

Statutes Revolving in Common-Law Orbits*

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It is an honor to give the lecture commemorating one of the great men of our time. By his noble example, Pope John has renewed faith everywhere in the world that human beings can resolve their problems with reasoning humanity. He envisaged much more than rules of law in the abstract or people in the abstract. His vision encompassed a context of *lege et grege*, of rules in relation to people. We can be mindful of his grand perspective as we turn to special problems of the law.

In time sold old saws lose their edge, but others prove sharper than ever. The old saying that a judge's word is law now has fresh validity. A modern judge has the last word in a steadily widening area of unprecedented controversies. Spectacular examples of new frontiers indicate that there are no last frontiers in the law.

A judge's responsibility for settling controversy peaceably with some well-chosen words can hardly be delegated to others unfamiliar with the continuity script of the common law. It remains his job to underwrite that continuity with thoughtful words even though the very language he is using may be undergoing substantial transformation. His training for fitting pieces into a coherent whole makes him technologically indispensable in any age. In periods of wholesale devastation his words may go unheeded for a time, but they usually survive when much else is rubble to give direction to reconstruction. Likewise, in periods of great discovery and exploration, words of law can offer guidance to formulate rational relationships in the use of what has been discovered.

A judge's responsibility is the greater now that legislatures fabricate laws in such volume. The endless cases that proceed before him increasingly involve the meaning or applicability of a statute, or on occasion, its constitutionality. Such statutes, reflecting their sponsors or draftsmen or author-legislators, are of infinite variety in purpose, range, and quality. Except for constitutional limitations, legislators innovate them with a freedom unknown to judges, who must ordinarily stay within the confines of precedent and articu-

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late the reasons for their rules.¹ A statute may be a fat code or a thin paragraph or a starveling sentence. It may cast a heavy shadow on the common law or a light one, or it may idly plane until some incident sends it careening into action. The hydraheaded problem is how to synchronize the unguided missiles launched by legislatures with a going system of common law.

There is no overall solution to such a problem. Sometimes a statute examined close to the weathered textures of the common law reveals so marked a kinship to existing or readily foreseeable judicial rules as to facilitate its recognition as a source of common law. Sometimes a statute serves to reveal a gap or aberration in the common law even though it does not itself provide a remedy, and thus affords a basis for judicial correction within the common law. One way or another, the rising lines of statutes and of judicial precedents are likely at times to converge. It is not realistic, if it ever was, to view them as parallel lines. The volume of lawmaking is now so great that we no longer can afford to have judges retreat into formalism, as they have recurrently done in the past to shield wooden precedents from any radiations of forward-looking statutes while they ignored dry rot in the precedents themselves.

There was a deep plunge into such formalism during the eighteenth century. The legal profession came under the spell of Blackstone's vision of the common law as a completed formal landscape graced with springs of wisdom that judges needed only to discover to refresh their minds for the instant case. Undoubtedly many a judge must have found it comfortable to limit himself to job-specifications appropriate for a meticulous cultivator of a well-defined heritage. He was spared the labor of extending its boundaries, however much recurring novel cases indicated the need for such extension. It is easier to constrain such a case within familiar grooves, no matter how ill it fits therein, than to break new ground to accommodate it. So the formalism of the eighteenth century, riding with the always strong force of inertia, contin-

¹ "The primary internal characteristic of the judicial process is that it is a rational one. The judicial process is based on reasoning and presupposes—all anti-rationalists to the contrary notwithstanding—that its determinations are justified only when explained or explainable in reason. No poll, no majority vote of the affected, no rule of expediency, and certainly no confessedly subjective or idiosyncratic view justifies a judicial determination. Emphatically, no claim of might, physical or political, justifies a judicial determination." Breitel, *The Law Makers*, 65 *Colum. L. Rev.* 749, 772 (1965).

ued to hold sway in the nineteenth century. Though it has long since been discredited by its cumulative inadequacies and distortions, it remains to haunt our own time.

As such spells of formulism in the law come and go, induced by shifts in politics and philosophy, they should not destroy our perspective. With perspective we see that for many centuries judges have been accommodating statutes to the common law openly or indirectly, expansively or warily. As with other age-old trends, there is a gradually rising curve, traceable along a series of ups and downs. We are indebted to such scholars as Roscoe Pound, James Landis, and William Page² for piecing together fragments of old records to yield a chronicle of what might today be called the conglomerate mergers of judicial rules and statutes. With these scholars we can applaud such accommodation in the name of common sense in the common law.

Long before the eighteenth century, common-law judges made their way by fits and starts, sometimes by leaps and bounds, to conglomerate mergers that worked wonders in the law. If statutes in English law did not invariably have so large a role as in Roman law, they nonetheless served now and again to change the course of common law. Long before the discovery of America, a doctrine so sweetly named as *equity of the statute* was imaginatively conceived and utilized by judges in a manner described by Professor Page as "somewhere between a genuine, though very free, construction, and a disguised use of analogy in the creation of common law principles, rules and standards taken from the provisions of statutes which, by their terms, applied to like cases but not to the particular case in question."³

The law of averages plus the chronic resistance to change in law, as in other fields, gives reason to suppose that it was not the average ancestor-judge who took the initiative in the search for the edelweiss, the rare decision whose center reasoning emerges to dominate its woolly context. The imaginative ones among them who took the lead must have had to reckon with the resistance or apathy of their brethren. We can only guess at what divining rods they may have relied on preliminary to invoking such magic words as *equity of the statute*.

² See Pound, *Common Law And Legislation*, 21 Harv. L. Rev. 383 (1908); Landis, *Statutes and The Sources of Law*, in *Harvard Legal Essays* 213 (1934); Page, *Statutes As Common Law Principles*, 1944 Wis. L. Rev. 175.

³ Page, *supra* note 2 at 185.

Professor Page⁴ has called a roll of judicial decisions resting on these words. Such decisions made good use of statutes of limitation to determine the time necessary to perfect or to bar rights, notably in cases involving property rights where certainty is essential and a marked calendar allays doubts as to time. The cases evince a recognition that red-letter days make good black-letter law. Days that are numbered determine with neutrality when the doors to the courtroom will open or shut. Inexorable though such neutrality is, it enables people to order their affairs, as they could not do if they were subject to the vagaries of decisions expanding or contracting the law's tolerance as to spans of time in response to the details of each case.

Dean Landis has observed that "The doctrine of the equity of the statute was a double-edged device. . . . Under its authority exceptions dictated by sound policy were written by judges into loose statutory generalizations, and, on the other hand, situations were brought within the reach of the statute that admittedly lay without its express terms. No apology other than the need for a decent administration of justice was indulged in by judges who invoked its aid."⁵

In such early upside periods of the long-term upward trend there was no Blackstonian movement to deter judges from calling upon statutes with the intention of enlisting their services for their own judicial premises in the development of the common law. By the eighteenth century, however, doctrinaire preachments for the separation of powers had become influential enough to lend credibility to Blackstone's formidable voice of authority for the proposition that judges were confined to be finders of mystically pre-existing law within their own narrow domain. The temper of the times discouraged judicial initiative, and in response judges grew timid. Thus, when there was no relevant statute of limitation they were likely to decide whether the final gong had sounded or had yet to sound in general terms of what constituted reasonable time. Of course it was lawmaking to establish standards of reasonableness, but it was lawmaking that could be justified as no more than a holding operation against ancient or premature claims, pending the arrival of a suitable statute. The judges ventured to run the gamut of reason-

⁴ Page, *supra* note 2 at 186-200.

⁵ Landis, *supra* note 2 at 215; cf. Thorne, *The Equity of A Statute and Heydon's Case*, 31 *Ill. L. Rev.* 202 (1936).

ableness because they could not do otherwise in the face of claims whose reasonableness the clock put in question. They remained loath to adopt a specific measure of time as a standard, presumably because a precise standard would make clearer than the imprecise one the open secret that they were indeed engaged in lawmaking. That secret was at odds with their professed role of declaring or finding the law, a role that some of them apparently held dear for reasons as varied as status or self-preservation⁶ or the mere comfort of a niche along the well-manned line of least resistance. Definitely they did not deem themselves a piece of the action.

Lest we be mesmerized by this restful still life, we do well to read further in the reports, turning the pages backward as well as forward. They reveal that more than one judge who would not venture from his bench so long as no one else was doing any lawmaking in his vicinity was known to spring to life when a statute bearing on the case before him came into view.

With such a statute within his grasp, he would not be stepping beyond the bounds of his own domain to examine it discreetly, particularly when it appeared to be on a random cruise with no legislative guides to mother it. Examination might yield a pleasant surprise, a statute scrawled with lore that took words right out of his head. He would have abstained from using them in decisions because they were such concrete words of limitation, with such sturdy purchase as to suggest they were the words of lawmakers, and he insisted on giving the appearance of not being a lawmaker.

Suppose, for example, a statute bearing a phrase like *X number of years*, specifying that it shall apply to A and B and clearly unconcerned with anyone else. Why not an equivalent rule for C?, the judge might ask himself, when there is a perplexing C before the court who appears to be a little cousin, if not the sibling, of A and B. Before the fortuitous appearance of the statute, the judge might have deemed it prudent to abandon C to his legislative fate. Now he might deem it proper to compose a judgment as to C that would be in keeping with the newly declared legislative policy, even though the legislative authors had ended their text with B. He would thus make law to govern C by virtue of the analogy he would draw from the statute governing A and B. Whatever he chose to call his method, he would be creating law

⁶ See B. Abel-Smith and R. Stevens, *Lawyers And The Courts*, 126, 289, 294 (1967).

with a capital C. There was nothing in the statute that bade him thus to carry on. True, he was acting under the influence of a statute but the rule he created was his own.

Judges have taken some great leaps forward while under the influence of statutes. Far back in time, when libraries were not yet creaking under the weight of law tomes, the chatty Year Books were replete with creative lawmaking in the courts on the basis of statutes. Judges used the eyes at the back of their heads to note statutory rules as a source for analogous decisions. From successive analogies emerged a handsome pattern of judge-made law establishing interests in land such as easements on the basis of long use rather than possession. We read, for example, that in 1305 "Hugo and others, with the whole county and the king's tenants of the vill and land of Montgomery, sued E. de Mortuomari for that he had deforced them of their common of pasture in L., their free chase and fishery throughout the whole of Sabrina, and of all their streams in the lands of K."⁷ The most indifferent judge could hardly have turned a deaf ear to such a hue and cry. The dullest judge could hardly have remained unmoved by the visions of Hugo and others turned back in a pasture they regularly traversed, called to a halt on their customary free chase through Sabrina, commanded to lay down their fishing rods where they had always fished as they pleased, and abruptly barred from the use of their familiar streams.

They had cause to be outraged, and they had a good cause of action. They pleaded that they had enjoyed the uses in question "from before the time of memory." The judges readily equated "when the memory of man runneth not to the contrary" with the year 1189, when Richard the Lion-hearted acceded to the throne, and held that a continuous use since that year would be conclusively presumed to be of lawful origin.⁸ They fastened upon the year 1189 by analogy to the Statute of Westminster I (1295), which specified that year as marking the limit of time in which a plaintiff in a Writ of Right could trace his title.⁹ It took judicial imagination to see that if the year 1189 was an appropriate marker in establishing title to property it was likewise appropriate in establishing easements. One hundred and six years stretched between the marking year 1189 and the date of the

⁷ Y. B. 32, 33 Ed. I 519, 520, cited in 3 W. S. Holdsworth, *History of English Law* 169 (3d ed. 1923).

⁸ *Id.* at 166-171; 7 *id.* at 343-345.

⁹ 3 *id.* at 166; 7 *id.* at 343.

statute, 1295. If it was reasonable for a statute to allow a claimant to trace title through the records of more than a century, and if the statute evinced thoughtfulness in fixing the terminal marker year as the accession year of the first Richard, then the statute was an appropriate source of law on two counts. It would now seem abundantly reasonable for a judge to determine that continuous use of land for more than a century created an interest that could not forcibly be taken away and to borrow as the opening marker year the convenient date in the statute.

As one century succeeded another, and old records withered, it became increasingly onerous, if not impossible, to prove continuous use dating back to 1189! Not until the late eighteenth century, however, did courts accept proof of twenty years of continuous use to buttress a plea of a fictional lost grant.¹⁰ The judges adopted the twenty-year period by analogy to the period of limitations in a statute of James I that they had already held applicable to actions of ejectment.¹¹

The fiction of a lost grant was inappropriate to a new world and found little favor in American courts. Hence they arrived at the requisite period of use by analogy to the period prescribed in statutes to protect long-continued possession.¹² The kinship between statutory and judicial rules in this area has prompted judges on occasion also to adopt changes in the statutory rules.¹³ In recent years the American Law Institute has endorsed such judicial reasoning from statutes as a rational means not only of determining the requisite period for a prescriptive right, but also of defining the uses that can lead to a prescriptive right.¹⁴

The early modern statute of limitation of 1623 covered a range of common-law writs and, like its forerunners, specified time as an absolute. Nonetheless it proved helpful to courts of equity as they developed the doctrine of laches, wherein time takes on the aspect of relativity. When a right recognized at common law was also recognized in equity, and was at issue in a court of equity, a judge might find that the

¹⁰ 7 *id.* at 345-350.

¹¹ *Id.* at 348; see Page, *supra* note 2 at 198.

¹² See Simonton, *Fictional Lost Grant In Prescription—A Nocuous Archaism*, 35 W. Va. L. Q. 46 (1928).

¹³ See *Edson v. Munsell*, 92 Mass. (10 Allen) 557 (1865); *Truc v. Field*, 269 Mass. 524, 169 N.E. 428 (1930); *Klin Co. v. N. Y. Rapid Transit Corp.*, 271 N.Y. 376, 3 N.E.2d 516 (1936). *Contra*: *Zetrouer v. Zetrouer*, 89 Fla. 253, 103 So. 625 (1925).

¹⁴ See *Restatement, Property*, section 460, comment a (1944).

statutory period lent itself well to incorporation in the doctrine of laches.

The judges made haste slowly in this regard, but there are some notable examples of how they recurringly related equity time to standard statutory time. On occasion they were probably impelled to do so because they deemed themselves unable to cope with the differentials of equity time. In 1767, one hundred and forty-four years after the enactment of the statute, Lord Camden heard a plea to set aside a clearly erroneous thirty-year old decree. He refused to do so, declaring himself powerless to formulate "a positive rule to an hour, a minute or a year." His recourse was to the statute that barred any action on a Bill of Error at common law after twenty years.¹⁵

More than a generation later, in 1805, a court of equity felt free to grant relief instead of denying it, when they found there was no statutory bar to relief in analogous actions at common law. The court allowed the plaintiff to recover on unsatisfied claims extending over a period of nineteen years under an annuity charged upon land under a marriage settlement, on the ground that there was no statutory limitation on a right to comparable recovery on unsatisfied claims under an analogous legal rent charge.¹⁶ The court was as mindful to draw an analogy from the absence of a statute as from the presence of one.

On occasion a fixed statutory period played a useful subordinate role rather than a dominant one. Thus, the House of Lords allowed a suit to recover money in trust, even though it was filed well beyond an analogous statutory period of limitation; but its decision limited recovery to six years' arrears of interest, "the ordinary period of limitation laid down by the statute."¹⁷ So the doctrine of laches gained in flexibility, even though courts of equity continued to rely primarily on analogy from statutes of limitation, as when they barred tardy suits to set aside a transaction for fraud or upon some other equitable ground, suits for a declaration that shares in a partnership have not been abandoned, and suits for the enforcement of a constructive trust.¹⁸

Statutes have served to establish bounds on the relativity of time in more ways than one. Professor Page has cited the

¹⁵ *Smith v. Clay*, Amb. 645, 27 Eng. Rep. 419 (1767).

¹⁶ *Stackhouse v. Barnston*, 10 Ves. 454, 32 Eng. Rep. 921 (1805).

¹⁷ *Thompson v. Eastwood*, 2 App.Cas. 215, 241 (1877).

¹⁸ See J. Brunyate, *Limitations of Actions in Equity* 20 (1932).

example of a pair of venerable statutes.¹⁹ One, enacted under James I in 1603, imposed the death penalty for bigamy, but specified it would not apply if one spouse were absent for seven years and the other had no knowledge of his fate. The other statute, enacted under Charles II in 1667, provided that a life tenant missing for seven years would be presumed dead if there were no clear proof to the contrary, thereby opening the way for reversioners and remaindermen to take.

In a variety of cases across the ensuing years, it became clear that missing persons complicate the lives of many besides possibly bigamous spouses or anxious reversioners or remaindermen. Yet it was not until 1805 that a court made so bold as to instruct a jury that it was free to find that a missing person was dead, by analogy to the early statutes.²⁰ Four years later a court held outright that an unexplained absence of more than seven years created a presumption of death, rebuttable by a party who contends that the person is alive.²¹ The courts moved slowly through many generations in analogizing a presumption of death from narrow statutes. When at last they established a broad presumption of death as to missing persons, they gave a new lease on life to those so linked to the missing that they could not hitherto order their own affairs with any certainty. So broad an analogy by any other name would be called generalization, yet few would condemn it for its boldness. Whatever increase it caused in the death toll on the official records of the missing, it freed the very present ones proportionately from needless perplexities and inequities.

Judges have dealt with many other problems besides the relativity of time in developing common law from statutes. Common-law rules on conspiracy dramatically illustrate how judges advanced statutory policy in areas not covered by the statutes. We go back many centuries to find the origins of the offense of conspiracy in the Third Ordinance of Conspirators²² enacted in 1304 in the reign of Edward I, Longshanks. This statute prohibited confederacies for the false and malicious procurement of indictments. For some three centuries thereafter the statute remained the last word in the courts; the writ of conspiracy would lie only if the victim had been indicted and subsequently acquitted.²³ Then in 1611

¹⁹ Page, *supra* note 2 at 201-202.

²⁰ *George v. Jesson*, 6 East 80, 102 Eng. Rep. 1217 (1805).

²¹ *Hopewell v. DePinna*, 2 Camp. 113 (1809).

²² 33 E. div. I (1304).

²³ See Sayre, *Criminal Conspiracy*, 35 Harv. L. Rev. 393, 397-398 (1922).

came the case of one so clearly innocent of alleged robbery that the grand jury had refused to indict him. The Star Chamber held that he could bring an action for damages.²⁴ The judges reasoned that the gist of the statutory offense was the agreement falsely to accuse another of a crime before a court whether or not there was a sequence of false indictment and subsequent acquittal. This view of statutory policy as directed against the very act of agreeing lent itself readily to analogy. If combinations to commit an offense against the administration of justice were illegal, then combinations to commit other crimes would likewise be illegal. Ultimately, the judges wrote into the common law the generalization that an agreement to commit any crime was a criminal conspiracy.²⁵ They could hardly have foreseen that this generalization would be so extended that an agreement to commit a misdemeanor would be deemed a felony.²⁶

It is one of the gentle ironies that the mother country's most unruly children, the American colonists, founded a government whose courts would rely at first primarily on the parental rules in its legal matters though they were destined to develop the common law beyond the most farsighted visions of the eighteenth century. Even in the beginning, however, the parental rules took on the coloration of transplants. Moreover, when the colonies became the United States, parental rules were increasingly subject to inspection at the border to determine their adaptability to native soil. United though the states were in regarding English common law as their common heritage, they differed in their methods of putting it to use. Some states accorded it a reception that not only included common law rules derived from English statutes but also extended to the statutes themselves.²⁷ Other states left it to the courts to determine which of any acts of Parliament would be received into their own common law.

These courts in turn differed in the exercise of their discretion to receive or reject the statutes from overseas. Some courts recognized only statutes that had either codified the common law or had been assimilated into it.²⁸ On occasion they went to such great lengths not to recognize assimilation as in effect to reject statutes outright as part of the common

²⁴ *The Poulterers' Case*, 9 Coke 556, 77 Eng. Rep. 813 (1611).

²⁵ See Sayre, *supra* note 23 at 400-401.

²⁶ See Cal. Pen. Code, § 182.

²⁷ See Hall, *The Common Law: An Account of Its Reception in the United States*, 4 Vand. L. Rev. 791, 816, 818 (1951).

²⁸ *Id.* at 817.

law. Thus, in 1848 the Ohio Supreme Court dismissed an action by the grantee of a lessor's reversion to recover rent due by the lessee.²⁹ In doing so it rejected a statute³⁰ enacted in 1540, in the reign of Henry VIII, that permitted recovery in such cases even though the plaintiff was not a party to the lease. This statute would have afforded an appropriate balance in Ohio, as in England, to the common-law rule that the lessor could prevail against a lessee's grantee or assignee. Nonetheless, the Ohio court seized upon the fact that some three centuries earlier this statute had abolished the common-law rule that choses in action were not assignable. In its view the statute remained forever a stranger to the common law, not "part and parcel" of it, because the statute had undertaken to work a change in the common law. In Ohio one did not take chances with such innovation, even though its respectable place in English law for more than three hundred years suggested that it had long since been assimilated into the common law.

Most courts received English statutes, including this one, more hospitably. There was a disposition to receive English statutes enacted before 1776 as part of the common law, subject to such tests of relevance and propriety as were applicable to judge-made rules.³¹ Thus, Nevada permitted grantees of reversions to take advantage of a breach of condition, noting that Henry VIII's statute "was enacted to remove restraint of feudal law, and should not in this age be circumscribed in its operation."³² Chancellor Kent observed that "though the statute was made for the special purpose of relieving the King and his grantees, . . . yet the provision is so reasonable and just, that it has doubtless been generally assumed and adopted as part of our American law."³³

The preponderant view was that indigenous law could not assimilate any English rule inconsistent with its own rules or repugnant to its tenor. That view found expression in varying constructions of what a reception statute encompassed by its reference to the common law of England.³⁴ Sometimes judges construed it to extend to any English statute that had proved to have a beneficial effect upon the

²⁹ *Crawford v. Chapman*, 17 Ohio 449, 453 (1848).

³⁰ 32 Henry VIII, c. 34 (1542).

³¹ See McKean, *British Statutes in American Jurisdictions*, 78 U. Pa. L. Rev. 195 (1929).

³² *Hamilton v. Kneeland*, 1 Nev. 37 (1865).

³³ 4 J. Kent, *Commentaries* 127 (Fourteenth ed. 1896).

³⁴ These reception statutes are collected in Chapter 4, *Sources of American Law*, 1 R. Powell, *Real Property* (1949).

common law. California judges, for example, saw no reason why they should limit reception to "the ancient and frequently most barbarous rules and customs of the common law, and in so doing refuse to take into account the mitigation of their harshness and the broadening of the rules themselves which followed the successive enactments of the English statutes."³⁵ They rejected early the Statute of Enrollments.³⁶ When they came to the Statute of Uses, they rejected it insofar as it purported to vest legal title in the *cestui que trust*.³⁷ When they dealt with the Statute of Elizabeth,³⁸ permitting the enforcement of charitable trusts, they took care to note that it was not "technically adopted," since its procedures were "totally inapplicable to our social or political condition." Nevertheless, they found that "its principles and definitions are indeed very frequently resorted to," and invoked them to support a decision upholding a trust for "human beneficence and charity."³⁹

Thus the statutes of England, like its judicial precedents, were frequently found wanting in their adaptability to new soil. At the same time there was no large fund of indigenous law upon which courts could draw. From the beginning, therefore, American judges were compelled to play a far more creative role in the law than their English contemporaries, and as time went on there would be no end to the creativity required to meet the novel problems of a rapidly growing economy. So it came about, often in the very process of examining English law, that the judges of this country, along with legislators and commentators, developed an American common law. In noting its substantial development in less than three quarters of a century, Dean Pound has commented that "No other judicial or juristic achievement may be found to compare with this."⁴⁰

A pioneer society strongly motivated to reach new fron-

³⁵ *Martin v. Superior Court*, 176 Cal. 289, 293, 168 P. 135, 136 (1917).

³⁶ 27 Henry VIII, c. 16 (1535); *Chandler v. Chandler*, 55 Cal. 267, 271 (1880).

³⁷ 27 Henry VIII, c. 10 (1535); *Estate of Fair*, 132 Cal. 523, 535, 60 P. 442, 457 (1901).

³⁸ 43 Eliz., c. 4 (1600).

³⁹ *Estate of Hinkley*, 58 Cal. 457, 490, 504-507 (1881). Similar reasoning prevailed in Ohio. See Hall, *supra* note 27 at 818. For another example of the inclusion of statutes in the common law received by California, see *Moore v. Purse Seine Net* (1941) 18 Cal.2d 835, 118 P.2d 1, *aff'd sub. nom. Hendry v. Moore*, 318 U.S. 133 (1943).

⁴⁰ R. Pound, *The Formative Era of American Law* 9-10 (1938); see Hall, *supra* note 27 at 807.

tiers, was bound thus to make clearings in law as well as in land. Statutes usually had greater leverage for such enterprise at the outset. Often, however, the fields they opened up could be maintained only by the assiduous cultivation of the courts.

Though the law habitually moves in slow motion, it occasionally takes one step backward or two steps forward of remarkable span. An invigorating new environment increases the chances of forward motion, particularly in the traditional status of people. Women, who in recent centuries in some parts of the world have been recognized as people, played so significant a role in the everyday pioneering of this country that some significant developments in its law can be viewed as a tribute to her identity. In modern laws, *trouvez la femme*. She has not been easy to find as a person in her own right. We need not look back very far to note how scarce she was even in relatively modern law, how phantom an existence she eked out on the isles of man.⁴¹ Who today would condemn his mother or sister, let alone his wife or daughter, to banishment in the world of Blackstone? In that nineteenth-century world, he scarcely noticed a phantom until she emerged briefly from the shadows to walk down the aisle and become wedded to the idea that she had no life of her own. Blackstone made it plain that "the husband and wife [became] one person in law," and then made it plainer that the wife was not the one. He found eminently right magic words for this blunt fiction: ". . . the very being or legal existence of the woman [was] suspended during the marriage. . . ."⁴² Any woman who did not stick to her knitting as she mastered the art of not living soon learned to mend her ways. There were abundant legal rules to keep her in order as the zero in oneness.

Thus at common law a married woman could not do anything so personal as owning personal property. She could not manage an estate of land, even one of which she was seised, even if her husband was versed only in mismanagement. She was so unreal that she could not convey real property. By no dexterous feint could she enter into a contract. Whatever the wounds she might be nursing, she could not sue in a court of law.⁴³

⁴¹ See, e.g., J. Schouler, *Treatise on the Law Of Husband and Wife* 91 (1882).

⁴² 1 W. Blackstone, *Commentaries* 442 (Jones ed. 1916).

⁴³ See cases cited in J. W. Madden, *Handbook of the Law of Persons and Domestic Relations* 28, 32-35, 54 (1931).

If she managed not to go to pieces in confronting such a cumulative lack of burdens, she might still be tested by other rules of oneness. She could not sue her husband in tort for any injury to her person, a disadvantage heavily counterbalancing any incidental recognition that she was a person by virtue of some such adornment as a black eye. It must have been small comfort to the average woman that the law was compelled by its own logic to err on her side in deeming her incapable of committing larceny against her husband, since few of them were likely to have entered matrimony with intent to steal. Likewise few of them would have qualified for the one curious benefit that accrued to women as well as their husbands if they put their heads together to do wrong. Neither could then be adjudged a conspirator, since it took two to make a company of conspirators, and no such crowd was created by marriage.⁴⁴

By the late nineteenth century, the negative status of married women had become markedly anachronistic in the light of major departures from moral dogma and major changes in the economic facts of life. Given the omnipresent force of inertia, there is little cause for surprise that common-law judges nonetheless continued to apply old rules to women as if nothing had changed. It took legislation, commonly known as the Married Women's Statutes, to give impetus to new judge-made rules. By and large, these statutes accorded to women the power to hold and to convey property and to sue and to be sued.⁴⁵ In thereby sweeping away age-old limitations they called the signals of a new day, leaving to courts the responsibility of formulating additional rules in keeping with their innovations.⁴⁶

The new status symbols that married women acquired were substantial recognition that they were on the way to

⁴⁴ *Id.* at 220-221, 226 note 6, 216 note 58.

⁴⁵ See Landis, *supra* note 2 at 222-224.

⁴⁶ We are indebted to Dean Landis for a perceptive statement of how influential the statutes were as catalytic agents. In his words, "The statutes themselves were quite terse . . . their terms did not directly control numerous allied questions. . . . There has been general recognition that the married women's acts embodied principles which were of wider import than the statutes in terms expressed and thus necessitated remolding common-law doctrines to fit the statutory aims. Judgments that sought to retain older common-law limitations hostile to the aim of the statutes were overruled by subsequent legislation, more attuned to the principles of the married women's acts than the courts that professed to be controlled by 'principle.' The result is an impressive edifice of law resting upon statute and yet not depending upon the express terms of the statutes for its content." Landis, *supra* note 2 at 223-224.

full participation in the legal benefits of living. It was inevitable that sooner or later they would be called upon to share corresponding legal burdens. Once the courts recognized that a married woman could enter into a contract independently, they automatically made her subject to rules of contract. She was coming of age in the world of law.

It took a long time for courts to recognize that she was an independent person rather than a mere doppelgänger, when she plotted with her husband to break the law, and that when she did so, she as well as he would be held to account. The tempo at which courts advance in these matters depends not only upon their willingness to advance but also upon fortuitous cases that enable them to do so. In 1889 the Supreme Court of California had ruled that there could be no conspiracy between husband and wife.⁴⁷ Not until 1964 was it able to overrule this decision on the ground that "The fictional unity of husband and wife has been substantially vitiated by the overwhelming evidence that one plus one adds up to two, even in togetherness."⁴⁸

Though three quarters of a century elapsed before the court could advance to such simple addition, preceding cases paved the way. Two years earlier, in the appropriately-named case of *Self v. Self*,⁴⁹ the court ruled that one spouse may recover against another in tort. In recalling that case in the context of the conspiracy case, we noted its relevance on the issue of separate identities. "The tortfeasor, though perhaps not quite himself or herself at the time of the tort, is clearly not one with the injured spouse. Indeed, the latter emerges more separate than ever, now that injury has been added to the usual marks of identity."⁵⁰

Self v. Self was in turn made possible by the court's pioneer ruling that one member of the family can recover against another in tort, in a case involving the claims of injured minor children against a minor sibling and their parent.⁵¹ In that case we confronted the customary argument that such actions would disrupt family harmony, and concluded that there was more risk of such disruption if the court denied a remedy for injuries within the family circle.

When the court thereafter came to the conspiracy of her-

⁴⁷ *People v. Miller*, 82 Cal. 107, 22 P. 934 (1889).

⁴⁸ *People v. Pierce*, 61 Cal.2d 879, 880, 395 P.2d 893, 894 (1964).

⁴⁹ 58 Cal.2d 683, 376 P.2d 65 (1962); also *Klein v. Klein*, 58 Cal.2d 692, 376 P.2d 70 (1962).

⁵⁰ *People v. Pierce*, supra note 48 at 880.

⁵¹ *Emery v. Emery*, 45 Cal.2d 421, 289 P.2d 218 (1955).

self and himself, it had still to reckon with the argument that it should leave any new rule to the Legislature since its old rule had endured so long. That argument dies hard because old age tends to command respect and we are likely to ignore that many an old rule has survived in a comatose state, sometimes from the outset, because its vitality has not been tested by the rigors of new litigation. A vicious circle ensues, for the longer a rule exists, the more likely it is to discourage such testing.

Confronted with a moribund rule that was patently awaiting a coup de grâce, we noted that the rule had been judicially created in the first place and hence it would be inappropriate to await its undoing by the Legislature! "In effect the contention is a request that courts abdicate their responsibility for the upkeep of the common law. That upkeep it needs continuously, as this case demonstrates."⁵²

It has taken doing and redoing, but over the years judges have thus amplified the range and steadied the course of such legislative missiles as statutes of limitation and Married Women's Statutes. We come now to groups of statutes whose possibilities have yet to be fully explored. Among these are the penal or regulatory statutes constructed to specific standards of conduct. Given their built-in controls, judges have little difficulty in keeping them on course in cases involving direct violations of a statute. The problem of judicial guidance is not with the statutes themselves, but with all the unidentified flying objects that do not come strictly within their orbit. Judges have still to make optimum use of penal or regulatory statutes in civil cases on negligence, involving the very conduct forbidden by the statutes.⁵³

In these cases judges have long been invoking such statutory standards as a test for civil liability, though in varying ways. Within a single case in California one finds large differences of judicial opinion.⁵⁴ One opinion was that a violation of the statute was merely evidence of negligence. Another opinion was that such a violation engendered a rebuttable presumption of negligence. This opinion prevailed and

⁵² *People v. Pierce*, supra note 48 at 882.

⁵³ See Thayer, *Public Wrong and Private Action*, 27 *Harv. L. Rev.* 317 (1914); Lowndes, *Civil Liability Created By Criminal Legislation*, 16 *Minn. L. Rev.* 361 (1932); Morris, *The Relation of Criminal Statutes to Tort Liability*, 46 *Harv. L. Rev.* 453 (1933); Note, *Products Liability Based Upon Violation of Statutory Standards*, 64 *Mich. L. Rev.* 1388 (1966).

⁵⁴ *Satterjee v. OrangeGlen School Dist.*, 29 *Cal.2d* 581, 177 *P.2d* 279 (1947).

still does.⁵⁵ My own opinion was, and still is, that the statutory standard for penal liability was the appropriate one for civil liability and hence that a violation of the statute was negligence *per se*.⁵⁶

It is fair to ask why the statutory standard should govern civil liability when the statute prescribes criminal sanctions only. My answer is that it establishes a minimum standard of reasonableness, for a legislature responds to community experience in determining when conduct is likely to cause harm of such magnitude as to call for its prohibition in a penal statute. The rational course for a court is hence to adopt such a standard instead of delegating the formulation of one to a jury. It bears noting that "The decision as to what should be the controlling standard is made by the court, whether it instructs the jury to determine what would have been due care of a man of ordinary prudence under the circumstances or to follow the standard formulated by a statute."⁵⁷ If a judge gives the latter instruction, he thereby guides the flying objects of civil litigation on a course that can be rationally synchronized with that of the pilot penal statute.

A penal statute may set forth an exemplary standard for a judge to adopt as a test of civil liability even though some technical defect renders the statute itself ineffective and hence absolves one who violates it from being held to account in a criminal proceeding. So we decided in California, in confronting a case that resounded with the crash of cars at a stop-sign intersection.⁵⁸ Despite the defect in publication antedating the posting of the stop-sign, there was no mistaking its clear and present mandate. Though there could be no criminal enforcement of the relevant ordinance, we nonetheless adopted the standard it had set forth by word and deed as an eminently fit test of conduct to determine civil liability. We spelled out how circumspect was our initiative under the circumstances. "When the court accepts the standard it rules in effect that defendant's conduct falls below that of a reasonable man as the court conceives it. It does no more than it does in any ruling that certain acts or omissions amount as a matter of law to negligence."⁵⁹

⁵⁵ See Cal. Evid. Code, § 699, codifying *Alarid v. Vanier*, 50 Cal.2d 617, 327 P.2d 897 (1958).

⁵⁶ *Satterlee v. OrangeGlen School Dist.*, supra note 54 at 593-601.

⁵⁷ *Id.* at 595.

⁵⁸ *Clinkscales v. Carver*, 22 Cal.2d 72, 177 P.2d 279 (1943).

⁵⁹ *Id.* at 76.

It would be wasteful for courts not to utilize such statutory materials when they are so readily available for analogy as well as for adoption. The statutes that protect specified classes of people from specified risks in specified areas are rich sources of analogy. "Suppose, for example, a penal statute regulates conduct only on the public highways, in a jurisdiction where all crimes are statutory. The court could not properly extend the area of crime by applying the statute to conduct on private roads. If the statute sets forth an appropriate standard of reasonable conduct for all roads, however, the court should be free to invoke it in a civil case involving negligence on a private road even though there has been no criminal violation.

"The court should also be free to make broad use of the standards in penal statutes preoccupied with the protection of a particular class. It is literal in the extreme to regard that preoccupation as indicative of indifference to the protection of any others. Yet the rule persists that a plaintiff cannot base a cause of action for negligence on the violation of a penal statute unless he is a member of the class the statute was designed to protect.⁶⁰ Thus one who is not an employee is precluded from invoking a statute designed solely to protect employees even though he is injured by the very conduct proscribed. It is logic run riot that a state requiring the barricading of an open well or elevator shaft for the protection of employees cannot, by virtue of its particularity, be invoked for the protection of any others."⁶¹

The well and the elevator shaft and the busy intersection aptly illustrate a first-grade reader on the mounting interactions of human enterprise, the mounting statutes that govern such enterprise, and the mounting use that judges make of statutes that spin in long-traveled orbits of common law.

Successive readers tell of the statutes that spin off in new directions, initiating travel in new orbits of common law. Judges are drawing analogies from a host of new statutes that offer appropriate models for remedies to cover injuries less obvious than those ensuing from disastrous openings into ground or mid-air or from disastrous close-ins on earth-bound highways. Once again I summon illustrations from my

⁶⁰ See Restatement (Second) Torts, § 286 (1965); but see comment (g). Contra: *Porter v. Montgomery Ward*, 48 Cal.2d 846, 847-849, 313 P.2d 854, 855-856 (1957).

⁶¹ Traynor, Comment on Courts and Lawmaking, in *Legal Institutions Today and Tomorrow* 59-60 (Columbia Law School Centennial Volume (1959)).

own state because they come most readily to mind. Moreover, it is a state that abounds with judicial precedents, sometimes as old as the gold from its hills but sometimes dated in their experience, and that also abounds with statutes that are sometimes well under thirty but sometimes, even if over thirty, limited in their experience. Though the uninformed may still believe that there is a great distance between seemingly immovable precedents and seemingly irresistible statutes, the twain are always meeting in the courtroom.

Often enough when a dispute arises there is neither a precedent flexible enough nor a statute extensive enough to set forth a ready-made solution of the instant case. Such a dispute arose among the perennial controversies of the living over the wills or purported wills of the dead.⁶² The deceased Mary had executed a will leaving her home and most of its contents to the mother of Robert if she were living to receive the bequest; if not, it would go to Robert. Robert's mother predeceased the testatrix. Several years after Mary executed her will she became mentally incompetent and a bank was appointed guardian of her estate. With court approval, the guardian sold Mary's home for \$21,000 and kept the proceeds in a separate account. It spent nearly all the proceeds to support Mary, who remained incompetent to her dying day. It left intact nearly seven thousand dollars in the estate that were not part of these proceeds.

Could Robert get that residue in partial restoration of his own nearly extinguished specific gift? Residuary legatees claimed that the near extinguishment of Robert's gift was beyond redress under the common-law doctrine of ademption. For all the surface plausibility of that contention, given the obvious attrition of Robert's gift, ademption was hardly fit to govern the case. There had been no act of the testatrix signifying the revocation of the specific gift or a clear intent to revoke. There could not be, given Mary's incompetence. Even though the guardian had been permitted to sell the house willed to Robert and to tap the proceeds for the benefit of the incompetent, how could his action serve to extinguish the intended gift?

Courts in other states made answer to such a question by holding that there was only a *pro tanto* ademption, that the gift was extinguished only to the extent that it had actually been used up. That answer gave us pause. It did indicate an

Continued on page 530)

⁶² Estate of Mason, 62 Cal.2d 213, 397 P.2d 1005 (1965).

(Continued from page 527)

awareness that it was one thing for a competent testator to undo his own testamentary plan, and quite another for a guardian to undo the testamentary plan of an incompetent testator who had no way of directing which gifts the guardian should undo. Nevertheless even a doctrine of ademption mollified with a smidgen of Latin was not equal to a guardianship case. Whatever its deceptively reasonable sound, *pro tanto* ademption, like plain ademption, was bound to operate erratically as well as harshly. In the case of Robert, after a house specified as a gift to him had been sold and nearly all of the \$21,000 received for it had been used up, he was left with \$555.66. Over twelve times that sum remained intact to be claimed as a residue. *Pro tanto* was hardly *pro bono Roberto*.

We succeeded in finding a more rational solution by analogy to a statute. The Probate Code, though silent on the problem before us, set forth rules to govern the abatement of testamentary gifts whenever the assets of an estate are insufficient to satisfy them in full. It provided for contributions from all devisees and legatees, according to their respective interests, to one whose specific devise or legacy had been sold by an executor for the payment of debts and expenses or family allowances. This provision mitigated the adverse consequences to a specific devisee or legatee when a gift intended for him and never revoked by the donor was used to meet charges against an estate. Why not a comparable rule in a like situation except that management of the estate was entrusted to a guardian rather than to an executor and he paid expenses before rather than after the death of the testatrix. Had he failed to pay them during her lifetime, it would then have fallen to the executor to do so, and the statute would have applied automatically.

Since the Probate Code specified estates in charge of an executor, it was not open to an interpretation that it applied to guardianships. We could not extend its language, but we could still make good use of its rule. We adopted it as the one best fit to govern estates in charge of guardians. We held accordingly that the other beneficiaries, whose only interest was a residual one, must contribute the full amount of the residue toward the satisfaction, in this case only partial, of Robert's specific gift. It was a long road from the harshness of ademption and *pro tanto* ademption in guardianship cases, where the adverse consequences of a guardian's act fell arbi-

trarily on one beneficiary or another, to a rule that insured an equitable distribution of adversity among beneficiaries. Sweet are the uses of adversity, but sweeter still when shared.

When a judicial rule is thus modelled after a statutory rule, the very fact of copying signifies that it is not to be confused with interpretation that clarifies an obscure statute or amplifies a skeletal one. Such a judicial rule takes on a life of its own in the common law. It can prove endlessly useful within its own orbit and may even serve as a model itself for successive judge-made rules.

A seemingly simple case provides a homely illustration.⁶³ A company that sold carpets and sometimes installed them sued the state of California to recover excess sales taxes it had mistakenly collected from its customers and then paid to the state. The question was whether the plaintiff could recover without promising to pass the refund on to the over-taxed customers. Once again there was a statute that came close to being applicable. The Revenue and Taxation Code required a refund to customers by the collector or the state of any erroneous tax payment, whether the collector had knowledge or not of the error. It afforded customers no specific remedy, however, except when the one who collected excess taxes did so knowingly and did not pay them over to the state.

We were not deaf to the clear legislative policy set forth in the Code and reinforced by a Civil Code section imposing an involuntary trust on "One who gains a thing by fraud, accident, mistake, . . . unless he has some other and better right thereto, . . . for the benefit of the person who would otherwise have had it."⁶⁴ Likewise we were not blind to strong judicial precedents within the same orbit as the statutes, declaring that "Parties to an action frequently have responsibilities to persons who are not parties."⁶⁵

A question remained. The relevant statutory provision in the Revenue and Taxation Code was enacted some time after the mistaken collection of taxes in the instant case, though it antedated the case itself. We were not deterred thereby, for our task was not one of statutory interpretation. Our

⁶³ *Decorative Carpets Inc. v. State Board of Equalization*, 58 Cal.2d 252, 373 P.2d 637 (1962); cf. *In re Arens*, 41 N.J. 364, 197 A.2d 1 (1964).

⁶⁴ *Decorative Carpets Inc. v. State Board of Equalization*, supra note 63 at 254.

⁶⁵ *Id.* at 255.

responsibility was a different one, to create the most rational rule possible for a novel situation, almost but not quite covered by a statute. Once again we made use of a statutory rule as a model for the creation of an analogous judicial rule. It would hardly have been rational for a court not to make use of so rich and readily available a source for a common-law rule, particularly when the statutes and the decisions had long been going in the same direction.

When there are riches available to a court, it should matter little whether geographically they are a few paces or many miles from the courthouse. Gold is where you find it, and today distant places are within easy reach. Searching for a rule in a criminal case,⁶⁶ we found an appropriate one in a Congressional statute. The question was whether a defendant has an unconditional right to examine a document submitted to a grand jury if he has reason to believe it might prove essential to his defense. The defendant wished to verify if the document in question contained, as he had been informed, contradictory statements of a prosecution witness. The document had been produced in court, but the defendant, representing himself, had been allowed to see only one and one-half pages out of a hundred. The trial judge, after inspecting the document, had determined that the other pages related to offenses that "had nothing at all to do with the case."⁶⁷ The defendant contended that he must be allowed to judge for himself the relevance of the pages withheld.

The case presented a novel problem in the developing law of criminal discovery. Though it was long an uncharted area, we had begun to chart it in California, largely by court decisions that liberalized discovery. For all the growing trend in that direction, few states have moved so far.⁶⁸ There was precedent in our state for allowing a defendant to compel the state to produce statements of witnesses relating to the matters covered in their testimony.

We ruled in this new context, however, that when a trial court finds upon inspecting a document that it contains material unrelated to the defendant's case, the disclosure of which would interfere with effective law enforcement, the court should withhold such material. We also ruled that the mate-

⁶⁶ *In re Waltreus*, 62 Cal.2d 218, 397 P.2d 1001 (1965).

⁶⁷ *Id.* at 223.

⁶⁸ See Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U.L.Rev. 228; *Ground Lost and Found In Criminal Discovery In England*, 39 N.Y.U.L.Rev. 749 (1964).

rial should be preserved "so that the appellate court can re-examine the entire text to determine the correctness of the trial judge's ruling if the defendant appeals." The rationale was that "Although this procedure does not permit defense counsel to determine for himself the relevance and importance of the withheld material, it affords a reasonable compromise between the defendant's right to use the statement and the prosecution's need to withhold confidential information not relating to the case."⁶⁹

We took as our model the rules that Congress set forth in the Jencks Act,⁷⁰ just as we might adopt a judicial precedent from another jurisdiction. Thus, once again statute and precedent met in the courtroom, and this time it was East that was meeting West. The meeting was a particularly interesting one. When the statute from the East, representing the United States, crossed the path of the judicial precedent from the West, representing California, there ensued a new precedent in the West directly traceable to the encounter. Now that it has its own life to lead, it could in time conceivably beget another precedent, or maybe even a statute. There is ample room for more.

Leaving the underdeveloped area of criminal discovery, we come now to the bustling domains of commercial law. For centuries scribes and commentators have recorded the endless transmutation of commercial customs into law, and in recent years draftsmen have quickened their pace to repair or replace statutes showing signs of age or urban sprawl. Hence it has long since been normal procedure for judges, even those who resist reading up on any law outside that inscribed on their own caves, to consult the richly-worked relevant statutes when they come upon problems of the marketplace. They were bound to make use of the nuggets in the Uniform Acts sponsored by the Commissioners on Uniform State Laws. Recurringly, for example, they have made use of the Uniform Sales Act, which by its terms covered only sales of goods, as a basis for analogous lawmaking to cover contracts involving securities and real estate.⁷¹ Moreover, the federal courts have found in the Uniform Acts an appropriate basis for developing the federal common law that now

⁶⁹ Supra note 63 at 223.

⁷⁰ 18 U.S.C.A., § 3500 (1964).

⁷¹ See *Agar v. Orda*, 264 N.Y. 248, 251-253, 190 N.E. 479, 480-481 (1934) (securities); *Freeman v. Poole*, 37 R.I. 489, 511-512, 93 A. 786, 793-794 (1915) (land).

governs the commercial transactions of the federal government.⁷²

The Uniform Commercial Code, far from diminishing the interaction of statutes and judicial decisions, has greatly accelerated it. The Code itself suggests in several comments that it should serve as a basis for analogous judicial rules to govern situations it has not expressly covered.⁷³ Law journals have discussed extensively the possibilities of using various sections of the code, particularly Article Two, Sales, as a basis for judicial analogy.⁷⁴ Comments on decisions have also noted the implications of the code even when it has not been directly controlling.⁷⁵ When so formidable a code begins to revolve in common-law orbits, it dramatically compels even those who may hitherto have been unheeding, to note that in the vanguard as well as in the wake of such a skymark there are many less spectacular planets.

There are usually visible portents that a skymark is on the way. It would be unrealistic to say that it has no bearing on the scene until the day it bears down in full view. Hence courts have recognized the Uniform Commercial Code as influential when they have formulated kindred common-law rules to govern transactions that occurred before the effective date of the Code.⁷⁶ Judge Wright, speaking for the United States Court of Appeals for the District of Columbia, found the code section on unconscionableness to be "persuasive authority for following the rationale of the cases from which the section is explicitly derived."⁷⁷ Other courts have referred to the code as an appropriate source of law even

⁷² See *New York, N.H. & H.R.R. v. R.F.C.*, 180 F.2d 241, 244 (2d Cir. 1950).

⁷³ See Uniform Commercial Code, §§ 1-102, Comment 1; 2-105; comment 1; 2-313, comment.

⁷⁴ See, e.g., Franklin, *On the Legal Method of the Uniform Commercial Code*, 16 *Law of Contemp. Probs.* 330 (1951); Murphy, *Book Review*, 37 *Notre Dame Law.* 465 (1962); Tisdale, *Impact of the Uniform Commercial Code on the Law of Contracts*, 39 *Notre Dame Law.* 7 (1963); Note, *The Uniform Commercial Code as a Premise for Judicial Reasoning*, 65 *Colum. L. Rev.* 880 (1965).

⁷⁵ See 78 *Harv. L. Rev.* 895, 898 (1965); 50 *Iowa L. Rev.* 881, 883-885 (1965).

⁷⁶ See, e.g., *Williams v. Walker-Thomas Furn. Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965); *Universal C.I.T. Credit Corp. v. Guaranty Bank & T. Co.*, 161 F.Supp. 790, 792 (D. Mass. 1958); *Maber, Inc. v. Factor Cab Corp.*, 19 App.Div.2d 500, 502 n. 1, 244 N.Y.S.2d 768, 771 n. 1 (1963); *Gresham State Bank v. O. & K. Constr. Co.*, 231 Ore. 106, 118-119, 370 P.2d 726, 732 (1962).

⁷⁷ *Williams v. Walker-Thomas Furn. Co.*, supra note 76 at 449.

though it has not yet been enacted in their jurisdictions.⁷⁸ It has been viewed as "entitled to as much respect and weight as courts have been inclined to give to the various Restatements. It, like the Restatements, has the stamp of approval of a large body of American scholarship."⁷⁹

The Uniform Commercial Code has become a major influence in the development of common law in the federal courts to govern cases involving government contracts and other commercial transactions.⁸⁰ Judge Friendly, speaking for the Court of Appeals for the Second Circuit, has reinforced with appellate approval the established practice of lower courts and federal agencies to make use of the Code as a source of federal law. He notes that its widespread enactment put it "well on its way to becoming a truly national law of commerce" and that this promise of uniformity would be diserved if transactions with the government were not subject to kindred rules.⁸¹

Federal courts have also found the Uniform Commercial Code an influential source for the formulation of kindred judicial rules on bankruptcy.⁸² The Second Circuit has recently reappraised and rejected an old distinction that turned upon whether a secured creditor had title to the property in question, in the light of the Code's rejection of that formal distinction. Judge Kaufman noted that "it would be incongruous for the federal courts, historically the leaders in the development of the law, to continue to employ anachronistic distinctions . . . when the overwhelming number of states have succeeded in bringing their laws more into line with commercial reality."⁸³

⁷⁸ See, e.g., *Fairbanks, Morse & Co. v. Consolidated Fisheries Co.*, 190 F.2d 817, 822 n. 9 (3d Cir. 1951); *Kanton v. United States Plastics, Inc.*, 248 F.Supp. 353, 361 (D.M.J. 1965); *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 415, 161 A.2d 69, 100-101 (1960); cf. *Galler v. Galler*, 32 Ill.2d 16, 30-31, 203 N.E.2d 577 (1964).

⁷⁹ *Fairbanks, Morse & Co. v. Consolidated Fisheries Co.*, supra note 76 at 822 n. 9.

⁸⁰ See, e.g., *United States v. Wegematic Corp.*, 360 F.2d 674, 676 (2d Cir. 1966); *Transatlantic Fin. Corp. v. United States*, 363 F.2d 312, 315 n. 3 (D.C. Cir. 1966); *United States v. First Nat'l Bank*, 263 F.Supp. 298, 300-302 (D. Mass. 1967); *General Elec. Co.*, 3 U.C.C. Rep. 510 (Bd. of Contract App. 1966); *Productions unlimited, Inc.*, 3 U.C.C. Rep. 620 (V.A. Contract App. Bd. 1966); *Carpenter Steel Co.*, 2 U.C.C. Rep. 1036 (A.E.C. Bd. of Contract App. Mazur Bros. & Jaffe Fish Co., 3 U.C.C. Rep. 419 (V.A. Contract App. Bd. 1965); *Federal Pac. Elec. Co.*, 2 U.C.C. Rep. 210 (Bd. of Contract App. 1964).

⁸¹ *United States v. Wegematic Corp.*, supra note 80 at 676.

⁸² See *In re Yale Expr. System, Inc.*, 370 F.2d 433, 437-438 (2d Cir. 1966); *In re Elkins-Dell Mfg. Co.*, 253 F.Supp. 864, 871 n. 3, 873 (E.D. Pa. 1966).

⁸³ *In re Yale Expr. System, Inc.*, supra note 82 at 437.

At times courts have found in the policies of the Code a source for analogous judicial rules to govern situations not explicitly covered by the Code. They have made use of the Code's parol evidence rule in Article Two, which governs sales of goods, to formulate analogous rules for sales of securities and real estate.⁸⁴ The Court of Appeals for the Third Circuit has made use of the Code's provisions on damages to decide a question involving a service contract.⁸⁵ The Court of Appeals for the District of Columbia has made use of the Code's rules on impossibility to decide a question involving a contract for the carriage of goods.⁸⁶

The Code's flexible policies on secured transactions have proved useful in cases involving the interpretation of other recent statutes governing security interests in automobiles.⁸⁷ In these cases the courts have noted that they relied upon the Code, even though it was not controlling, "because it embodied the foremost modern legal thought concerning commercial transactions."⁸⁸

Therein lies the key to the Code's success as a model for judicial lawmaking. It was the culmination of years of scholarly work. The scholars were beholden to no one and to no cause. Their project was sponsored by the American Law Institute and the Commissioners on Uniform State Laws, two groups that were likewise eminently un beholden. Everyone concerned had notice of the project and full opportunity to be heard. There were evaluations of the work in progress and revisions in sequence of critical comment at meetings of the American Law Institute and elsewhere. Over a long period of time and in every corner of the country the draftsmen checked the fitness of then governing statutes in the

⁸⁴ See *Stern & Co. v. State Loan & Fin. Corp.*, 238 F.Supp. 901, 911 n. 2 (D.Del. 1965); *Hunt Foods & Indus., Inc. v. Coliner*, 26 App.Div. 41, 42 n. *, 270 N.Y.S.2d 937, 939 n. 1 (1966); *Golden Gate Corp. v. Barrington College*, 199 A.2d 586, 591 (R.I. 1964).

⁸⁵ *Vitex Mfg. Corp. v. Caribtex Corp.*, — F.2d — (3d Cir. 1967) 4 U.C.C. Rep. 128.

⁸⁶ *Transatlantic Fin. Corp. v. United States*, supra note 80 at 315, n. 3.

⁸⁷ See *In re Pollack*, 3 U.C.C. Rep. 267 (D. Conn. 1966); *Howarth v. Universal C.I.T. Credit Corp.*, 203 F.Supp. 279, 284 (D.Pa. 1962).

⁸⁸ *Vitex Mfg. Corp. v. Caribtex Corp.*, supra note 85 at —. See also *In re Dorset Steel Equipt. Co.*, 2 U.C.C. Rep. 1016 (E.D. Pa. 1965); reversed on other grounds sub. nom., *In re Elkins-Dell Mfg. Co.*, 253 F.Supp. 864 (E.D. Pa. 1966); *Pennsylvania Co. v. Wilmington Trust Co.*, 39 Del. Ch. 453, 462-463, 166 A.2d 726, 731-733 (1960); *Mortimer B. Burnside & Co. v. Havener Sec. Corp.*, 25 App. Div.2d 373, 374-375, 269 N.Y.S.2d 724, 726 (1966); *Fairchild Lease Corp. v. Colonial Aluminum Sales, Inc.*, 3 U.C.C. Rep. 858 (N.Y.Sup.Ct. 1966).

light of commercial customs, of equitable principles, of combinations of flexibility and uniformity. The final draft was of a piece and it had the look of having been out in the open. It was soon apparent that it also travelled well, as one state legislature after another adopted it. Even a diehard judge, resistant to the use of statutes in the formulation of common-law rules, could hardly ignore so rich a source of law.

Not all statutes, however, have such credentials. Sometimes a statute has no readily traceable history or even any recorded history at all. Legislators are under no compulsion to disclose the reasons for a rule, let alone to keep a chronicle of its origins. Sometimes a statute is enveloped in a history so voluminous or ambiguous as to be more confusing than revealing. A statute may be dubious because those who sponsored it were not motivated to do so in the public interest or because those who enacted it did so without adequate knowledge or consideration of its objectives or implications. For all the vaunted responsiveness of legislatures to the will of the people, it is no secret that legislative committees, particularly those dominated by the elder statesmen of a seniority system, tend to dilute the reliability of statutes as expression of public policy.⁸⁹ Hence it is small wonder that statutes are often bad and indifferent as well as good.

More often than not a judge must resign himself to such variations in quality. It bears emphasis that often he has no choice but to rule that a statute, however bad or indifferent, governs the case before him. In the many cases that call for statutory interpretation, a judge must keep his distance from adjudging the wisdom of the statute in determining its meaning. Even when he construes the meaning of a statute that has been challenged on constitutional grounds, he does not adjudge its policy except in the limited sense of determining whether it is consonant with the constitution. If it is constitutional it governs all cases within its scope, regardless of its wisdom. The very constraint upon a judge to follow the legislative policy in such cases precludes him from even considering alternatives.

Only when a case is not governed by a statute is the court free to work out its own solution. Only then is it free to copy an appropriate model in a statute. A judicial rule that thus emerges signifies a discriminating choice of policy, in sharp

⁸⁹ See Shapiro, *Judicial Modesty, Political Reality and Preferred Position*, 47 *Cornell L.Q.* 175, 185-187 (1962); Tyler, *Court Versus Legislature*, 27 *Law and Contemp. Prob.* 390, 391 (1962).

contrast to the routine compliance with a legislative policy when the statute encompassing it governs.

The process of discriminating choice involves more than the usual deliberation characteristic of the judicial process. A judge may have to evaluate more than one policy and more than one model for a rule from whatever source, if they appear relevant, and in doing so he may decide to reject rather than accept one model or another. He is free to reject a statutory rule as a model, arriving instead at another or at a rule without benefit of any model that becomes itself a prototype, because the rule he rejects does not in any event govern the instant case. Its very rejection signifies a considered judgment that it is not appropriate to govern the case, just as its acceptance would signify a considered judgment that it is.

Once a court formulates a rule by analogy from a statutory rule, it creates a precedent of the same force as any other. Its continuing force, like that of any other precedent, depends on its continuing fitness to survive as it ages.⁹⁰ It may endure for generations or succumb to rapid obsolescence.

It should not surprise us that such judicial rules analogized from statutes are at one with other judicial lawmaking. They always have been, despite the protestations of those who would have us believe that judicial rules and statutory rules are like set pieces of an automaton clock, springing from separate covertures to make wooden appearances at separate times.

We have seen that history has given the lie to the preachments of such separation. Across the centuries many a judge has seen fit to speak the speech of an exemplary statute in a new rule to protect or bring to justice the litigants whose problems were not covered by the statute. The real problem is not whether judges should make use of statutes, but how they can make optimum use of them.

One might better ask how they can make optimum use of the statutes that are inherently serviceable as sources of judicial lawmaking. There are of course countless statutes that will govern indefinitely without becoming relevant to a particular case. As to those that could be relevant, there are two problems. How do relevant statutes come to the attention of a judge? If they do come to his attention, how

⁹⁰ Cf. Witherspoon, Administrative Discretion to Determine Statutory Meaning: The Middle Road I, 40 Texas L. Rev. 751, 825, 831 (1962).

does he make a discriminating choice of a statute as a basis for a judicial rule?

There is no orderly research of statutes comparable to the orderly research of cases.⁹¹ The problem at the outset is that they are not systematically catalogued as cases are. There are no comparable cross-references to make their interrelations clear or to identify their antecedents. How can a judge be sure that between counsel's efforts and his own all pertinent materials have been rounded up? Suppose there lies undiscovered some pertinent statute still at large? Cases may arise in which no statute is even in issue, and yet a statute may exist that would be of the greatest relevance as a basis for judicial analogy, and that a judge should study as closely as any judicial precedent if he is to make a rational decision.

There is great need not only for a systematic cataloguing and research of statutes but also for systematic criticism. Although some of the mounting statutes engage the attention of scholarly critics there is no steady evaluation of the work-product of legislators comparable with the continuous criticism of judicial decisions. Moreover, there are few internal controls or external controls on the mass production of bad or indifferent statutes. Reports on the progress of even major bills from the committee room to the legislative floor vary greatly in quality, and even the most perceptive are often isolated pieces, lacking in continuity.

Until there are signs of a much closer watch on the legislative process than we now have, what are we to think of the enigmatic aphorism that ours is a government of laws and not of men? Given the major premise that legislatures are the dominant lawmakers, and the minor premise that there are no steady controls to insure a rational lawmaking process, we come to the unhappy conclusion that the bulk of our laws carry no assurance of quality controls in their fabrication.

With all too little critical comment to serve as warning or guide, how can judges immersed in mounting litigation ferret out potentially good statutes for use in their own lawmaking from among the host of inferior ones? If we cannot yet be too optimistic about their chances of finding gold that is there for the taking, we may perhaps still see a silver

⁹¹ See Traynor, A Foreword to the Vanderbilt Law Review's New Section on Legislation, 16 Vand. L. Rev. 1261 (1963); Traynor, The Unguarded Affairs of the Semi-kempt Mistress, 113 U.Pa. L. Rev. 485, 490 et seq. (1965).

lining in the major premise of our somber syllogism. A government of laws suggests an ideal, a legal process as rational in all its ramifications as it has traditionally been in the courts. We do not lack for ways to realize such an ideal, as thoughtful men have noted. Among others, Professor Keefe has called upon lawyers to realize it in a piece of some years ago⁹² that he subtitled with Cardozo's famous phrase: "The Time is Ripe for Betterment."⁹³

We are still far from betterment measured by the goal of rational processes of lawmaking in all the lanes of law. We might well concentrate on a preliminary goal, better use in the judicial process of the good laws that often emerge amid the variegated products of the legislative process. There must be teamwork to that end. If the librarians and researchers will systematize the study of statutes, if the watchbirds will sharpen their watch on legislatures in action, if commentators will set forth salient qualities or defects of legislative products, the judges will surely make better use than they have of the statutes revolving in common-law orbits. Then benefits will flow in every direction, *pro bono Hugo, pro bono Roberto*, but above all *pro lege et grege*.

⁹² Keefe, A National Ministry of Justice: "The Time Is Ripe for Betterment," 40 A.B.A.J. 951 (1954). See also Pound, Anachronisms in Law, 3 J. Am. Jud. Soc'y 142 (1919); Cardozo, A Ministry of Justice, 35 Harv. L. Rev. 113 (1921); Shientag, A Ministry of Justice in Action: The Work of the New York State Law Revision Commission, 22 Cornell L. Q. 183 (1937); Friendly, The Gap In Lawmaking—Judges Who Can't and Legislators Who Won't, 63 Colum. L. Rev. 787, 802-807 (1963); Traynor, The Unguarded Affairs of the Semikempt Mistress, *supra* note 91 at 485, 493-501 (1965).

⁹³ Cardozo, *supra* note 89 at 126.

JUDGES' WIVES OF CALIFORNIA

MONDAY, OCTOBER 7—Harbor Cruise and Ladies' Luncheon
Kona Kai Club, Shelter Island—10:30 a.m. to 3:00 p.m.

TUESDAY, OCTOBER 8—Ladies' Golf Tournament
Coronado Golf Club—9:30 a.m.

Tour of Hotel del Coronado—10:30 a.m. to 11:30 a.m.

1968 STATE BAR CONVENTION

San Diego, California

October 7-11, 1968