves from the shackles of authority,
Statutory precedent grows as case-precedent grows. First, someone bolder than the rest marks a new course. If the course appears satisfactory, others follow. Legal science calls this the doctrine of *stare decisis.* The legislative process is similar. For example, the common-law rule prior to legislative change was that the operator of an automobile owed a duty to an invited guest to exercise due care to protect the guest from unreasonable danger of injury. A few states limited the operator's liability to "gross negligence". When this seemed to provide an undesirable stimulus to hitchhiking and to assist collusion between guest and host for the recovery of insurance, legislative change was thought to be desirable. Connecticut adopted a statute relieving the operator from liability to a guest, except for "wilful or wanton conduct". Twenty-three states followed that lead. Described in juristic language, the legislatures have followed the rules of precedent. In popular language, the statute has been copied. The result is the same.

have learnt to soar above the mists of prejudice, know as well how to make laws for one country as for another: all they need is to be possessed fully of the facts; to be informed of the local situation, the climate, the bodily constitution, the manners, the legal customs, the religion, of those with whom they have to deal. These are the data they require; possessed of these data, all places are alike. If they are more at home in their own country than elsewhere, it is only because the requisite stock of facts in the former situation is already possessed by them without their being obliged to wait the time which, in a foreign country, it would require to seek them out." 7 BENTHAM WORKS (Bowring Ed.) 801.

10 Sometimes the new course is discovered quite by accident. See the strange case related by Lewis in *THE ANATOMY OF SCIENCE* 34–37. Not always do the proponents of a new idea suffer the fate of Mr. Lewis' young man whose ideas were "so heretical in character that he was tried, condemned, and eaten."


Additional legislation has been adopted by seven states further to protect society from the dangers of hitch-hiking. In these states hitch-hiking has been made a crime. The legislative intent is clear. It is doubtful, of course, whether such regulation will be of practical utility in reducing hitch-hiking. But this is no objection. Judicial decision has never been criticized because it fails to stop litigation. The significant point is that in adopting these statutes legislatures have followed a system remarkably similar to that of judicial precedent. It may be objected that the legislature, not having explained its result, need not feel bound by the statutes of other states. This is, indeed, true. But the statute tells but half the story. If the committee reports, the hearings, and the debates, accompanied every statute, the procedure would be apparent. Important present day legislation is no longer of "wild and sporadic growth". Scientific legislative services have made great strides, national associations follow proposed state and federal legislation, with careful scrutiny, and the conflicting interests represented in every committee room make it as dangerous for proponent or committeeman to be unfamiliar with existing legislation as it is for judge or counsel to argue without "authorities".

It may be objected, of course, that so long as statutes are not applied by analogy in judicial proceedings, care in legislative preparation is unimportant. This overlooks two rather significant possibilities. First, that the history of social control through law usually follows a pattern which eventually shifts from the unwritten

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14 See Horack, In the Name of Legislative Intention (1932) 38 W. VA. L. Q. 119, 128 and cases cited.


16 The significance of the participation of national organizations in the legislative process is emphasized by their inclusion in THE BOOK OF THE STATES (1937) published by the Council of State Governments, and the reference in BEARDSLEY, LEGAL BIBLIOGRAPHY (1937). Any one conversant with the legislative service bureaus of these associations and their activities before specific state legislatures will recognize the shift that has been made from the insidious private lobby to the public recognized and responsible national association.

17 See Landis, supra note 7.
to the written law — and, thus, statutes become the significant legal materials. Second, that the lawyer's function today is not limited to litigation. The understanding of administrative action and the prediction of legislative action are chief responsibilities of many lawyers. The job is difficult, of course, but it is not impossible. To achieve a capacity for legislative prediction the lawyer must organize legislative materials along systems similar to the judicial digests.

The examination of a single volume of judicial reports discloses fortuitous, isolated, and unorganized opinions — no orderly system appears. The further examination of all the reports in a single state will likewise disclose only a partial number of precedents necessary for a systematic jurisprudence. No lawyer, however, has ever thought it necessary to confine his conception of our common law by jurisdictional limits and a search of all the authorities, English and Empire, as well as American, is an accepted technique. If expressions of law are still lacking, the abridgements, the commentaries and all the juristic writings are available to synthesize and complete "the law". Indeed, the American Law Institute in "restating" the law assumed the "omni-brooding presence" of the common law and filled in many gaps by the use of "legal reasoning and analogy". In short, scores of possible situations although undecided at least by case law are rationalized nevertheless into the body of common-law jurisprudence.

Legislation boiled in a similar caldron produces the same brew. A single volume of session laws is as heterogeneous as a single volume of judicial opinions. A collection and arrangement of all the session laws, in a code, is a distinct improvement over a single volume of acts but still falls far short of a complete jurisprudence. It is the premise, however, of the common-law lawyer that in dealing with statutory materials it is not permissible to go further than the code itself. Only reluctantly will reference be made to the growth of a statute and its legislative history.

If only the latest expression of judicial opinion were made the basis of common-law jurisprudence, it too would be fragmentary and useless. Applying the judicial method to legislative materials,

a continuity of legislative precedence can be established. Reflection will suggest the probability of this result.

Legislation in a single state shows uniformity and continuity. The legislation of all the states becomes a consistent jurisprudence. The construction of a single common-law rule depends, at least in America, not only upon the precedent of a particular state but also upon the development of the rule in England and in all of our states. The development of a legislative common law is entitled to similar source material. With this material available, continuity of development and certainty of prediction would be possible within the usual limits of majority and minority views. To construct such a picture certain exclusions and inclusions of material are necessary, but these exclusions and inclusions may be made consistently with standards acceptable to the traditional common law. The multitude of statutes which expand the size of our session laws which change the salaries of public officials, provide for interdepartmental adjustments, and legalize local governmental action, are analogous to the orders of nisi prius courts. Our common law is a common law of appellate tribunals. Legislative common law need include statutes of a legal character only.

Historically, the development of statutory rule parallels judge-made rule. Although the caprice of popular majority may shift legislative personnels, today's majority follows the paths of yesterday's representatives. Social policy changes slowly. Indeed, an examination of many existing policies suggests that change is indeed too infrequent.

The social condemnation of gaming, for example—even in the face of gambling's widespread and undiminished existence—speaks from the statute books and from the cases with undiminished vigor. Prior to the nineteenth century, gambling was prohibited in most of the colonies. From specific prohibitions, statutes expanded by analogy to cover most of the games of chance played with cards or dice. Modern mechanical gambling machines pre-
sent a new problem but not a new policy. Regulation kept pace with invention.\textsuperscript{22} And when public fancy turned to horse racing,\textsuperscript{23} yacht racing,\textsuperscript{24} and animal fighting,\textsuperscript{25} baseball and football pools,\textsuperscript{23} there was an equal readiness to condemn such conduct. Although it hardly can be recommended as desirable legislative draftsmanship, case by case statutory expansion has paralleled the judicial technique of deciding questions as they arise. And even the amenderary process by which this has been done would be unnecessary in many cases if courts themselves would apply the statutes by analogy in similar cases.\textsuperscript{27}

Statutory uniformity, however, does not exclude the possibility of contra authorities, special rules,\textsuperscript{28} and minority views.\textsuperscript{29} Thus, although the majority ruling prohibits gambling, a minority of jurisdictions have recently abandoned hope of prohibiting gambling and have sought to “legalize” it. The course of the minority rule is so constant and the time of its adoption so apparent that it might well be predicted that states will shift from the majority position to the minority when popular opinion against gambling is not excessive, when there is urgent need for additional state revenue, and when state income is being tapped by legalized gambling in


\textsuperscript{23} Miss. Code Ann. (1930) § 971; Fla. Code (1930) § 7672.

\textsuperscript{24} Miss. Code Ann. (1927) c. 20, § 971.

\textsuperscript{25} Iowa Code (1919) § 8828; Fla. Code (1930) c. 7, Art. 20, § 7672; Miss. Code (1927) c. 20, § 971.

\textsuperscript{26} Conn. Code (1925) § 628.

\textsuperscript{27} The doctrine of the equity of the statute has been generally abandoned in the United States today. See Lloyd, \textit{The Equity of A Statute} (1909) 58 U. Pa. L. Rev. 76; Horacek, \textit{Statutory Interpretation} (1931) 19 Ky. L. J. 211. The former difficulties of statutory extension have been avoided by Florida, \textit{supra} note 22, by providing “Whoever stakes, bets, or wagers any money or other thing of value upon the result of any trial or contest of skill, speed or power or endurance of man or beast . . . shall be guilty of gambling.”


\textsuperscript{29} Nev. Comp. Laws (1929) § 10201. Legalization of pari-mutual betting on horse races has become common in several states.
The development of legislative policy follows as predictable a system as does the judicial opinion.

Declaration of policy alone does not insure the success of the policy, and it matters not whether the policy is declared in a case or in a statute. Thus, legislators have taken further steps to enforce policy by penalties and strictures on persons and places. Again this secondary policy is consistent but not uniform. Some states declare that the operation of gaming houses as a business is more injurious than participation in the game for pleasure;\textsuperscript{31} others impose equal treatment on all concerned;\textsuperscript{32} and still others find that the kibitzer is entitled to equal punishment with the player.\textsuperscript{33}

Control or prohibition of equipment used in gambling either for the purpose of gaming or for the warning of the arrival of enforcement officers finds consistent statutory expression. A more difficult policy problem arises when the issue is fairly put, should unfair and fraudulent gambling be punished more severely than gambling conducted according to orderly laws of chance.\textsuperscript{35} In other words, is the cheat injurious or beneficial to the suppression of gambling? It is arguable that to punish the cheat is to protect the gambling institution, while to encourage the nefarious discourages those who play with him. Courts as well as legislatures find difficulty in making a consistent choice.\textsuperscript{36}

Some legislatures have sought the aid of courts in the enforce-

\textsuperscript{30} Note the spread of pari-mutual betting statutes from Rhode Island to Massachusetts and New Hampshire.

\textsuperscript{31} MONT. REV. CODE ANN. (1935) c. 32, § 11159.

\textsuperscript{32} ARIZ. REV. CODE ANN. (Struckmeyer, 1928) c. 104, Art. 9, § 4671.

\textsuperscript{33} Mass. Acts (1869) c. 364, § 1; R. I. CODE (1923) c. 401, § 28. Some states make it a special offence if particular persons engage in gambling: public officers, KAN. GEN. STAT. ANN. (1875) c. 21, Sec. 1611; minors, ALA. CODE ANN. (1928) § 4240.

\textsuperscript{34} VT. PUBL. LAWS (1933) § 8696; PA. STAT. ANN. (Purdue, 1935) § 1447; CONN. GEN. STAT. (1930) § 6344; Ala. Acts (1931) 671; OKLA. STAT. ANN. (1921) § 11623.

\textsuperscript{35} MONT. REV. CODE ANN. (1935) § 11159; IDAHO CODE ANN. (1932) § 17-2303.

ment of their policy by permitting the recovery of money lost in betting through civil suits. Other states have felt the policy against betting is advanced by denying the loser the opportunity to recover. Psychologically, it seems doubtful whether either policy has much meaning when the participants understand informally that recourse to courts is not the gentleman's way. Within the limits of majority and minority opinion there is consistency and completeness in legislative jurisprudence. Continuity of legislative policy is in degree similar to judicial precedent. Courts distinguish rules, and on occasion, overrule hard cases. Legislatures amend the law and sometimes repeal it. The standards which guide the action of each is little more than judgment concerning desirable social controls.

*Stare decisis* provides courts and litigants a fair standard for the prediction of future judicial action; *stare de statute* enables legislators, public administrators, and those privately interested in legislative development to predict within similar degrees of error the development of statutory rule. It is as Bentham suggested, an understanding of the mores, prejudices and past experience of a people that will provide the key for the prediction of statute law. Legislation develops in an orderly manner. It finds analogy in prior legislative enactment. Unique is the occasion when completely new legislation is enacted.

**Mr. Justice v. Mr. Senator**

Putting aside the psychological advantages that judicial feathers provide, judges are alleged to be superior because of the advantage

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39 The Federal Social Security Act is perhaps generally considered the most unique and unprecedented legislation that we have of recent date. Yet it patterns after much continental experience and is almost a duplicate of the act which Jeremy Bentham wrote in 1797. He outlined a plan for old age security, mothers' aid, children's aid, and unemployment compensation. In many respects his plan was more comprehensive than our own. He concluded, however, that the plan would not work. See 8 Bentham Works (Bowring Ed. 1843) 166, 367, 442.

of their professional training. It is said that judges are “safer guardians” of the law because they are trained in law, serve apprenticeships as lawyers, and because they develop a cautious appreciation of the necessities of certainty and continuity. Legislators, it is said, receive no special training, are frequently swept into office on the tide of political or of economic disaffection and arrive at their desks without training for or appreciation of their responsibilities. Again the comparison is only partially accurate.

Judges, like legislators, may ride the tide of political fortunes. But legislators, unlike judges, are not assured of great power or influence by their election. The new representative must make his way. During his first term, he must sit with quiet respect for those familiar with legislative practice and procedure. The legislative tyro receives training similar to the attorney who practices before he presides. Minor committee assignments will be his first term rewards. With a second term, he may receive more important assignments; but if the seniority rule applies, he must be an “old wheel horse” before he can expect important chairmanships.41

The difficulty is that we still see legislation emanating from the oratorical halls and the smoke-filled chambers of state capital hotels. For the most part, this picture exists, today, only in the cartoons. Thus, although formally legislatures are unpredictable, heterogeneous collections of untrained representatives, the informal organization of the legislature makes it a highly trained skillful machine that can when it wants make an examination of policy and write a statute with a skill to be envied by any court.42 Again, although the forms and symbols differ—the personnels of each system have the same capacities and incapacities for their functions.43

Judicial Trial v. Legislative Hearing

Notice and hearing and the give and take of trial procedure long have been unquestioned virtues of common-law procedure, but they are not common law monopolies. Legislation follows the same

41 Note the rise of southern Democrats to the chairmanship of important committees, because of the seniority rule, in spite of their opposition to so-called New Deal policies.

42 See Wis., The Assembly Manual (1927) p. 279, Joint Rule No. 6; hearings before the committee of Bank and Currency, 73d Cong. 1st Sess., H. Rec. 84, 56, 97. Part 15.

esoteric path—the essentials of the "trial of a statute" are the essentials of the judicial system.

Legislation of significance inevitably receives complete committee consideration. A hearing is held, witnesses subpoenaed and sworn, evidence presented, policy discussed, and in recent years, an opportunity for proponent and opponent provided. Inasmuch as the determination of legislative policy involves much more than a specific or limited fact inquiry, it is natural that the form of the hearing will not be identical with a judicial trial; but although the form differs, the essential purpose of each procedure is the same—the collection of reliable evidence and a sharp policy judgment based on the evidence. Indeed, when legislatures consider special legislation, the committee hearing assumes not only the objectives of trial procedure but all its forms.

A distinction has frequently been drawn between legislative and judicial procedure on the basis of the care and thoroughness with which each system disposes of its business. The legislative process is frequently attacked because many bills are "rushed through" on the closing days of legislative sessions, apparently without thought or consideration. This is not the true picture. If it were, judges might be criticized because they hand down many opinions on a single day or enter many orders at a single time. Lawyers understand that the opinions handed down and the orders entered are but the final result of careful consideration, thorough conference, and much debate. The same is true of legislative action. Bills speedily enacted have run the gamut of committee hearing, administrative counsel, and have the additional protection that the process has been duplicated in each house of the legislature. Apparent haste might delude the unwary observer; but the trained legislator knows that the committee's time and thought has been expended to perfect the legislative policy. The legislature holds the committee responsible and accepts its judgment.


46 Wilson pointed out that our government was a "government by the chairman of the standing committees of Congress". Wilson, Congressional Government 102.
In many respects the legislative hearing provides greater protection to the essential interests of society than does the trial. Self-limitation has made the judge a referee. The legislator understands that he must bear full responsibility for his decisions, and thus he is not content with the evidence of interested parties. He must search out every source which adds to the understanding and the determination of the question before him.47

Committee responsibility usually results in more complete and competent information than the judicial method of brief and argument. The appellate tribunal must depend upon a lawyer's evaluation of a proposed decision. The committee, in addition to its lawyers, enjoys the counsel of economists, public administrators, and business men. And bi-party committee representation insures additional divergent viewpoints. Practical evaluation of proposed legislation is ever available in the committee room.

Committee procedure follows as orderly a pattern as judicial procedure. It is true that some of the lawyers' safeguards are missing, but likewise, many out-moded judicial procedures are avoided.48 Thus, the form and indeed the practice of trial and hearing are similar in the essentials. This is naturally so; not only because courts and legislatures trace their origin to the single governmental body — the Curia Regis,49 but also because the nature of their work is parallel. Only because lawyers have eulogized the judicial system and spokesmen for the legislative procedure have been few, has the idea become common that legislation is ill-considered and unpredictable. The consistent development of statutory rules defends the system against accusations of ill-considered and irrational growth.50

Appeal v. Review

As evidence of the impossibility of a legislative jurisprudence jurists have often emphasized the number of legislative acts which courts have declared unconstitutional. Until recently, it has been assumed that the court in the exercise of this function represents

47 See note 43, supra.
48 See note 44, supra.
49 PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW (2d ed. 1936) 122.
50 Note, for example, the development of gambling statutes previously referred to and the development of the regulation of the railroad rates through the Interstate Commerce Commission, the growth of state milk statutes, and state corporation laws.
in a more substantial way the “liberties of the people”. This, of course, is largely humbug. The unconstitutionality of a statute means and can mean nothing more than that the court and legislature differ concerning the essential policies of the state. There is no infallible yardstick\(^1\) by which contemporaneous judgment may be made concerning the validity of one policy as against the other. Only experimentation, sad and costly mistakes, and the willingness to reconsider determinations can provide the necessary standards. Most of the social legislation of the present day—legislation now unquestioned—such as workmen’s compensation, safety appliance laws, and rate regulation have been declared unconstitutional at one time or another. Constitutionality is primarily a question of time and place and not of eternal truth. Argument against the consistence or continuity of legislative change of judicial rules is an argument against common law jurisprudence.

The system of judicial review has perhaps had undue emphasis. Proportionally, declarations of unconstitutionality do not exceed trial court reversals. Reversals of nisi prius decisions are not considered evidence of deficiency in the judicial system. Appeal and review are merely recognitions that neither the legislative nor the judicial policies are perfect, and that both should be subject to reexamination. The argument cannot be maintained that because acts are declared unconstitutional we cannot rely upon legislatures to develop reliable legal rules based on past experience and useful for future prediction.

A Comprehensive Jurisprudence

Jurisprudence, in America, today, is a diverse science. Essentially, it is a case-law jurisprudence built around our digest systems, our annotated reports, and our legal encyclopedias. Some organization of administrative materials and thought have been attempted—the decisions of the Interstate Commerce Commission, the Board of Tax Appeals, and the rulings of the Bureau of Internal Revenue have been compiled.\(^2\) State corporation laws have been collected

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\(^1\)"When an act of Congress is appropriately challenged ... the judicial branch of government has only one duty; to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former." (italics ours) Mr. Justice Roberts in United States v. Butler, 297 U. S. 1, 62 (1935).

\(^2\)The “lay-lawyer” has little realization of the “separate bodies of law” that have been developed in governmental departments. It is interesting to note
Statutory regulation of family relations has received juristic treatment. But no general attempt to explain the development of law concurrently by legislatures, courts, and administrative tribunals has been undertaken. In the special field of wills, pioneering work has been done by Professor Bordwell. Indeed, the conclusion can not be escaped after reading his illuminating articles that many of the "blank spaces" in the law of wills are well regulated by statutory enactment and that the policy of the law is so sharply fixed and the requisites for compliance so exactly outlined that there is neither room nor cause for litigation or judicial decision.

The statute of wills, like the statutes of frauds and limitation have been received into the sanctum of lawyers' thinking. Yet, it is significant that the courts accepting these statutes as a part of the common law have failed to recognize the true value of their statutory development. This omission has resulted not only in the judicial failure to apply the statutes by analogy but also in a failure to use the statutory development as a guide in determining shifting social policy and shifting administrative demands. These defects are particularly apparent in the judicial use of jurisdictional statutes, shifting equity power from in personam to in rem.

In the field of public regulation the defects of a separate case-law and statute-law jurisprudence are particularly apparent. The regulation of the milk industry, for example, has had an exceedingly long case and statutory history. Originating in a policy prohibiting the sale of "diseased, corrupt, and unwholesome products", milk control legislation has struggled as the courts have struggled for an adequate method of enforcing standards of

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53 Parker, Corporation Manual (1908); Stimson, 2 Am. Stat. Law (1892).
54 Vernier, American Family Laws (1931).
56 Md. Code (Bagby, 1924) art. 16, §§ 1, 82, 90, 94, 97, 98; Conn. Acts (Roulestone's Laws) (1792-95) 246; N. Y. Civ. Prac. Act §§ 978, 979; Cook, Powers of Courts of Equity (1915) 15 Col. L. Rev. 128; Huston, Enforcement of Equitable Decrees (1915).
57 Mass. Acts (1784) c. 50.
purity and quality. Legislation has sought to keep pace with scientific improvement, and judicial opinion has sought to make effective the legislative standards, but a genuine ignorance of the objectives and methods of each system of law has resulted in much lost motion, in much unsatisfactory enforcement, and often in the loss of the original objective.

What appears as constant legislative change has been, in fact, an orderly development of legislative standards to provide the courts with effective weapons for the enforcement of policy. Only with the establishment of the Babcock test and the bacteria count have standards of law compliance for courts and legislatures found common ground through the aid of science. How much this process might have been accelerated by a system of law which would make judicial opinion ever available to legislators and which would place the pattern and history of legislative development at the ready disposal of courts is only conjectural. It is certain, however, that so long as courts have no immediate access to the legislative

58 In Massachusetts, for example, a host of acts have been adopted but the consistency of their pattern shows the legislative intent to mark out definite standards of purity. From 1859 (the first year for which the acts were available to me) the legislation proceeds as follows: Mass. Laws (1859) c. 206; (1860) c. 165; (1863) c. 140; (1864) c. 122; (1865) c. 194; (1867) c. 204; (1868) c. 263; (1869) c. 150; (1872) c. 219; (1880) c. 209; (1882) c. 263; (1883) c. 263; (1884) c. 259, c. 310; (1885) c. 352; (1886) c. 313; (1889) c. 382; (1894) c. 425; (1896) c. 398; (1899) c. 169, c. 233; (1900) c. 300; (1901) c. 202; (1908) c. 643, c. 570; (1909) c. 443, c. 425; (1910) c. 641; (1912) c. 218; (1913) c. 761; (1917) c. 256, c. 259; (1918) c. 170, c. 257; (1923) c. 170; (1924) c. 310, c. 123, c. 44; (1925) c. 120, c. 117; (1927) c. 259; (1929) c. 267, c. 279; (1932) c. 305, c. 158; (1933) c. 338, c. 263, c. 124; (1934) c. 376. It is obvious that the development of the Massachusetts pure milk policy cannot be developed in this article; nor can the cases which fill-in this legislative picture be included, but by a tracing of these statutes, each building upon the experience of its predecessor, a far more comprehensive picture of the general policy, and the specific liabilities of dealers and distributors will be gained than can be obtained from the cases of the same period.

59 See Comm. v. Flannelly, 15 Gray (Mass.) 195 (1860); Comm. v. Smith, 149 Mass. 9 (1899). But generally, the court has been ready to follow the legislative policy in Massachusetts and litigants have been either ignorant of the legislative policy or too sanguine concerning its avoidance; see Comm. v. Kendall, 144 Mass. 357 (1887); Comm. v. Holt, 146 Mass. 38 (1888); Comm. v. Weatherbee, 153 Mass. 159 (1891); Comm. v. Vieth, 155 Mass. 442 (1892).


8 U. of CinN. L. Rev. 219.
precedents of their own jurisdiction and feel that the statutory enactments of other states are foreign and unimportant guides to the development of their own policy, so long will courts fail to achieve their goal of certainty and continuity.

Perhaps the greatest difficulty in advancing the thesis of consistency and order in legislative policy is the inability to make readily available the course and pattern of legislative precedent. Today it is little more than a realization of those persons who have had close contact with the activity of legislatures. Its complete establishment will depend, as the establishment of case precedent depended, upon its growing use. Law schools provide the most effective agency for the advancement of a jurisprudence which combines in an effective way the inter-related development of case and statute law. Unfortunately, even at this late date, there is little appreciation or sympathy for such a movement. All Gaul is still divided into three parts — executive, legislative, and judicial.

Legislation as a law school course is considered an intruder. The infusion of legislative materials into classical substantive courses, save in the case perhaps of sales, bills and notes, and bankruptcy, is still a myth. The hard work necessary to search through legislative volumes without the aid of digest or index appears too much a task for Hercules. And yet, until the host of statutes which fill in the gaps of case-law torts and contracts, (to select two courses for illustration) the law graduate will enter his profession only partially equipped. The inclusion of isolated statutes, without the development of their prior legislative precedents, will leave the student misguided in the significance of legislation. The day is already at hand, at least in the constitutional field, when the successful practitioner must be as well versed in legislative history as he is in case precedent. The demands of tomorrow will place on lawyers the burden of directing the orderly development of legislation, the correlation of administration with that policy, and the sympathetic review of that policy by the courts. If the lawyer of tomorrow adequately fulfills this responsibility he must be trained in a system of jurisprudence that excludes none of its potential materials. He must be able to synthesize statutes, administrative rulings, and judicial decisions into a consistent jurisprudence. This he cannot do until the present diverse materials are assembled. When this is done, the legal profession will find that legislative practice has its own system of precedents, and has only needed a second Stimson to give its precedents articulation. We will discover belatedly that legislation, too, has its common law.