Marquette Law Review

Volume 46
Issue 2 *Fall 1962*

Article 8

1962

Remedial Legislation

Rudolph H. Heimanson

REMEDIAL LEGISLATION

RUDOLPH H. HEIMANSON*

Like a good many legal expressions, "remedial legislation" is a vague and loosely applied term. It seems desirable to identify it more closely and to survey the many jurisprudential issues to which it points. According to the definition of *Corpus Juris Secundum*,[1] a remedial statute "is designed to correct an existing law, redress an existing grievance, or introduce regulations conducive to the public good." *American Jurisprudence*,[2] while agreeing with these views, extends the term to statutes which provide practical means for obtaining relief. First of all then, we should note that "remedial" covers two different meanings: substantive and operational. In our discussion, we shall disregard the operational type, because it refers mainly to the mechanics, not to the spirit of the remedy.

Looking to the explanations of the substantive type, one question arises at once: legislation for the public good—it is certainly needed and welcome, but is there anything special about it? Should not every law in its final application serve the public good? We have to inject here the time-honored but never outworn issue of popular government and its impact on lawmaking. We are wont to say that under popular government, laws are made *by* the people. We do not always state—outside of reciting the Gettysburg address—that they should be made *for* the people. These two concepts—*by* and *for* the people—are harmonious but not synonymous. Laws could be made by the representatives of the people and still be indifferent, even hostile, to their interests. We have witnessed in our own lifetime the phenomenon of governments, which made the people participate in their own oppression. For a study in power politics, let us remember that the Nazis owed their absolute rule to an Enabling Law which was handed to them by a freely-elected—if somehow truncated—parliament. The Soviet state goes through the motions of a popular election which, under the One-Party system, means very little, but keeps up the pretense of a democratic process. We knew that this is a sacrilegious mockery of the democratic idea, but it demonstrates that democracy is more than a technical procedure. Promotion of the public good is the touchstone of truly democratic legislation and the most effective distinction between popular and arbitrary administrations.[3] The term "remedial" as defined by the encyclopedias, would

* Professor of Law and Law Librarian, Cleveland-Marshall Law School, Cleveland, Ohio.

[1] 82 C.J.S., *Statutes* §338, p. 918.

[2] 50 AM. JUR., *Statutes* §15, p. 34.

[3] See also PATEN, TEXTBOOK OF JURISPRUDENCE, p. 77: "Law consists of the body of rules which the community considers essential for its welfare." (2nd ed. 1951).

therefore apply to ALL our laws. To identify remedial legislation as a special type, more is needed than a reference to the public good. Turning to straight semantics, a remedy is cure for an ill, the improvement of a situation, the filling of a gap. This too is mentioned in the definitions of *Corpus Juris Secundum* and *American Jurisprudence.* Again, we should ask whether this is not the final objective of every law. When a new law is passed, where none had existed, a shortcoming has been rectified. When a current law is being supplemented or altered, we speak of an "amendment," revealing, in the very name, the ameliorative purpose. In both cases, the enactment of the law fills a need and thereby improves a given condition. In a democratic system, no other law should exist; unneeded legislation is unsound legislation. This view of the purposes of lawmaking is compatible with almost all current schools of jurisprudence. Law is variously seen as a social precept; an expression of sovereignty; the realization of a moral idea; the reflection of a nation's history; a section, or an annex, of the social sciences. On the other hand, all sociological or ethical ties are ruled out by the teachings of "positive jurisprudence," which have today been strongly revived by Professor Kelsen's "Theory of Pure Law." This much noticed and discussed theory seemingly denies the remedial task of the law, because according to its views, law is merely a system of valid norms, self contained and not committed to specific purposes. Tracing this concept to its roots, we find a "primary norm" as the source of all law. He who sets the norm, creates and shapes the law. Law is thus determined by the nature of the State. The Pure Law Theory, quite consistently, proclaims that in an autocracy, tyrannical laws are genuine laws, in keeping with the nature of the State; they reflect the whim of the ruler. Consequently, even the Pure Law Theory does not refute the political overtones of lawmaking. As a government activity, lawmaking is naturally and vitally influenced by political thoughts. Regardless of what school of jurisprudence we follow, we must acknowledge the kinship between political science and law. American jurists, in their majority, have never denied the political science links of the law, yet they have never stated them with any explicity either. This restraint may be caused by opposition to Austin's "analytical jurisprudence." Austin identified law as a command of the ruler, and thus overstressed the political factor. But criticism of his theory refers to the concept of the law; it does not dispute the fact that the making of the law is under any set-up an exercise of political power. Austin did err when he equated the *power* with the *idea,* when he failed to distinguish between the *validity* and the *value* of the law. To our modern thinking, law is both a directive and an ideal. This dualism is alive, even though the English language takes no proper cognizance of it. The single term "law" conceals an actual division into *loi* and *droit, Gesetz* and *Recht, lex* and *ius.* True, the Roman *ius*

survives in our "justice," but all too often we view justice as a mere technical application of the law, and as such, an exclusive function of the courts. We should be aware, however, that justice is not an adjunct, but a component of the law, and therefore, a legislative responsibility as well. If justice were restricted to the courts alone, we would face the strange fact that an ethical principle applies to one, but not to another, part of our legal system. Instead, we should recognize that law in all its branches serves the same goal, and that the just verdict, which we expect from the courts, must be matched by just legislation.

In order to be "just," legislation must actively consider the public interest, i.e., create laws to protect and to advance it, change those which offend it. The creative and corrective purpose which our legal encyclopedias ascribe to remedial legislation, applies indeed quite generally to the making of *all just* laws. To this extent, we are bound to declare that all sound legislation is intrinsically remedial.

Should we then conclude that "remedial legislation" lacks an identification of its own, that it is merely a decorative tag for legislation as such, and that the problems, usually associated with it, are the general problems of all statutory law?

Certainly not. Rather, we should acknowledge that two types of remedial legislation exist: (1) General laws, which, in order to be sound, must be in fact remedial. (They stand in contrast to laws which do not qualify as just, and may, in severe cases, even be challenged as unconstitutional.) (2) Specific statutes, which are enacted for a *preconceived* helpful purpose. This distinction is far more than academic. In a general statute, the remedial effect is a yardstick of its usefulness; in a specifically-remedial statute, "remedy" is its guiding spirit, its raison d' etre, its actual life.[4]

The principal problems of remedial legislation arise from *specifically-remedial statutes.* Probably one of the best known issues is: Broad versus strict construction. According to many authorities, remedial statutes should, as a rule, be broadly interpreted. The beneficial purpose of a remedial law calls indeed for a liberal application. The general premise, that remedial statutes should be broadly construed, seems sound enough—but what about its implications for other laws? Should we infer that general laws should be strictly construed? If we accept such an uncompromising view, we invite disagreement. If, on the other hand, we concede liberal interpretation for other laws too, why then should we in our statement on broad interpretation single out just the remedial type? To find a way out of this puzzle, let us look more

[4] A typical example of specific-remedial legislation is the amendment to WISCONSIN STAT. Ann., §269.46(1), which grants relief from judgments and orders, brought about by excusable mistake on the part of the defendant. Likewise, §50D of the NEW YORK GENERAL MUNICIPAL LAW allows tort claims against charity hospitals.

closely at nature and degrees of interpretation. Strict interpretation, it appears, clings to the words of a statute,[5] broad interpretation considers their implications;[6] one finds what the statute says, the other what it wants to say. This leads straight to the problem of the legislative intent. In broad interpretation, the search for implications points in the direction of the intent, the moving spirit behind the words. Conversely, the intent should be of lesser importance for strict interpretation, where the wording alone determines the meaning of the law.

Legal science, however, has not developed a very consistent and distinctive view on the "intent." The majority of reported decisions stresses the paramount role of the intent in any interpretation.[7] Even in a clash between text and purpose, the text has to yield.[8]

What, then, remains of the difference between "strict" and "liberal?" If the intent dominates in any event, if extrinsic elements are injected into the text, interpretation loses its strictness. One cannot dodge the conclusion that the all-importance of the intent severely blurs the line between strict and liberal interpretation. Little comfort is drawn from Sutherland's explanation in his treatise on Statutory Construction.[9] "Liberal construction," he states, extends the letter to include matters within the spirit or purpose," in strict interpretation "the letter is narrowed to exclude matters which, if included, would defeat the policy of the legislature."

One cannot help feeling that both versions really say one and the same thing: the purpose of the legislature controls the reading of the text. Also, "narrowing of the text," with "a view to exclude matters," actually reaches beyond the text and indicates liberal rather than strict interpretation.

Of the various jurisdictions, Missouri has most openly challenged the distinction between strict and liberal interpretation: ". .. our courts are not wedded to strict or liberal construction."[10] This seems to modify the court's previous stand for literal interpretation;[11] at any rate, it attests to the prevailing uncertainty and fluctuations in this field. Radin,

[5] Priest v. Capitain, 236 Mo. 446, 139 S.W. 204 (1911): "Strict construction is . . . according to its letter, . . . admits no implications."

[6] Massey v. Poteau Trucking, 221 Ark. 589, 254 S.W. 2d 959 (1953): "Liberal construction consists in giving statutory words meaning . . . to accomplish purpose . . . or fulfill intent . . ."

[7] Cf. AMERICAN DIGEST, key numbers *Statutes*, 181, 184, 190.

[8] Safe Way Motor Coach Co. v. City of Two Rivers, 256 Wis. 35, 39 N.W. 2d 847 (1949): "In interpreting statutes, the intent of the legislature is a controlling factor." Ervin, Attorney General v. Peninsular Telephone, 53 So. 2d 647 (1951): "The Supreme Court has the duty to ascertain the legislature's intention; intent must be given effect even though it may appear to contradict the strict letter."

[9] 3 SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION, §5505 (Callaghan, 1943).

[10] In re Duren, 355 Mo. 1222, 200 S.W. 2d 343 (1947).

[11] Priest v. Capitain, *supra*, note 5.

in his article on Statutory Interpretation,[12] recognizes, and partly deplores, the fluctuations of construction procedure, and calls every construction *"more or less* strict" [Emphasis supplied]. Justice Frankfurter[13] flatly refuses to honor—even to mention—the legislative intent. Unlike Radin, however, he does not discount the differences between strict and liberal construction. On the contrary, he favors the *literal* over the *liberal*: an interpretation which is free of extraneous links and preserves the sanctity of the text. Exponents of this view may not be the majority, but they deserve to be heard. In the *Caminetti* case,[14] the Supreme Court upheld the text of the law as a legitimate clue to its meaning. Again, in *Magnane v. Hamilton*,[15] Judge Sutherland requests that the words of an act "must be given their ordinary meaning." The Court, however, waivers in *United States v. Constantine*[16] and reads a submerged meaning into the statute in question. This impelled Judge Cardozo, in his dissent,[17] to exclaim: "There is a wise and ancient doctrine that a court will not inquire into the motives of a legislative body." A California decision likewise reminds us of the primary importance of words:[18] "The court first turns to words themselves. . . . Intention at odds with the intentions *articulated in the statutes,* cannot be ascribed" [Emphasis supplied]. This view is remarkable because it does not reject the intent, but sees it expressed in the text. We should, indeed, not forget that words are the natural repository of ideas; therefore, the wording of an act is the main key to its objective. An overzealous concern for "implications" may cause us to misjudge the value of language. The case for the importance of words has been strongly pleaded by Charles P. Curtis:[19] "When a legislature enacts a statute, it enacts certain words, and nothing else." He scorns the quest for hidden motives with the brisk dictum: "The Congressional Record is not the United States Code." One should agree that interpretation of a statute is, like any interpretation, an explanation of the *text.* But Mr. Curtis overstates his case when he sees "nothing else" behind the words. The text is not an empty shell. It indicates and contains a meaning. We do look for the intent of a statute, because each statute *intends* to fulfill a *meaning.* This *statutory* intent is not necessarily identical with the *legislative* intent. Statutory intent is the purpose and reason of the law, as demonstrated by the text. If the text, thanks to its clarity, reveals a "plain

---

[12] Radin, *Statutory Interpretation,* 43 HARV. L. REV. 863 (1930).
[13] Frankfurter, *Some Reflections on the Reading of Statutes,* 47 COLUM. L. REV. 523 (1947).
[14] United States v. Caminetti, 242 U.S. 470 (1917).
[15] 292 U.S. 40, (1934).
[16] 296 U.S. 287, (1935).
[17] *Ibid,* at 299.
[18] People v. Knowles, 35 Cal. 2d 275, 217 P. 2d 1 (1950).
[19] Curtis, *A Better Theory of Legal Interpretation,* in JURISPRUDENCE IN ACTION, 135, 143 (New York, 1953).

meaning," no further speculation is invoked.[20] In case of doubt and ambiguity, inquiry into the surrounding circumstances may disclose the exact statutory intent.

"Broad interpretation," however, means more than detecting the proper meaning. The term "broad interpretation" is in itself elastic. It can be widened into a consideration of analogies. Analogy is not the implied but the symbolic meaning of a word.[21] There is a fine but distinct difference between an implication and an anology. The former still centers around the original meaning, the latter reaches out for parallel ideas. On various occasions, courts have applied a statute beyond strict semantic limits, treating its chosen terms as symbols rather than as curbs. In an insurance case, where benefits depended on the plaintiff's inability to "work," a federal court drew an analogy from "work" to "regular occupation."[22] In the *Holy Trinity* case,[23] the court rejected an analogy between a "laborer" and a "professional worker." On first glance, this exclusionary definition appears restrictive rather than broad, and, technically, it is. But the law itself, which barred the importation of "laborers," was restrictive, and the refusal to extend the restriction amounts to a liberal application. For similar reasons, criminal provisions, relating to "railroad cars" have not been applied to "motor vehicles."[24] What is the motive for drawing or refusing analogies? The answer is: Equity, a concept which is not limited to judicial procedures, but a necessary part of legislation. We had already stressed that remedial legislation is inspired by considerations of justice—a reassertion of the ancient equity idea. The call for equitable interpretation is thus particularly strong in the remedial field; it should certainly not be overlooked for other types of law.[25] Liberal treatment of remedial statutes, prompted by their equitable goals, has been recognized as the guiding rule. Exceptions have been advocated for statutes which *derogate the common law,* and in some jurisdictions they are still narrowly construed.[26] In more than 40 statutes, though, narrow interpretation has been abolished by special legislation,[27] such special legislation, incidentally, is in itself, remedial. Thus, the fires of a once burning issue have died down—

---

[20] See also In re Brown's Estate, York et al. v. State, 168 Kan. 612, 215 P. 2d 203 (1950): "This statute is plain and unambiguous. There is no room left for judicial interpretation."

[21] *Cf.* Frankfurter, *supra* note 13, at 528: "Words are symbols of meaning."

[22] Rushing v. Travelers Insurance, 133 F. Supp. 707 (E.D. Okla. 1955).

[23] Church of the Holy Trinity v. United States, 143 U.S. 457 (1892).

[24] Smith v. First Judicial District of Nevada, 75 Nev. 526, 347 P. 2d 526 (1959).

[25] See Davisen v. Andersen, 125 Cal. App. (2) 928, 271 P. 2d 233 (1954): "A common sense construction, which brings about justice, should always be placed on legislation."

[26] See e.g. Falls v. Employers Liability Assurance, 104 F. Supp. 256 (W.D. La., 1952).

[27] For details see Fordham and Leach, *Interpretations of Statutes in Derogation of the Common Law,* 3 VAND. L. REV. 438, 449 (1950).

but they are not quite extinct, and they illuminate a basic problem of our law: The balance between case law and legislation.

If in our legal system case law were truly predominant, broad construction of a deviating statute would be illogical. Moreover, the legislature would not have real authority to demand such construction from the courts. Fact is, that case law does not predominate and that legislation has become a full fledged partner. Yet in our terminology—and perhaps in our semi-conscious thinking—we still cultivate the historic view of the pure case law. In the early beginnings, courts were indeed the only guardians of the law; Parliament was not at first a legislative body—its very name points to "speech" rather than "action," and the King's lawmaking powers or intentions were often negligible. But even Blackstone recognized "lex scripta," i.e., statutory law. At least two centuries ago, the Anglo-American system ceased to be a *pure* case law system. It presents, instead, an interlocking relationship between legislative and judicial activities. In deciding a case, courts must apply any pertinent statute. If no statute exists, courts will, by their own action, fill the void; to sum it up, case law *interprets* and *supplements* statutory law. Neither of these two functions establishes judicial superiority. In interpretation, courts are bound by the text of the law; supplementation is predicated on the absence of such law. In both instances, courts must look to legislation first. We do occasionally refer to the reviewing powers of the Supreme Court as "judicial supremacy." This is a misleading term, because the testing of the constitutionality of a law is a typical "check and balances" procedure, and does not in a general way place case law above legislation. In the final analysis, judicial review is oriented toward legislation: The Constitution, which it upholds as the "highest law," is in itself a statutory law.

We should cleanse our jurisprudential vocabulary of several existing inaccuracies. It is not precise to say that our legal system is a mere case law system and as such opposed to the statute-based "Civil Law."[28] The Civil Law does not rely on Codes alone, but, through "jurisprudence constante," on judicial precedent as well, just as in our system case law works in conjunction with statutes. For comparative evaluation, and for a truer understanding of our own system, we should take notice of these similarities.

How far are our legal practitioners aware of the need to correlate case law to statutes? To put it more tersely: How statute-minded are our judges and attorneys? There is much room for improvement. It would be naive to assume that every search for law invariably starts with the Code, and that, when finding a case, we are still curious on

[28] This, too, is a confusing term. It stems from the debatable assumption that the Civil Law of Rome had exclusive influence on other systems, and none at all on ours.

what statute it rests. In reality, statutes are quite often overlooked. Roscoe Pound deplored the prevailing "indifference," even "contempt" for statutory law,[29] and Justice Stone voiced the same complaint.[30] Fordham, in his above quoted article, lists several instances where courts plainly ignored the statutory request for broad construction of remedial laws. Disregard of statutes is probably caused by over-consciousness of the Anglo-historical roots of our law. It almost certainly follows from the continuous "case law" reference; words, as advertising science teaches us, shape our thinking. To promote respect for legislation, is a prime responsibility of our law schools. Some of them, as Professor Jones[32] points out, may be slack in the performance of this duty. He compares legislation with the constructional design of a building, and case law with maintenance and remodeling. This would mean that, in the partnership between case law and legislation, legislation is the *senior* rather than the junior partner. Surprising and heretic as this may sound, case law itself supports this theory. When statutory law conflicts with case law, case law, by its own admission, yields.[33] This incursion into case law by the legislature may be incidental, i.e., not the immediate objective of the statute. On the other hand, the law may have been enacted for the express purpose of deflecting the case law from its present course. This is remedial legislation in its most determined form. Remedial legislation is concerned with defects in the law at large, it is not merely a refinement of legislation proper. Change of case law by remedial legislation is an approved principle, and an often used device. As one of the many typical examples, we quote again the amendment to *Wisconsin Statutes Ann.* § 269.46(1),[34] which gave relief from judgments caused by the defendant's error. Not only did it provide a remedy hitherto unknown, but in so doing it changed a judicial doctrine which had been in force since 1881.[35] The likewise mentioned amendment of the New York Municipal Law[36] was caused by inadequacies of the common law. The judicial situation on torts liability of charitable hospitals had been so complex and vacillating that finally the legislature stepped in to straighten it. On the federal level, the amendment of U.S. Code Title 18, ch. 223, sec. 3500 is remarkable.[37] Passed in the interest of national safety and of private constitutional rights, it regulates the

[29] Pound, *Common Law and Legislation,* 21 HARV. L. REV. 383 (1908).
[30] Stone, *The Common Law in the United States,* 50 HARV. L. REV. 4 (1936).
[31] *Supra,* note 27.
[32] Jones, *A Case Study in Neglected Opportunity: Law Schools and the Legislative Development of the Law.* 2 J. LEGAL ED., 137 (1949).
[33] See the landmark case, Huguley v. Huguley, 204 Ga. 692, 51 S.E. 2d 445 (1949); also: Newton v. Mitchell, 42 So. 2d 53 (1949); Thomas v. Wisconsin Dept. of Taxation, 250 Wis. 8, 26 N.W. 2d 310 (1947).
[34] *Supra,* note 4.
[35] See the comments in Paschong v. Hollenbeck, 13 Wis. 2d 415, 108 N.W. 2d 688 (1961).
[36] *Supra,* note 4.
[37] 71 Stat. 595 (1957).

production of statements and witness reports in criminal prosecutions brought by the U.S. Government. Remedial in its primary aims, it also strives to prevent wrong applications of the closely related *Jencks* doctrine.[38] It appears from the Reports of the Senate Committee on the Judiciary[39] that Congress did not want government files subjected to indiscriminate disclosure. The *Jencks* case could be taken as an encouragement for such disclosures, and the amendment to Title 18, ch. 223 warns courts away from this conclusion. Here, too, as in the Wisconsin and New York examples, remedial legislation sets up a definite course for the courts to follow. It emphasizes, however, that the new formula does not affect previous interpretations, but works entirely in the future.

This points to another sensitive problem of our legal system: Should changes in the law be *pre-* or *retro*-spective? Usually, changes of legislation are thought to be prospective, those of case law retroactive. It is true that a non-remedial, retroactive statute might breach the "due process" and "ex post facto" clauses of the Constitution. But in a *remedial* law, "due process" may actually be promoted by extension of the remedy, and the ex post facto provision aims to curb penalties, not to withhold benefits. Retroactive operation of remedial statutes is advocated by *Ohlinger v. United States,*[40] by *General Motors Acceptance Corporation v. Anzelme,*[41] and, more cautiously, by *Vest v. Cobb;*[42] exceptions are, understandably, claimed for laws which would upset contract rights.

One may indeed wonder why retroaction should be denied to statutory law, whereas it seems to be the norm in case law. Overruling, we have generally thought, changes the law ab initio; more than this, it proclaims that the old doctrine never existed.[43] Although legal science still introduces this version as current, it is neither fully tenable, nor consistently practiced. It presupposes that the old rule was an error, a misrepresentation of the real law. This is only partially true. In a great number of cases the old doctrine was discarded, not because it was originally wrong, but simply because it was obsolete. Courts do recognize that overruling need not erase an error but could change the law as of now.[44] Overruling, which not only rectifies but improves the law,

[38] 353 U.S. 657 (1957).
[39] *U.S. Code Congressional and Administrative News,* 85th Cong. 1st Sess. p. 1861-64 (1957).
[40] 135 F. Supp. 40 (S.D. Idaho, 1955).
[41] 222 La. 1019, 64 So. 2d 417 (1953).
[42] 138 W. Va. 660, 76 S.E. 2d 885 (1953). For an outright rejection of retroactive effects, see State v. Zangerle, 133 Ohio S. 532, 14 N.E. 2d 932 (1938).
[43] See the celebrated case Mickel v. New England Coal Co., 132 Conn. 671, 47 A. 2d 187, 117 A.L.R. 1001 (1946).
[44] Cf. Elkins v. United States, 364 U.S. 206 (1960): "Rule became outworn"; People v. Cahan, 44 Cal. 434, 282 P. 2d 905 (1955): "Rule must yield to the experience of a succeeding generation."

parallels remedial legislation. Some observers, and notably the exponents of the "error theory," have denounced reformative overruling as "court legislation."[45] This argument is hardly conclusive, because our legal system clearly envisages participation of the courts in law making. In his famous dissent in *Southern Pacific v. Jensen*,[46] Oliver Wendell Holmes acknowledges that judges do, and must, legislate; Cardozo, too, realized that the "power to declare the law carries with it the power to make the law."[47] When, on preceding pages we disputed the thesis of pure case law, we underscored the coordination between case and statutory law. Legislation claims a major place but no absolute superiority. Yet the demand is made that reform of the case law should come from legislation only. In *People v. Friedman*,[48] the court tersely states that "the defendant's remedy lies with the legislature;" the Supreme Court of Pennsylvania[49] maintains that any change of an established doctrine "ought to be effected by the Legislature"; Patterson, in his treatise on Jurisprudence,[50] feels that the "drafting of legislation by a Law Revision Commission seems a much better way to bring about changes." The creation of a Law Revision Commission, desirable as it is, is not everywhere a reality. It had been, in New York and some other states, inspired by Cardozo's proposals for a "Ministry of Justice."[51] Yet Cardozo himself did not deny that courts may change their own law: "I do not say that judges are without competence to effect changes themselves."[52] It seems indeed incongruous that courts should not be free to mend their own product. Let us remember that in the absence of a statute, courts do create the law; if they could form it in the first place, why not *re-form* it at a later date? We sympathize with the view in *Woods v. Lancet*,[53] that courts, which refuse to reshape their own rules, abdicate their own function. The history of this case (which dealt with prenatal injuries) revealed that the New York Law Revision Commission had passed up a chance to propose remedial legislation in this field. This points straight to the heart of the problem: remedial legislation and overruling do not *exclude*, but *supplement* each other. There are, in our legal system, no monopolies, but there is inter-action. Remedial legislation has the power to change judicial precedent, but this does not destroy the courts' own power to do it. In arrogating to themselves a curative function, legislators do not deny these functions, a priori, to the courts; neither do courts, by reformative overruling,

[45] Von Meschzisker, *Stare Decisis in Courts of Last Resort*, 37 HARV. L. REV. 409 (1924).
[46] 244 U.S. 205, 221 (1917).
[47] CARDOZO, THE NATURE OF THE JUDICIAL PROCESS, 124 (New Haven, 1921).
[48] 302 N.Y. 75, 96 N.E. 2d 184 (1950).
[49] Knecht v. St. Mary's Hospital, 392 Pa. 75, 140 A. 2d 30 (1958).
[50] PATTERSON, JURISPRUDENCE; MEN AND IDEAS OF THE LAW, 579 (Brooklyn, 1953).
[51] Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 113 (1921).
[52] *Ibid*, p. 118.
[53] 303 N.Y. 349, 102 N.E. 2d 691 (1951).

invade the province of the legislature. The inter-acting relationship between remedial legislation and overruling has been most tellingly expounded by the Supreme Court in *Funk v. United States*:[54]

> . . . legislative bodies have the power to change old rules of law—nevertheless when they fail to act, it is the duty of the courts to bring the law into accordance with present standards.

The responsibility for law reform is shared by the legislatures and the courts. In acting on their own, each one picks up an option, left unused by the other.

Remedial legislation stirs up some other delicate issues: can it be employed to cure private contracts and deeds? The New York Court of Appeals affirms this.[55] The problem touches the foundations of contract law and leads us away from our subject. But we should take cognizance of its existence. It discloses an affinity between *remedial* and private legislation: Every private law is intrinsically remedial—should remedial legislation branch out into private case law? We are again reminded of the sometimes vague nature of our terminology. Most "private" laws are not entirely "private." Passed for the relief of individuals, they still operate in the public rather than the private sphere: taxation, immigration, civil service, etc. Others do not style themselves as private, but, like the so-called group statutes, as public—yet, by the usual standards they might be called private, because they are not addressed to the public at large. More logically, none of them really reflects "private law," the relationship between individuals. In the field of contracts—a genuine private law area—remedial legislation may have a place; it may also turn out to be a two edged weapon. A certain measure of restraint may be in order; the idea itself is by no means alien to our basic concepts. Legislation, as we have seen, is a vital force in the creation and rejuvenation of all our law. In its relationship to case law, it is neither inferior, nor domineering nor at cross purposes with it. Our survey of remedial legislation should alert us to a reappraisal of some of our phraseologies and attitudes, to an awareness that our law reflects an interactive, unifying effort of courts and legislatures.

---

[54] 290 U.S. 371, 385 (1933). See also Brown v. Georgia-Tennessee Coaches 88 Ga. App. 519, 77 S.E. 2d 24 (1953): "We have a charge to keep"; Montgomery v. Stephan, 359 Mich. 33, 101 N.W. 2d 227 (1960): "Judge-invented-judge-destroyed."

[55] Meigs v. Roberts, 126 N.Y. 371, 56 N.E. 838 (1900).