Theories of Legislation

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A third certainty, along with death and taxes, is legislation. Granted that we must have some legislation, it is undeniable that we have too much of it. Recently, for example, it was ascertained that the Pennsylvania Statutes in full text run to more than six million words, with a vocabulary consisting of about fifteen thousand words. Why then so much legislation? For one thing, state legislatures pass many unnecessary, and even frivolous, statutes. For another, after the need for many statutes has long since disappeared, if indeed it ever existed, the statutes linger on.

What is the function, the object, the purpose, of legislation? A statute should represent "timely responsiveness"; that is, it should be responsive to the needs of the people—it should be protective of their interests—and it should be enacted when the need arises, before wrong is wrought. A good example of a statute constituting "timely responsiveness" is the 1959 Massachusetts statute requiring the storing of frozen food under proper temperature. The statute is as follows:

No person engaged in the business of storing frozen food or transporting such food shall store or transport such food within the commonwealth unless it is stored or transported under refrigeration which shall insure good keeping qualities and under temperatures and holding conditions approved by the director of the division of food and drugs of the department of public health. Said director may, after public hearing, make regulations for the storing and transportation of frozen food, including temperature control, sanitation and other matters, in accordance with recognized standards necessary for the protection of the public health and the preservation of such food in wholesome condition. The term 'frozen food,' as used in this section, shall include food of any kind which has been preserved by a process of freezing.  


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Another good example of a statute constituting "timely responsiveness" is the 1961 Wisconsin statute requiring the installation of safety belts in automobiles. The statute reads as follows:

It is unlawful for any person to buy, sell, lease, trade or transfer from or to Wisconsin residents at retail an automobile, which is manufactured or assembled commencing with the 1962 models, unless such vehicle is equipped with safety belts installed for use in the left front and right front seats thereof. . . . All such safety belts must be of a type and must be installed in a manner approved by the motor vehicle department. The department shall establish specifications and requirements for approved types of safety belts and attachments thereto. The department will accept, as approved, all seat belt installations and the belt and anchor meeting the Society of Automotive Engineers’ specifications.³

Still another good example of a statute constituting "timely responsiveness" is the 1955 California so-called "abandoned refrigerator statute." The statute is as follows:

Any person who discards or abandons or leaves in any place accessible to children any refrigerator, icebox, or deep freeze locker, having a capacity of one and one-half cubic feet or more, which is no longer in use, and which has not had the door removed or the hinges and such portion of the latch mechanism removed to prevent latching or locking of the door, is guilty of a misdemeanor. Any owner, lessee, or manager who knowingly permits such a refrigerator, icebox, or deep freeze locker to remain on premises under his control without having the door removed or the hinges and such portion of the latch mechanism removed to prevent latching or locking of the door, is guilty of a misdemeanor. Guilt of a violation of this section shall not, in itself, render one guilty of manslaughter, battery or other crime against a person who may suffer death or injury from entrapment in such a refrigerator, icebox, or deep freeze locker.

The provisions of this section shall not apply to any vendor or seller of refrigerators, iceboxes, or deep freeze lockers, who keeps or stores them for sale purposes, if the vendor or seller takes reasonable precautions to effectively secure the door of any such refrigerator, icebox, or deep freeze locker so as to prevent entrance by children small enough to fit therein.⁴

Yet another good example of a statute constituting "timely responsiveness" is the 1959 Connecticut fluoroscopic x-ray shoe-fitting devices statute. The statute reads as follows:

³ § Wis. Laws 1961, at 575.
Any person, partnership, association or corporation which operates or maintains within this state any fitting devices or machines which use fluoroscopic x-ray or radiation principles for the purpose of selling footwear or other articles of apparel through commercial outlets shall be fined not more than one hundred dollars.\(^5\)

The "ideal" then in legislation is "timely responsiveness." The only means which can (but not necessarily will) lead to this end is extreme thoughtfulness and understanding on the part of every individual legislator. This then is the "ideal" means of attaining the goal. The exact opposite of the "ideal" legislative process was unwittingly described by W. Russell Arrington, a Republican state senator in Illinois. The following appeared in the Chicago Tribune on May 18, 1961:

Also given unanimous approval was a series of massive measures recodifying all laws relating to commercial transactions (Uniform Commercial Code) and bringing them into conformity with national standards. Senator Arrington urged the Senate to adopt them on faith, inasmuch as few members could comprehend them in the two months they were under consideration. He said they were worked out nationally over a period of twenty-five years by legal scholars.

Faith has its place in morality but certainly not in the legislative process.

**Emergency Legislation**

The constitutions of many states require that emergency legislation may be enacted only by a two-thirds vote of all members elected (not of those voting) and that the emergency shall be expressed in the statute. The purpose of emergency legislation is that the statute take effect immediately upon passage by the legislature and approval by the Governor.

But does an emergency actually exist, or is the legislature just saying so? If the legislature spells out the ostensible conditions allegedly causing the emergency, again do such conditions actually exist or is the legislature simply saying that they do? The writer is of the opinion that emergency legislation is entirely too readily enacted, without first conducting the necessary and proper research and analysis, and that there is definite abuse in this area.

Consider the 1955 Illinois emergency legislation which lowered the

age of the male for forcible rape from sixteen to fourteen years. The age of fourteen years for the male was carried over unthinkingly into the 1961 Illinois Criminal Code for rape\(^6\) (the distinction between forcible and statutory rape having been abolished and the equivalent of statutory rape coming under indecent liberties with a child).\(^7\) The 1955 statute is as follows:

Rape is the carnal knowledge of a female forcibly and against her will. Every male person of the age of seventeen years and upwards, who shall have carnal knowledge of any female person under the age of sixteen years and not his wife, either with or without her consent shall be adjudged to be guilty of the crime of rape; provided, that in case the parties shall be legally married to each other before conviction, any legal proceedings shall abate, and provided, that every male person of the age of fourteen years and upwards who shall have carnal knowledge of a female forcibly and against her will shall be guilty of the crime of rape. Every person convicted of the crime of rape shall be imprisoned in the penitentiary for a term not less than one year and may extend to life. Whereas, the crime of forcible rape is increasing at an alarming rate among juveniles, and police officials and criminologists believe that lowering the age of culpability for this abhorrent crime will prove an effective deterrent, therefore an emergency exists and this Act shall take effect upon its becoming a law.\(^8\)

Was the crime of forcible rape in truth increasing at an alarming rate among juveniles in 1955? What was the rate? Did police officials and criminologists in 1955 really believe that lowering the age of the male for forcible rape from sixteen to fourteen years would prove an effective deterrent? Did they so believe in 1961 when the new Illinois Criminal Code was adopted? Have they ever believed thus?

But consider the following 1932 Illinois piece of emergency legislation:

That the proper authorities of public agencies, political subdivisions, public municipal instrumentalities and municipalities, public corporations, boards and commissions (all of which are herein called municipalities) are hereby authorized to apply for and make loans from and contracts with the Reconstruction Finance Corporation as authorized by an Act of Congress entitled 'An Act to relieve destitution, to broaden the lending powers of

\(^8\) Ill. Laws 1955, at 1007.
the Reconstruction Finance Corporation, and to create employment by providing for and expediting a public-works program to aid in financing projects authorized under Federal, State or municipal law. Such loans or contracts to be made by said municipalities through the purchase by the Reconstruction Finance Corporation of the securities of such municipalities or otherwise or by pledging the securities of any of said municipalities, and all such municipalities are hereby authorized and empowered, if deemed necessary or desirable, to pledge their securities for the purposes in this Act specified. . . . Whereas it is necessary to find employment for a large number of mechanics, craftsmen and laborers who are now out of work and thereby relieve the public from contributing to their support and maintenance, which condition can be materially bettered by the passage of this Act and obtaining funds to aid in the construction of public works. Therefore, an emergency exists and this Act shall take effect upon its passage.⁹

That a large number of mechanics, craftsmen and laborers were out of work in Illinois, as elsewhere, in 1932, that it was necessary to find employment for them, that finding employment for them would relieve the public from contributing to their support and maintenance, and that the condition could be materially bettered by the passage of an act as the result of which funds could be obtained to aid in the construction of public works were all matters of common knowledge to the citizenry of Illinois in 1932. Purported emergency legislation is really emergency legislation when the truth of the stated reasons for it is a matter of public knowledge.

The year of enactment is a helpful although inconclusive clue as to the truth of the stated reasons for emergency legislation. An even-numbered year, of course, means a special session of the legislature, which is indicative of a state of urgency if not crisis. And a year may be remindful of such events of epochal proportions as war, depression, etc.

ADOPTIVE LEGISLATION

Of what value today is adoptive legislation? For example, by the terms of a federal statute, in 1901 the District of Columbia adopted "the common law, all British statutes in force in Maryland" as of February 27, 1801. The statute reads as follows:

The common law, all British statutes in force in Maryland on the twenty-seventh day of February, eighteen hundred and one, the principles of eq-

uity and admiralty, all general acts of Congress not locally inapplicable in
the District of Columbia, and all acts of Congress by their terms applicable
to the District of Columbia and to other places under the jurisdiction
of the United States, in force at the date of the passage of this act shall
remain in force, except in so far as the same are inconsistent with, or are
replaced by, some provision of this code.\textsuperscript{10}

The law carried over (not only "over" from Maryland but also
"overseas" from England) by the foregoing adoptive act, in order to
be applicable, must pass approximately seven tests, in addition to be-
ing "not inconsistent" with "the principles of equity and admiralty":
(1) not be in conflict with organic provisions; (2) not be in conflict
with statutes; (3) not be in conflict with legislative resolutions; (4)
not be in conflict with decisions of the court of last resort; (5) not be
in conflict with decisions of the intermediate appellate court; (6)
must be capable of general application; and (7) must be susceptible
of "timely" application.

Occasionally adoptive legislation takes the form of a constitutional
provision. The Constitution of Kentucky of 1891 adopted "all laws
which . . . were in force in the State of Virginia" as of June 1, 1792.
The constitutional provision is as follows:

All laws which, on the first day of June, one thousand seven hundred and
ninety-two, were in force in the State of Virginia, and which are of a
general nature and not local to that State, and not repugnant to this Con-
stitution, nor to the laws which have been enacted by the General Assem-
bly of this Commonwealth, shall be in force within this State until they
shall be altered or repealed by the General Assembly.\textsuperscript{11}

At the present time the law carried over by adoptive legislation,
whether in the form of a statute or a constitutional provision, simply
cannot legitimately satisfy all of the foregoing requisites.

\textbf{LEGISLATIVE WORD-MEANING EQUATION}

Occasionally a word in a state statute is judicially defined by the
court of last resort of the same state in terms of another word. If the
second word (in terms of which the first word has been judicially
defined) is found in another statute of the same state, the second word
may be defined in terms of the first word.

\textsuperscript{10} 31 Stat. 1189 (1901).
\textsuperscript{11} Ky. Const. 1891, § 233.
For example, a 1953 Illinois statute contained the word “part.” The statute read as follows:

Every clock, tape machine, slot machine or other machine or device for the reception of money on chance or upon the action of which money is staked, hazarded, bet, won or lost is hereby declared a gambling device and shall be subject to seizure, confiscation and destruction by any municipal or other local authority within whose jurisdiction the same may be found. A coin-in-the-slot-operated mechanical device played for amusement which rewards the player with the right to replay such mechanical device, which device is so constructed or devised as to make such result of the operation thereof depend in part upon the skill of the player and which returns to the player thereof no coins, tokens or merchandise shall not be considered to be a gambling device within the meaning of this Act and any right of replay so obtained shall not represent a valuable thing within the meaning of this Act.\textsuperscript{12}

The Supreme Court of Illinois in 1957 in \textit{People v. One Mechanical Device or Machine}\textsuperscript{13} defined the word “part” as meaning not “pure” skill (which would be 100\% skill) or “predominate” skill (which would be 51\% or more skill) or “equal” skill (which should be 50\% skill) but “some” skill (which would be less than 50\% skill). And, according to \textit{Stanton on Illinois Criminal Law and Practice}, the word “part,” as used in the 1953 Illinois statute, does not mean a modicum, minimal amount or scintilla of skill but does mean something about which one can reasonably either feel or talk and still not be feeling or talking about nothing or next to nothing.\textsuperscript{14}

The word “part” was carried over into the gaming device section\textsuperscript{15} of the 1961 Illinois Criminal Code. Also in the new Code is a section containing the word “some.” The section is as follows:

“Affirmative defense” means that unless the State’s evidence raises the issue involving the alleged defense, the defendant, to raise the issue, must present some evidence thereon.\textsuperscript{16}

Thus, “some” evidence means not “predominate” evidence (which would be 51\% or more of the quantity of evidence) or “equal”

\textsuperscript{12} Ill. Laws 1953, § 2, at 930.
\textsuperscript{13} 11 Ill.2d 151, 157, 142 N.E.2d 98, 101 (1957).
\textsuperscript{14} \textit{BAILEY, ILLINOIS CRIMINAL LAW AND PRACTICE}, ch. 27, § 1876, at 268 (Stanton rev. 1955, Grigsby Supp. 1959).
\textsuperscript{16} \textit{ILL. CRIM. CODE} 1961, \textit{ILL. REV. STAT.} ch. 38, § 3-2(a) (1963).
evidence (which would be 50% of the quantum of evidence) but "part" of the quantum of evidence (which would be less than 50%). "Some" evidence "does not mean a modicum, minimal amount or scintilla of" evidence "but does mean something about which one can reasonably either feel or talk and still not be feeling or talking about nothing or next to nothing." This theory has been consistently overlooked as an aid to statutory construction.

COMPARATIVE LEGISLATION

The ultimate purpose of comparative legislation is not simply to ascertain if there are any statutes in sister states similar to a particular statute of state A. Let us assume that there is a similar statute only in state B. Then if there is no court decision in state A construing the statute but there is such a court decision in state B, the court decision in state B may be applied in interpreting the statute in state A, with the result that the court decision in state B constitutes implied law in state A. This is one of the two ultimate purposes of comparative legislation.

The other ultimate purpose of comparative legislation could not have been overlooked more had it been purposely overlooked. That purpose is to ascertain the gravamen-difference between the two statutes as it is seldom that two pieces of legislation of different states, even though substantially the same, do not contain at least one difference which is material. For example, consider the involuntary manslaughter provisos of Colorado and Georgia, which are respectively set forth below:

Involuntary manslaughter shall consist in the killing of a human being without any intent to do so; in the commission of an unlawful act or a lawful act which probably might produce such a consequence, in an unlawful manner; Provided, always, that where such involuntary killing shall happen in the commission of an unlawful act which in its consequences naturally tends to destroy the life of a human being, or is committed in the prosecution of a felonious intent, the offense shall be deemed and adjudged to be murder.17

Involuntary manslaughter shall consist in the killing of a human being without any intent to do so, in the commission of an unlawful act or a lawful act which probably might produce such a consequence, in an unlawful manner; Provided, always, that where such involuntary killing shall

happen in the commission of an unlawful act which in its consequences naturally tends to destroy the life of a human being, or is committed in the prosecution of a riotous intent, the offense shall be deemed and adjudged to be murder. 18

Upon close analysis it can be seen that the Georgia statute, unlike the Colorado statute, includes "riotous intent" as well as "felonious intent" (as in the Colorado statute) or "a crime punishable by death or confinement in the penitentiary" (viz., a felony, as in the Colorado statute). Riot is a misdemeanor rather than a felony in both Colorado 19 and Georgia, 20 as it is in most states. Thus, the Georgia statute is analogous to the typical burglary statute, which includes intent to commit any felony or the stipulated misdemeanor, the only distinction being that the misdemeanor in the case of the Georgia involuntary manslaughter proviso is riot while the misdemeanor in the case of the typical burglary statute is petit larceny.

CONSTITUTIONAL ARROGATION

Occasionally a statute will be enacted in substantially the same terms as a pre-existing constitutional provision. Insofar as any difference in wording is concerned, if the difference is material the constitutional provision, of course, will govern under the theory that the subject matter was arrogated to the constitution, an instrument of higher dignity than the statute.

However, if the difference is not material the wording of the statute may amplify and explain the language of the constitution. As expressed by the writer in Illinois Continuing Legal Education:

One theory is to compare the new statutory section and the constitutional provision to an oral statement and a written instrument, respectively, and by analogy to the parol evidence rule analyze the affect of the new statutory section on the constitutional provision as one not of contradiction and variance but rather of amplification and explanation. 21

The Constitution of Illinois of 1870 contains the following provision:

All laws of the state of Illinois, and all official writings, and the executive, legislative and judicial proceedings, shall be conducted, preserved and published in no other than the English language.22

Consider the effect on the foregoing constitutional provision of the following 1923 Illinois statute:

Whereas, since the creation of our American Republic there have been certain Tory elements in our country who have never become reconciled to our Republican institutions and have ever clung to the tradition of king and empire; and,

Whereas, America has been a haven of liberty and place of opportunity for the common people of all nations, and,

Whereas, these strangers within our gates who seek economic betterment, political freedom, larger opportunities for their children, and citizenship for themselves, come to think of our institutions as American and our language as the American language, and

Whereas, the name of the language of a country has a powerful psychological influence upon the minds of the people in stimulating and preserving national solidarity, and,

Whereas, the languages of other countries bear the name of the countries where they are spoken, therefore; . . .

Be it enacted by the People of the State of Illinois, represented in the General Assembly: The official language of the State of Illinois shall be known hereafter as the "American" language.23

The Appellate Court of Illinois in 1932 in Carlin v. Millers Motor Corporation made the following statement:

Section 18 of the Schedule of the Constitution of 1870 provides that judicial proceedings shall be conducted and preserved in the 'English language,' which, since the legislative enactment of 1923 probably should be referred to as the 'American language.'24

What did the Appellate Court of Illinois mean by the foregoing statement? We cannot assume that it considered the two words "English" and "American," as used in the contexts of the constitutional provision and the statute, respectively, to be in conflict, for to do so would result in the view that it held the latter paramount over the former. Rather, we must assume that it considered the two words, as so used, to be in pari materia. On the basis of this assumption, validly made, what it had in mind, we may conclude, was that the language

22 Ill. Const. 1870, Schedule, § 18.  
23 Ill. Laws 1923, at 7–8.  
officially recognized in Illinois should be the English language, with apologies to H. L. Mencken and the Fifty-third Illinois General Assembly of 1923, replete with American provincialisms, localisms, idioms, colloquialisms, and, alas, barbarisms.

The Constitution of Illinois of 1870 contains the following provision:

No person who has been, or hereafter shall be, convicted of bribery, perjury, or other infamous crime, nor any person who has been or may be a collector or holder of public moneys, who shall not have accounted for and paid over, according to law, all such moneys due from him, shall be eligible to the general assembly, or to any office of profit or trust in this state.\(^{25}\)

Consider in connection with the foregoing constitutional provision the following 1961 Illinois statute:

Every person convicted of the crime of murder, rape, indecent liberties with a child, kidnapping, aggravated kidnapping, perjury, arson, burglary, robbery, sale of narcotic drugs, deviate sexual assault, incest, aggravated incest, bigamy, or theft, if the punishment for said theft is by imprisonment in the penitentiary, shall be deemed infamous, and shall forever thereafter be rendered incapable of holding any office of honor, trust or profit, of voting at any election, or serving as a juror, unless he or she is again restored to such rights by the terms of a pardon for the offense or otherwise according to the law.\(^{26}\)

The offense of bribery was designated as an infamous crime in the constitutional provision but not in the statute. Thus, the catalogue of infamous crimes in the statute was incomplete. But bribery, due to its express mention in the Constitution, was impliedly contained in the statute and would be read into same. However, this defect, one primarily of form rather than substance, was remedied by the inclusion of the offense of bribery in the list of infamous crimes set out in the 1963 Illinois Code of Criminal Procedure.\(^{27}\)

**EXEMPTIVE LEGISLATION**

It is a very dangerous practice for a legislature to exempt certain offenses from the application of criminal punishment laws as there is usually the likely prospect that one of the exempted offenses is closely

\(^{25}\) ILL. CONST. 1870 art. IV, § 4.  
\(^{26}\) 2 Ill. Laws 1961, at 2271.  
enough related to a non-exempted offense for the exemption to create an invalid classification and be violative of the due process and the equal protection of the laws clauses.  

For example, consider the following 1935 Oklahoma statute:

An act to be known and cited as the "Oklahoma Habitual Criminal Sterilization Act"; providing for and authorizing operations of vasectomy and salpingectomy to be performed upon habitual criminals; defining habitual criminals; conferring jurisdiction upon the District Courts of this State to hear and determine actions instituted and carried on under and pursuant to the provisions thereof; providing and prescribing the pleading and practice and rules of procedure in actions instituted and carried on under and pursuant to the provisions thereof; providing for a person adjudged to be an habitual criminal and upon whom it is adjudged that an operation of vasectomy or salpingectomy be performed to be taken into and held in custody until such operation has been performed; defining and prescribing duties in relation thereto to be performed by the Attorney General, the County Attorneys, the Court Clerks, the Sheriffs, and the Wardens or other officers in charge of the State's penal institutions; providing for appeals to the Supreme Court of Oklahoma from judgments rendered in actions instituted under and pursuant to the provisions thereof, and conferring jurisdiction upon said Court to hear and determine said appeals; providing for the allowance and payment by the State of fees to surgeons performing operations of sterilization authorized under and pursuant to the provisions thereof; and for other purposes. . . . Provided, that offenses arising out of the violation of the prohibitory laws, revenue acts, embezzlement, or political offenses, shall not come or be considered within the terms of this Act.

The Supreme Court of the United States in 1942 in Skinner v. Oklahoma ex rel. Williamson, reversing a decision of the Supreme Court of Oklahoma handed down the year before, held that embezzlement and larceny are too closely related for only one of the two offenses to be exempted.

LEGISLATIVE GRAVAMEN-WORD MISSPELLING

Each chamber of a legislature should have a "Committee on Style" charged with the duty of checking the spelling, punctuation, grammatical construction, and rhetorical quality of all proposed legislation

28 U.S. Const. amend. XIV, § 1.

29 Ibid.


31 316 U.S. 535 (1942).

initiated in that particular chamber. Such a committee should include those legislators who have been, or are, teachers.

It is an especially sad commentary on current standards of English usage when even gravamen-words are misspelled in statutes. Consider the following June 9, 1955 amendment to the Illinois wrongful death statute:

In any such action to recover damages where the wrongful act, neglect or default causing the death occurred on or after the effective date of this amendatory Act of 1955, it shall not be a defense that the death was caused in whole or in part by the contributory negligence of one or more of the beneficiaries on behalf of whom the action is brought. Provided, however, that the amount of damages given shall not include any compensation with reference to the pecuniary injuries resulting from such death, to such contributorily negligent person or persons; and provided further, to such contributorily negligent person or persons shall not share in any amount recovered in such action.\(^3\)

The word "contributorily" was spelled incorrectly as "contributorily." (See both principal American\(^3\) and English\(^3\) dictionaries.) The statute was amended again on July 14, 1955\(^3\) and again on July 8, 1957,\(^3\) yet on neither occasion was the error corrected. If any lawyer who was a member of the Sixty-ninth or Seventieth Illinois General Assembly in 1955 or 1957, respectively, blushes when reading this paragraph, he can take small solace in the fact that state courts of last resort in Missouri\(^3\) and South Dakota\(^3\) and a federal court in Pennsylvania\(^3\) have similarly misspelled the same word.

**RECONCILIATORY LEGISLATION**

Reconciliatory legislation differs from corrective legislation in the following particulars: Corrective legislation involves two statutes, the more recently enacted of which corrects an error in the other (the

\(^3\) Ill. Laws 1955, at 294.
\(^3\) Third New International Dictionary Unabridged 496 (Merriam-Webster 1961).
\(^3\) 2 Oxford English Dictionary 925 (Clarendon Press 1933). The word "contributorial" is given, but not in the form "contributorily."
\(^3\) Ill. Laws 1955, at 2006.
\(^3\) 2 Ill. Laws 1957, at 1939.
\(^3\) Melton v. St. Louis Public Service Co., 363 Mo. 474, 482, 251 S.W.2d 663, 667 (1952).
error often having been pointed out to the legislature by the court of last resort). Reconciliatory legislation involves three statutes, two of which were enacted at the same time and are in conflict or at the least are inconsistent with each other and the third and more recent of which reconciles the other two. The two reconciled statutes must have been enacted at the same time for, if they were not, obviously the later in point of time would govern and there would be no need for a reconciliatory statute.

Consider, for example, articles 1494 and 911 of the Civil Code of Louisiana of 1870. The two statutes were enacted at the same time in 1825 and are in obvious and apparently impossible conflict. The two statutes are set forth below:

Art. 1494. Donations inter vivos or mortis causa can not exceed two-thirds of the property, if the disposer, having no children, leaves a father, mother, or both.\(^41\)

Art. 911. If a person dies, leaving no descendants, and his father and mother survive, his brothers and sisters, or their descendants, only inherit half of his succession.

If the father or the mother only survive, the brothers and sisters, or their descendants, inherit three-fourths of his succession.\(^42\)

If a person died, leaving no descendants, and his father or mother and his brothers and sisters, or descendants of such brothers and sisters, survived, the father or mother would be entitled to one-third (under article 1494) and the brothers and sisters, or their descendants, would be entitled to three-fourths (under article 911) of his property. Obviously, as the colloquialism goes, “something’s got to give.” And with this consideration in mind we arrive at the crux of the issue. Reconciliatory legislation would have to operate in one of the following three ways: (1) decrease the parent’s legitime (or forced portion) and the siblings’ portion equally to the extent of exhausting the estate; (2) decrease the parent’s legitime (or forced portion) to one-fourth; or (3) decrease the siblings’ portion to two-thirds.

The second method was adopted in 1956, as will become apparent from a reading of the following reconciliatory statute:

Art. 1494. Donations inter vivos or mortis causa can not exceed two-thirds of the property, if the disposer, having no children, leaves a father,\(^41\) 

\(^{41}\) LA. CIV. CODE ANN. art. 1494 (West 1951).

\(^{42}\) LA. CIV. CODE ANN. art. 911 (West 1951).
mother, or both, provided that where the legal portion of the surviving father, mother, or both is less than one-third the forced portion shall not be increased to one-third but shall remain at the legal portion. . . . All laws or parts of laws in conflict herewith are hereby repealed.\textsuperscript{43}

However, the first method is the only one of the three which would have done equity\textsuperscript{44} to both the ascendant and the collaterals. What the first method represents generically is an altering of two inharmonious statutes so that Group A, favored under statute I, and group B, favored under statute II, each sustains an equal reduction in its prerogatives and concord between the two statutes is achieved. For the sake of simple justice, this is the only form which reconciliatory legislation should assume.

**LEGISLATIVE TERMINOLOGICAL OBSELESCENCE**

Every legislature should have a joint "Committee on Revision" which would concern itself with ferreting out words in the state's statutes which have become archaic, obsolete or rare, and drafting legislation to either change or eliminate such words. Here again teacher-legislators should sit on such a committee.

Occasionally the meaning of a word in an old statute has disappeared into oblivion or at best is obscure. For example, consider the following 1874 Illinois statute, which remained in effect until the new Illinois Criminal Code became operative on January 1, 1962:

Whoever shall play for money, or other valuable thing, at any game with cards, dice, checks, or at billiards, or with any other article, instrument or thing whatsoever, which may be used for the purpose of playing or betting upon, or winning or losing money, or any other thing or article of value, or shall bet on any game others may be playing, shall be fined not exceeding $100 and not less than $10.\textsuperscript{45}

Of the word "checks" in the foregoing statute, *Stanton on Illinois Criminal Law and Practice* makes this terse statement: "Checks has no current definition as a game."\textsuperscript{46}

**LEGISLATIVE ATTACK—CIVIL OR CRIMINAL?**

All states except Louisiana make adultery and fornication penal offenses and prescribe punishments therefor. Probably the so-called


\textsuperscript{44} See La. Civ. Code Ann. art. 21 (West 1951); also, Morse, *Federal Equity Jurisdiction in Louisiana*, 7 Loyola L. Rev. 1 (1953).

\textsuperscript{45} Ill. Rev. Stat. 1874, at 371.

\textsuperscript{46} 1 BAILEY, *op. cit. supra* note 14, at 267.
"deterrent theory" of criminal punishment rests upon its weakest basis in this sphere of penal offenses.

Louisiana, on the other hand, combats the moral evil represented by adultery and fornication civilly rather than criminally. She attacks the evil in a sensitive area, where it really hurts, by tightening the purse strings effectively and thereby making such activity relatively profitless, and therefore pointless, for the concubine. Article 1481 of the Civil Code of Louisiana of 1870\textsuperscript{47} limits a gift or testamentary bequest to a concubine to personal property amounting to not more than one-tenth of the man’s estate.

Why enact a criminal statute when a civil statute will accomplish as much or more? Why use a sledge hammer when a tack hammer will suffice?

**LEGISLATIVE OVERSIGHT**

Every legislature should have a joint “Committee on Legislative Oversight” whose duty it would be to rectify legalistic errors in statutes which the judiciary committee of the initiating chamber overlooked and to do so before the courts strike down such statutes.

Consider the following 1872 Illinois statute, which is still in force:

Any person swearing falsely concerning his right to vote, or concerning the right of another to vote at any such election, or any person who shall cast a fraudulent vote at any such election, or who shall vote at such election not having a right to vote at such election, or who shall cast a vote at such election in any other name than his own, or who shall vote more than once at such election, shall be deemed guilty of a high misdemeanor, shall be liable to be indicted therefor, and shall, on conviction, be punished by confinement in the penitentiary to hard labor for a term of not less than one year nor more than five years.\textsuperscript{48}

There is not now, nor has there ever been, a high misdemeanor in Illinois—in New Jersey,\textsuperscript{49} yes, but not in Illinois. This error has been permitted to remain on the statute books for ninety-one years.

On a lower legislative level, consider also the following 1956 ordinance of the City of Chicago:

192-10.1 It shall be unlawful for any person knowingly to exhibit, sell, offer to sell, give away, circulate, or distribute or attempt to distribute to any person under the age of seventeen years any obscene book, maga-

\textsuperscript{48} Ill. Laws 1871–72, at 314 [Ill. Rev. Stat. ch. 34, § 212 (1963)].
zine, pamphlet, paper, writing, card, advertisement, circular, print, picture, photograph, motion picture film, play, image, instrument, statute, drawing, or other material.

Obscene for the purpose of this section is defined as follows: Whether to the average person under seventeen years, of the age of the person to whom the material is exhibited, sold, offered for sale, given away, circulated, or distributed, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests.

In determining whether the publication or other material is obscene and whether the dominant theme of the material taken as a whole appeals to prurient interests, consideration shall be given to whatever artistic, literary, historical, or educational value the said publication or other material may have for persons under the age of seventeen years in the community and whether the probability of the appeal to prurient interests is so great as to outweigh whatever artistic, literary, historical, educational or other merit the publication or other material may possess.

192-10.2 Any person violating any of the provisions of section 192-10.1 shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in an amount not less than one hundred dollars nor more than two hundred dollars or be imprisoned for a period not exceeding six months or be both so fined and imprisoned. Each day that such violation is committed or permitted to continue shall constitute a separate offense and shall be punishable as such hereunder. If more than one publication prohibited hereunder shall be sold, offered for sale, exhibited, given away or in any way furnished or attempted to be furnished to any such person in violation of section 192-10.1, the sale, offer, exhibiting, giving away or in any way furnishing or attempting to furnish to any such person of each separate publication prohibited hereunder shall constitute a separate offense and shall be punished as such hereunder.

How can a municipality prescribe a misdemeanor? A misdemeanor is a state offense, and only the state legislature can provide for same. And, as of the time of the ordinance, it had been so provided by the Illinois legislature for eighty-two years.

A 1951 Illinois statute abolished the legal effect of private seals. The statute reads as follows:


The use of private seals on written contracts, deeds, mortgages or any other written instruments or documents heretofore required by law to be sealed, is hereby abolished, but the addition of a private seal to any such instrument or document shall not in any manner affect its force, validity or character, or in any way change the construction thereof.  

Now consider, in reference to the foregoing statute, the following provision of the 1961 Illinois Commercial Code:

The affixing of a seal to a writing evidencing a contract for sale or an offer to buy or sell goods does not constitute the writing a sealed instrument and the law with respect to sealed instruments does not apply to such a contract or offer.

What "law with respect to sealed instruments"? The law with respect to sealed instruments had been abolished a decade earlier.

**LEGISLATIVE GRAVAMEN TRANSPOSITION**

In order to better understand a present statute we study the former statute which gave way to it and so on back to its source, if possible. But occasionally the gravamen of a present statute was not contained in the former statute which the present statute replaced but was contained instead in a former cognate statute.

For example, a tendency "to provoke a breach of the peace" is the gravamen of the following criminal defamation provision of the 1961 Illinois Criminal Code:

A person commits criminal defamation when, with intent to defame another, living or dead, he communicates by any means to any person matter which tends to provoke a breach of the peace.

The foregoing gravamen was not contained in the 1874 Illinois libel statute, which was replaced by the present statute, but was contained in the 1917 Illinois Group Libel Act (as was pointed out by the Supreme Court of the United States in 1952 in *Beauharnais v. People*, affirming the Supreme Court of Illinois), which was repealed by the 1961 Illinois Criminal Code. The Illinois Group Libel Act is as follows:

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52 Ill. Laws 1951, at 1299.


57 408 Ill. 512, 97 N.E.2d 343 (1951).
THEORIES OF LEGISLATION

It shall be unlawful for any person, firm or corporation to manufacture, sell, or offer for sale, advertise or publish, present or exhibit in any public place in this State any lithograph, moving picture, play, drama or sketch, which publication or exhibition portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion which said publication or exhibition exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots. Any person, firm or corporation violating any of the provisions of this section, shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not less than fifty dollars ($50.00), nor more than two hundred dollars ($200.00).

Tracing the gravamen of a statute is more important than tracking down its other provisions and phraseology. This effective key to legislative research has been constantly overlooked—"post-legislative oversight," as it were.

LEGISLATIVE USURPATION OF JUDICIAL PREROGATIVE

Certain matters legitimately fall within the exclusive pale of case law, and for the legislature to act in the premises constitutes an encroachment upon the judicial prerogative. These matters divide into two generic groupings: (1) statutes correcting bad law emanating from the state court of last resort; and (2) statutes declaratory or regulative of rules and principles of the common law which historically and traditionally have been dealt with exclusively by the courts.

In regard to the first generic grouping, the following example is illustrative: In January, 1874, the Supreme Court of Illinois in Corbley v. Wilson made poor law indeed, as is apparent from a reading of the excerpt from its opinion set out below:

Appellant objects to the seventh instruction for plaintiff, holding, as it does, that this plea of justification must be proved beyond a reasonable doubt. . . . If greater hardship is imposed upon a defendant, in an action of slander, who pleads justification—who places on the record that the charge is true—he ought to be held to prove it beyond a reasonable doubt. The same testimony required to convict the party on the criminal charge should be adduced. If it works a hardship, it will also be cautionary to a defendant. It is an admonition to him not to put the charge upon the record if he is not fully prepared to sustain it.

59 71 Ill. 209, 213-214 (1874).
The Illinois General Assembly corrected the foregoing decision two months later by enacting the following statute entitled “An Act to Revise the Law in Relation to Slander and Libel”:

In actions for slander or libel, an unproved allegation of the truth of the matter charged shall not be deemed proof of malice, unless the jury, on the whole case, find that such defense was made with malicious intent. And it shall be competent for the defendant to establish the truth of the matter charged by a preponderance of testimony.\(^{60}\)

Let the courts correct their own mistakes. Granted that it would take longer and some injustice might ensue during the intervening period, but far greater injustice could result from repeated legislative forays into the judicial preserve; our tradition of a strong, independent and co-equal judiciary would be jeopardized.

In respect to the second generic grouping, statutory declaration of elemental “hornbook” rules of the common law of contracts is exemplified by the following three provisions of the Civil Code of California of 1871:

Section 1582. . . . If a proposal prescribes any conditions concerning the communication of its acceptance, the proposer is not bound unless they are conformed to; but in other cases any reasonable and usual mode may be adopted.

Section 1583. . . . Consent is deemed to be fully communicated between the parties as soon as the party accepting a proposal has put his acceptance in the course of transmission to the proposer, in conformity to the last section.

Section 1584. . . . Performance of the conditions of a proposal, or the acceptance of the consideration offered with a proposal, is an acceptance of the proposal.\(^{61}\)

The following 1913 Illinois statute is illustrative of legislative ascription of a degree or extent (but not a burden) of proof of the common law of evidence to a specific situation:

The findings and conclusions of the commission on questions of fact shall be held \textit{prima facie} to be true and as found by the commission; and a rule, regulation, order or decision of the commission shall not be set aside unless it clearly appears that the finding of the commission was against the manifest weight of the evidence presented to or before the commis-


sion for and against such rule, regulation, order or decision, or that the
same was without the jurisdiction of the commission.62

The word "clearly" in the foregoing statute refers to the so-called
"clear and convincing" degree of proof customarily reserved for the
proof of chancery cases.

Also illustrative of legislative ascription of a degree of proof of the
common law of evidence to a particularized situation is the following
excerpt from a 1961 Illinois statute:

At the conclusion of the hearing, when the court determines from a pre-
ponderance of the evidence that probation has been violated, the court
may revoke probation and impose sentence.63

Another such example is the following provision of the 1961 Illi-
nois Commercial Code:

'Burden of establishing' a fact means the burden of persuading the triers
of fact that the existence of the fact is more probable than its non-
existence.64

The word "more" in the foregoing statute refers to the preponder-
ance of evidence degree of proof sufficient to prove an ordinary civil
case.

The following provision of the 1961 Illinois Criminal Code is illus-
trative of both statutory declaration of an elemental "hornbook" rule
of the common law of evidence and legislative ascription of a degree
of proof of the common law of evidence to a generic situation:

Every person is presumed innocent until proved guilty. No person shall
be convicted of any offense unless his guilt thereof is proved beyond a
reasonable doubt.65

The foregoing examples are of matters which were treated of by
the legislative but which historically and traditionally have been, and
should be, the rightfully exclusive concern of the judicial.

CONCLUSION

There most assuredly should be much less legislation; there should
be a survival of only the fittest legislation, "timely responsiveness"
constituting the determinant.

If extensive and exhaustive research and analysis inquiring into the need for emergency legislation and the propriety of exemptive legislation were to be conducted before enactment, there would appear in most cases to be little reason for enactment. And while the need for emergency legislation and the propriety of exemptive legislation is slight, the justification for adoptive legislation is non-existent.

Legislative word-meaning equation, comparative legislation, constitutional arrogation, and legislative gravamen-transposition are valuable doctrinal aids to statutory construction which should be availed of by the courts.

A legislature should have House and Senate "Committees on Style" to prevent legislative gravamen-word misspelling, a joint "Committee on Revision" to eliminate legislative terminological obsolescence and a joint "Committee on Legislative Oversight" to rectify legalistic mistakes in statutes.

Reconciliatory legislation is most beneficial when both conflicting statutes are qualitatively and quantitatively modified equally.

While public policy determines whether a socially reprehensible act should be attacked civilly or criminally, the legislature should favor the former method and in all cases of doubt proceed accordingly.

Of all the disciplines to which a legislature should be subject, the most salutary is self-discipline, and in pursuance thereof the legislative department should scrupulously endeavor to remain without the judicial fold.