Common Law Judging in a Statutory World: An Address

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I am grateful for the opportunity to speculate in this lecture about the future of common law judging in the world of statutes. I have two special reasons for addressing the topic today. One arises out of the difference in perspective that comes from being a judge rather than an academician. The other is the publication of an extraordinary new book by my former colleague, Professor Guido Calabresi, entitled "A Common Law for the Age of Statutes." It is hardly newsworthy that common law judging has undergone a revolution during the present century. When the twentieth century began, law and lawmaking and law teaching were dominated by a view of the legal landscape often attributed to Professor Christopher Columbus Langdell of the Harvard Law School, although Professor Arthur Corbin at Yale was an early disciple. In their view, common law cases were for all practical purposes the principal if not the exclusive source of law. It is true that there were statutes here and there, some ancient and hence essentially assimilated into the common law, such as the Statute of Frauds, some more recent and hence to be strictly construed as in derogation of the common law. California of course had adopted the Field Code in the nineteenth century, but that was essentially a common law code that imposed few if any constraints on common law development. Similarly, early twentieth century statutes were not, except in technical fields such as negotiable instruments, drafted to be competitive with the case law as it might emerge.

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** Justice of the Supreme Court of Connecticut; former Southmayd Professor of Law, Yale University.

4. See GILMORE supra note 2, at 27.
5. CAL. CIV. CODE §§ 1-3543 (West 1954) (effective date Jan. 1, 1873). For historical background on the legislative and judicial development of "The California Civil Code," see the special commentary by Arvo Van Alstyne at 1 to 43 of the first volume of the Code.
Samuel Williston wrote the Uniform Sales Act and, shortly thereafter, Williston on Sales. It turned out to matter little whether a state had adopted the Sales Act or not. Where it was enacted, it was often not cited; where it was not enacted, Williston on Sales often furnished a satisfactory substitute authority.  

This happy primacy of the common law courts came to be undermined, I believe, by two developments. On the one hand, the school of jurisprudence called legal realism challenged the methodological authority of the rule of law as elicited from a particular line of cases by demonstrating the ease with which a competing rule of law could be derived from a competing line of cases depending upon one's selection of a relevant fact pattern. Secondly, the New Deal, by accelerating the rate of change in the law, essentially by the use of legislation set the stage for statutory patterns in the law that I believe to be irreversible in form, although perhaps, if President Reagan succeeds, they may be reversible in substance.

It seems to be indisputable that by the end of this century, our legal landscape will be one in which statutes of one kind or another will be, not just occasional landmarks, but the dominant features on the map. The federal courts are there already. Felix Frankfurter made that observation about the Supreme Court of the United States some thirty-five years ago, and other federal judges have shared his observations since then. I must report that state courts have, if somewhat belatedly, gotten into the statutory swim. Reviewing the cases decided in my court since we started this last October, I found only a scant ten percent of them to be purely common law cases: two involving construction of deeds, and one concerning the propriety of imposing equitable restraints upon the enforcement of a promissory note. Everywhere else, statutes were relevant if not determinative of the controversy. Significantly, the role of statutes is just as crucial in the litigation involving so-called common law subjects, such as torts, contracts, property, and procedure, as elsewhere. Litigated negligence cases, when they con-

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7. J. Frank, Courts on Trial (1949).
cern accidents in the workplace, run into workers' compensation statutes; when they arise out of automobile accidents, they run into motor vehicle statutes. Contract cases are affected by the Uniform Commercial Code, by statutory liens such as mechanic's liens, and by a host of licensing statutes. Procedure is governed by judicially adopted rules of practice that are legislative in their effect even though they are judicial in their origin. Real property law is heavily influenced by local regulation in the form of zoning ordinances and by state and national regulation in the form of environmental controls.

Even in cases to which no statute presently applies, the fact that the legislature is always, or virtually always, in session casts a considerable shadow on innovation in common law growth and development. For example, there is a growing caselaw concerning employer liability for the retaliatory discharge of an employee hired at will. From one perspective this is ordinary, or almost ordinary, tort law, analogous to tort liability for malicious misuse of legal process. Yet a court deciding whether to impose such liability for the first time must be concerned with the inferences to be drawn from recent legislative refusal to act on a statute requiring all discharges to be "for cause" or from recent legislative enactment of a statute forbidding discharge of an employee in the limited case of his testimony, under subpoena, as a witness in a criminal case. Like the Pennsylvania Supreme Court in Geary v. United States Steel Corporation, the Connecticut court, in Sheets v. Teddy's Frosted Foods, Inc., has been willing to define a common law cause of action for a retaliatory discharge that substantially implicates state policy, but the opinions have not been without their critics. Other important questions of policy, such as governmental immunity for tort liability, the Connecticut Supreme Court, at least, has not been ready to re-examine, in large measure because of the limited exemptions that the legislature has from time to time created.

In sum, it is clear that the relationship between statutes and common law cases has taken a turn of nearly 180 degrees from the point at which we appear to have started at the beginning of the century. Statutes are now central to the law in the courts, and judicial lawmaking must take statutes into account virtually all of the time. As statutes have become ubiquitous, judicial attitudes have adapted to the changing scene. Hardly ever is a statute now regarded as a candidate for narrow construction because it may be in derogation of the common law. More often, the issue is rather to what extent a statute is itself a source of policy for consistent common law development.

I would like to discuss three aspects of the statutory world into which we have emerged. The first is the question of how statutes should be researched and interpreted, in short the problem of statutory construction. The second is the question of how common law developments are affected by statutes even when, properly interpreted, the statutes do not govern. The third is the question of the extent to which common law courts can restrict the application of statutes which, when properly interpreted, do govern.

I.

Statutory construction seems, at first blush, to be too mundane a subject to discuss at all. Sutherland has, after all, written volumes, volumes that one suspects are more often cited than read. Regrettably the judicial vantage point reveals some recurring trouble spots. The first of these is the difficulty that we all encounter in locating relevant statutes. I am of course particularly sensitive to cases in which the Uniform Commercial Code (U.C.C.) is overlooked, which arise with dismal regularity. But the U.C.C. is not the only statute that fails to surface. Courts and counsel frequently miss a statute that is directly in point and rarely venture in search of statutes that are indirectly applicable. I can only speculate why this unhappy state of affairs should persist. Of prime importance is the fact that few of us have been trained to do statu-

tory research. We cut our legal teeth on cases, not statutes, and we tend, therefore, to *look* for cases rather than for statutes. It is almost as if a statute was not firmly planted in the legal turf until some court had found it and commented upon its scope and meaning. Furthermore, the legal materials that we use most comfortably are case oriented rather than statute oriented. When the legislature passes a statute reversing or modifying a common law line of cases, that fact is not generally noted in the case digests or in the case Shepard's. Even when one thinks to look in the legislative indices, they tend to be unhelpful for anyone without pre-knowledge of the statute's existence. The indices are, for the most part, vertically organized, by existing statutory classifications, rather than horizontally across statutory lines. To revert again to the U.C.C. cases with which I am familiar, the general index to the Connecticut statutes\(^\text{17}\) contains no reference for unconscionability\(^\text{18}\) or for impracticability of performance.\(^\text{19}\) To discover, in Connecticut, that the U.C.C. has suggestions for the law of accord and satisfaction, one would have to know to look under "reservation of rights."\(^\text{20}\) Perhaps electronic retrieval will remedy this situation, although even there it may well be necessary to rely on educated surmise to discover the language that the statutory author is likely to have employed. There is an urgent need for lawyers to develop greater sensitivity and better techniques for locating relevant statutory materials.\(^\text{21}\)

Having found a statute that may apply, a lawyer is then faced with the task of reading it. What a cheerless undertaking! Cases are fascinating; they engage our attention because of the human drama that they portray, but statutes! That is why it is much easier to read comments on statutes than statutes themselves (note the "Comments on Comments" by Skilton).\(^\text{22}\) It takes an extraordinary act of will to work through a statute of any length. While it is clear that every word must be read, it is equally apparent that a reader cannot rely on the literal meaning of every word, without inquiring how that word is used elsewhere in the statute. In the

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19. U.C.C. § 2-615.
21. Perhaps a first step would be a unified case-statute index.
U.C.C. there are some sections, such as the one dealing with installment contracts, that are intrinsically unreadable, and others, such as those dealing with negotiation of negotiable instruments, that only become unreadable when read in unison with each other. In Connecticut we have an intricate mechanic's lien statute. I have had five cases dealing with it and have only now come to begin to unravel it in its entirety. With deference, I think that with all of the emphasis recently placed on teaching clinical skills, we have insufficiently noted the importance of teaching statutory skills.

Of course, some statutes come to us with helpful secondary gloss. They may have a legislative history, although in state legislation such a history is more often the exception than the rule. Many statutes are the product of compromise and tradeoff, so that the search for a single legislative intent is fruitless. Even statutes which have no history may, however, develop a present source of interpretation. Statutes whose enforcement is entrusted, in the first instance, to administrative agencies often generate regulations which, once located, are enormously helpful. Regulations, because of their greater specificity and because they are frequently blessed with illustrative examples, tend, like "official comments," to be much more readable than the underlying statutes. It is clear that the Internal Revenue Code would be entirely impenetrable to any non-specialist without Internal Revenue Service regulations. On a state level, insurance and banking regulations often serve a similar highly useful function.

There is, however, another source of interpretation that is less accessible than legislative history or administrative gloss. As common law lawyers we are trained to search for analogy when we seek to understand the case law that confronts us. It is just as vital to think by analogy when dealing with statutes. Let me cite two illustrative examples.

Last spring, the Connecticut Supreme Court had a case, England v. England, in which the principal issue was the availability of a prejudgment remedy in a law suit sounding in equity rather

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than in law. The statute directly applicable permitted an attachment "in any civil action in which a judgment or decree for the payment of money may be rendered."\textsuperscript{28} That language was not very helpful for a plaintiff whose prayer for relief asked for an order requiring the defendant to set up a trust. It is true that the plaintiff had also thought to append a boilerplate provision requesting such other equitable and legal relief as might be necessary and proper. At one point in our deliberations there was considerable judicial sentiment for fastening upon his addendum to the complaint as a basis for affirming the trial court's granting of the attachment. A later set of statutes furnished a broader, and I believe sounder, basis for the affirmance. In response to decisions by the Supreme Court of the United States, such as \textit{Fuentes v. Shevin},\textsuperscript{29} the legislature had enacted a series of procedural safeguards surrounding applications for prejudgment remedies, provisions for hearings and bonds and the like.\textsuperscript{30} These recent statutes, containing procedural amendments to the pre-existing law of attachments and garnishments, described prejudgment remedies as being generally available "in any action at law or at equity."\textsuperscript{31} This broader language in the later statutes cast a new statutory gloss on the earlier provision, and enabled us to hold, once and for all, that prejudgment remedies are available in both legal and equitable proceedings. I do not mean to suggest that 1981 was any too early for the joinder of law and equity to manifest itself in Connecticut law. I do, however, believe that statutes are best interpreted as part of the mass of legislative enactments.

Another example of the need to search out related statutes stands out in my mind because it was one of the first cases assigned to me in 1978 when I joined the court. \textit{Phipps v. Niejadlik}\textsuperscript{32} concerned a teacher who had suffered a heart attack while he was teaching at one of the state colleges. The record revealed the concession that his myocardial infarction was not causally related to his employment; he was overweight, perhaps even a smoker. In any event, the legal issue was his widow's entitlement to recover benefits under a statute covering "an injury sustained while acting

\begin{itemize}
\item \textsuperscript{28} \textit{CONN. GEN. STAT. ANN.} § 52-329 (West 1960).
\item \textsuperscript{29} 407 U.S. 67 (1972).
\item \textsuperscript{30} \textit{See, e.g., CONN. GEN. STAT. ANN. §§ 52-278(a) to 52-278(m) (West Supp. 1981).}
\item \textsuperscript{31} \textit{Id.} § 52-278(b).
\item \textsuperscript{32} 175 Conn. 424, 399 A.2d 1256 (1978).
\end{itemize}
within the scope of employment.\textsuperscript{33} The court had to decide whether a heart attack could constitute an "injury" and, if it could, whether this injury could be said to have been sustained "within the scope of employment." In interpreting this latter language, it seemed important to compare it with similar language in other sections defining, on the one hand, benefits under workers' compensation, and on the other, benefits for other state employees similarly or dissimilarly situated. Not surprisingly, such an expanded scope of reference cast a different light upon the meaning of the directly relevant section than that which could be gleaned from the reading of that section alone. The majority opinion came to be criticized from two sides. On the one hand, there was a dissenting opinion stating that the majority had gone too far afield in departing from the plain language of what the section directly in point had to say.\textsuperscript{34} I do not want to debate what meaning is plain—I find few things plain in the language of the law—but I do believe that the majority's frame of reference was the only appropriate one. Finding analogous statutes is, however, no easy undertaking. When the opinion was published, it was criticized from the other side, for having failed to consider still other provisions that might have been relevant. I must acknowledge that that was very likely true. The court's failure to exhaust the relevant statutes illustrates the precise point that I want to make. We need to learn how to think about statutes by analogy as aggressively and as extensively as we presently think about cases by analogy. We need to train ourselves to think statutes through.

In addition to legislative history, administrative regulations, and related statutes, there is still a fourth source of learning to help us to interpret statutes intelligently. That is the common law that surrounds a particular statutory enactment. Certainly the law of substantial performance in the common law of contracts has had a bearing on the statutory perfect tender rule in the law of sales.\textsuperscript{35} Courts can justly be criticized only for their lack of candor in revealing the extent to which common law seepage is regularly allowed to permeate the interstices of statutory development. Some statutes of course invite such osmosis.\textsuperscript{36} When article 2 of the

\textsuperscript{34} 175 Conn. 424, 399 A.2d 1256, 1260 (Bogdanski, J., dissenting).
\textsuperscript{36} See Calabresi, supra note 1.
U.C.C. was being drafted in the 1940s, the assault on the citadel of privity was still confined to minor skirmishes in the context of particularly virulent goods such as defective foodstuffs or egregious breaches of express warranty. By the time of the U.C.C.'s enactment in the 1950s and 1960s, the privity battle was in full swing, and the U.C.C.'s implied warranty sections had to be made to fit, lest they be reduced to instant obsolescence. Few state courts had substantial difficulty in making the adaptation, and fewer, to my knowledge, expressed any misgivings about attributing expansive meaning to narrowly defined statutory concepts of sales and sellers. In Connecticut, fortunately, this conundrum did not have to be faced, since in enacting section 2-318, the Connecticut legislature added a sentence saying expressly that "the section is neutral and is not intended to enlarge or restrict the developing caselaw on whether the seller's warranties . . . extend to other persons in the distributive chain." 38

It is serendipitous when those who draft statutes opt for a style which makes the statute a framework within which the law can develop rather than a straight-jacket that limits its growth. I have commented elsewhere that even within the U.C.C. the draftsmen adopted drafting styles, sometimes for reasons beyond their control, that exhibit marked divergences in attitudes about the relationship between statutory fiat and common law development. 39 Bankruptcy law as a backdrop for secured commercial transactions mandates a different approach than international banking law imposes on letters of credit. When background permits, however, a healthy respect for the scarcity of unclouded crystal balls counsels caution about the risks of statutory overdrafting.

It is not only in commercial law that courts are called upon to read statutes purposefully in order to make them accommodate to needs that the legislature did not clearly foresee. In construing statutes facially, courts often encounter problems that raise serious constitutional questions about the validity of a statute. It is sometimes feasible to consider construing a statute in a way that the language does not, on first literal reading, suggest. It is not unusual

37. Prosser, Assault upon the Citadel, (Strict Liability to the Consumer), 69 YALE L.J. 1099 (1960).
38. CONN. GEN. STAT. ANN. § 42a-2-318 (comment 3)(West 1960).
to read into a statute a requirement that a government official must give proper notice of his action in order to avoid problems of procedural due process. In order to avoid an argument of denial of equal protection, a statute may be construed to treat alike those between whom a statute, on a literal reading, might differentiate. For example, the Connecticut court had to construe a statute providing good time credits for convicted criminals, which appeared, on its face, to tie such credits, which determine the length of confinement in prison, to the date of a criminal defendant's original incarceration, rather than to the date of his reconviction when a new trial had been required to resolve his case. The literal wording of the statute would have distinguished between a defendant out on bail, pending his first appeal, and one immediately incarcerated. Poverty is sufficiently close to being a suspect classification for equal protection purposes so that the court read the statute to avoid the invidious distinction.

I believe that common law courts have a responsibility to read statutes contextually as well as literally. I know that others do not agree. Long ago when I was spending a day at the Harvard Law School, I happened to discuss with Erwin Griswold, then its Dean, my interest in working out a casebook for the Uniform Commercial Code which would take such a contextual point of view, which would seek to relate and to evaluate its provisions by comparing them with the emerging common law in less codified areas. Dean Griswold thought this was an entirely wrongheaded approach. It was much more appropriate, he thought, to focus entirely on the statutes themselves and to see them as a source of law independent of common law interference. Perhaps our difference in viewpoint is in part attributable to our differences in field. Tax law may well pose different problems. And I acknowledge that in my approach there is the risk of moving too rapidly from statute to gloss, to overleap too quickly the difficult task of ascertaining first, with absolute clarity, what the statute itself has to offer before deciding whether marginal adaptation is appropriate.

I am, however, comforted by the fact that what I propose has honorable historical roots in what another former Harvard Dean,

42. E. Peters, Commercial Transactions (1971).
James Landis, once called "the equity of the statute." Under its authority, "exceptions dictated by sound policy were written by judges into loose statutory generalizations, and ... situations were brought within the reach of the statute that admittedly lay without its express terms." The doctrine of "the equity of the statute" appears to have fallen into disrepute when Blackstone came upon the legal scene in the eighteenth century. It must be acknowledged that the historical notion of "the equity of the statute" may appear today to give too unlimited a range of authority to common law judges. It must be noted furthermore that the doctrine arose at a time when statutes were drafted more broadly and in a parliamentary system of government where separation of powers was less well defined than under our law. Nonetheless, I think we do better to recognize candidly, as Dean Landis urged, that common law developments and statutes are equally important constituent elements that a court must attempt to fuse in order to serve the interests of justice.

II.

What has been said so far about interpretation cannot of course serve to describe the totality of the relationship between case law and statutory law. Plainly, every statute has some boundaries, and the question then arises whether, and when, it is appropriate to apply the statute, as a matter of common law, beyond its designated boundaries.

I do not believe that there is any longer any serious doubt that statutes may have what one might call an extraterritorial effect. Judge Lehman of the New York Court of Appeals, in the 1934 case of Agar v. Orda, stated the proposition as follows. By placing certain rules into a statutory code, the legislature had, as he put it, "shattered or destroyed general common-law [sic] rules inconsistent with the statutory code." In determining the rules applicable in cases not covered by the statutes, the court was therefore obligated to determine whether there were inherent differences between those cases outside the statute and those within it. In the absence of such inherent differences, in order to reestablish a gen-

43. Landis, Statutes and the Sources of Law, in Harvard Legal Essays 213, 214 (1934).
44. Id. at 215.
45. 264 N.Y. 248, 190 N.E. 479 (1934).
46. Id. at 252, 190 N.E. at 480.
erally consistent common law universe, the statutory rule would be applied. Agar v. Orda concerned remedies for breach of contract in transactions involving choses in action—stocks rather than goods. The U.C.C. has similarly been used as a source of law in federal cases involving impracticability of performance, and in state cases involving unconscionability.\(^\text{47}\) To turn to non-commercial law examples, OSHA regulations inform common law negligence by constituting evidence of the standard of care required to be maintained at a worksite.\(^\text{48}\) The Connecticut court has presently before it a case in which it must decide whether the various statutes governing misuse of a motor vehicle combine to impose liability on a police officer who fails to stop an errant motorist before he causes personal injury to another.

The only limit that a court is likely to encounter in its consideration of a statute as a source of common law policy is the practical one of locating the statute that it ought to take into account. That problem I have already noted. Its importance bears underlining but not repetition.

III.

Lastly, let us consider the inverse of the case law/statutory law relationship just noted. That is, what authority does a court have to refuse to enforce a statute that, properly interpreted, applies to the case at hand, but appears, nonetheless, to be in some way fatally flawed? This is the issue that is the central concern of Professor Calabresi's recent book.\(^\text{49}\) Professor Grant Gilmore also has written on this subject.\(^\text{50}\) For this question, there are no easy answers, only tentative suggestions and cautious proposals.

The limits of this discourse are about the only aspect as to which there is general agreement. Courts are not free simply to disregard statutes which, as legislators, they would have voted against. Legislators are not required to make policy decisions that please courts; legislators are not even required to make policy decisions that are universally fair.\(^\text{51}\) Unless legislative action runs into

\(^{50}\) Gilmore, Putting Senator Davies in Context, 4 Vt. L. Rev. 233 (1979).
\(^{51}\) See CALABRESI, supra note 1.
constitutional constraints, the legislative voice generally determines the demands of policy and the ultimate choice among social and fiscal responses. There is, furthermore, widespread agreement, at least in the scholarly community, that courts risk much and gain little unless they use their constitutional powers sparingly.\textsuperscript{52}

With respect to caution in the use of constitutional authority, there is, on the whole, little to fear from state judges. The state court house is, if anything, too close to the state legislative house. Far from shutting the door to further legislative action, in Connecticut at least, most decisions involving unconstitutionality have concerned failures of procedural due process which the legislature has had no difficulty correcting.\textsuperscript{63} The court decided last year that a statutory limitation on the serving of alcohol in restaurants on Good Friday violated the first amendment;\textsuperscript{54} the legislature promptly built on that decision to permit liquor sales as well by package stores.\textsuperscript{55} Possibly it was more controversial to invalidate the Sunday closing law, although the statute that was finally struck down gave considerable evidence of having been deliberately torpedoed in the legislature through the accretion of ever-expanding exemptions.\textsuperscript{56} Perhaps the most far-reaching constitutional decision of the last ten years has been the case in which local school financing devices were found to be constitutionally inadequate, but there too the court stayed its hand to allow the legislature a chance to regroup and to find a constitutionally (and politically) viable solution.\textsuperscript{57}

That leaves us with the statute which is not unconstitutional but which a court would nonetheless like to influence. The class of such statutes is differently defined by Professors Calabresi and Gilmore and me. Professor Calabresi is most concerned with statutory obsolescence, with statutes that continue to remain on the books although their present reenactment seems doubtful.\textsuperscript{58} Pro-


\textsuperscript{57} Horton v. Meskill, 172 Conn. 615, 376 A.2d 359 (1977).

\textsuperscript{58} See CALABRESI, supra note 1, at chapter 1.
Professor Gilmore says statutes are most unsatisfactory in their middle age. In his words, as always eminently quotable, "Admittedly the statute is no longer what it once was but there is life in the old dog yet. An occasional subsection still has teeth and subparagraph (3)(b) may burn with a gem-like flame." For myself, I am most troubled about what the legislature has done lately. The democratization of our political processes, the pressure for the immediate institutional responses, the spotlight cast by the media, all have the capacity for producing legislation that is, from its inception, ill-conceived. Chief Justice Rose Bird of the California Supreme Court, speaking at the National Judicial College last fall on "The Role of the Judge in the 80's," noted the extent to which we have as a nation come to place a higher value on image and on speed than on sober reflection. "Life in the fast lane," as she put it, is reflected in a headlong rush by legislators to achieve a quick fix for every social problem. Legislators feel that they need to stand up and be counted, on subjects ranging from the appropriateness of allowing physicians to prescribe marijuana for patients on chemotherapy to the desirability of requiring juries to convict, rather than to acquit, criminal defendants who are found to be insane. Who can be sure that these statutes, almost always well-intentioned, may not hit an entirely unforeseen obstacle or target?

It is apparent that different observers of the statutory scene will inevitably focus on different unfortunate statutes whose continued existence, in their present form, strikes them as regrettable. Those who are scholars are of course always in a position to suggest amendments and deletions. From law revision commissions, if they survive budgetary incursions, we can hope for systematic efforts at keeping the statutory law consistent and up-to-date. Yet, the reality is that reform efforts do not have the same legislative appeal as do statutory innovations. It is notoriously easier, so all the commentators would agree, to pass a statute than to revise it. Should courts, because they are, after all, removed from the political battleground, because they are not majoritarian institutions, simply accept the failings of statutory processes, of what Professor Calabresi calls statutorification? What alternatives do courts have, other than misuse of their constitutional powers or distortion of their interpretive powers?

59. GILMORE, supra note 2, at 96.
60. See CALABRESI, supra note 1, at 79.
Professor Calabresi calls this the problem of assigning the burden of legislative inertia. He proposes that we consider ways and means by which courts might persuade legislatures to take a second look at statutes that are or might become misguided missiles. To paraphrase his words, we need to see if courts can be used, through techniques analogous to those employed in making common law, to determine where the burden of inertia ought to lie to force the legislative agenda. After all, he argues, all judicial non-constitutional lawmaking is in a sense conditional, because in a democratic society, it is always subject to revision by the legislature. We all recognize that much judicial lawmaking is silently ratified by long periods of legislative acquiescence. We countenance judicial lawmaking, although it is often removed from immediate majoritarian control in fact, because we think that judges, by virtue of their training and their independence, are well suited to mapping out the legal landscape. If we accept all of that, and if we allow courts periodically to update the common law, why not countenance judicial modification of statutes? In either case, if the courts are moving too far from the policies which the legislature wants to enforce, the legislature is free to act, and will retain the last word.

The question a court ought to ask itself, the first judgment it must make, according to Professor Calabresi, is whether the disputed statute “fits” the legal landscape, because that is what a court is good at discerning and because “fit” is likely to correlate with continued majoritarian support for the statute. In looking at “fit,” a court will naturally consider both the surrounding common law and the surrounding statutory law that make up the legal landscape. Indeed, Professor Calabresi urges that consideration also be given to the accretion of scholarly criticism, to take into account both intellectual and technological revolutions. Tellingly, he notes that the life expectancy of a statute varies with its age. “As with people, the life expectancy of a statute and of a judicial decision, too, is relatively low right after birth, becomes very high after the rule has survived a few years, and then diminishes as it ages.”

If a court decides that a statute is not a good “fit,” what then? Can a court impose a new rule in substitution for the statute? A court can indicate its displeasure with the existing rule, while con-

61. Id. at 80.
62. Id. at chapter 9.
63. Id. at 132.
continuing to apply it, and can hope that its unkind words will provoke a legislative response. If there is opportunity to threaten rather than to act, there is less danger of treading on doctrinally difficult waters. To the litigant, the news that he will lose, although some day the law will change, is of course not particularly gratifying, but he may nonetheless have served the cause of justice. This technique for dealing with statutes resembles prospective overruling of a common law doctrine, and encounters the same tensions between long run and short run fairness. Alternatively, a court may simply refuse to apply the statute and await legislative response to this more provocative form of judicial lawmaking. Often, that solution, although theoretically cleaner, may not be available. Take two related tort/contract problems. Courts could, and did, revise into virtual oblivion sections of the Uniform Commercial Code that had failed to anticipate the consumer revolution in products liability. But courts do not have the capacity to revise out-of-date payment schedules for workers’ compensation and could only bring that issue to legislative attention by direct criticism of the existing standards or by limiting application of the existing workers’ compensation system. Finally, courts, in contemplating what “fits,” must bear in mind the possibility that the legislature was deliberately creating a special exception, and was not intending to enact good fit.

That, in the briefest of outlines, is the Calabresi thesis. Clearly, no two critical observers of the relationship between statutory law and case law will strike quite the same balance for the judge who wants to respond intelligently and appropriately to the complex statutory network that a court encounters. The Calabresi book is invaluable for forcing us to think hard about the limits of judicial power and the wisdom of its exercise. It is unquestionably true that it is no longer possible to deal with statutes in isolation from the common law. Yet judges who embrace the Calabresi thesis are as likely to find it as much a source of new questions as of new answers. If judges perceive that legislation may have ill-considered consequences for the legal landscape as a whole, must judges not be equally reflective of the disruption that may follow from judicial intrusion into policy making? Judicial intervention may be seductively tempting because of the particular facts of an

64. Id. at chapter 11.
65. U.C.C. §§ 2-316 and 2-719.
especially appealing case that may be quite unrepresentative of the legal landscape as a whole. It is still true that hard cases make bad law. For those of us who are inclined to see ourselves as judicial activists, it is nonetheless heady indeed to contemplate extension of our hegemony to the world of statutes. Only a sober recognition that we may intrude only when we must, and that we must step cautiously when we can, will help us to begin to find our way. Professor Calabresi has begun to map out the difficult turf that lies ahead, but a detailed roadmap must await another day.