CHAPTER 4

Legislation *

Sec. 4–01. Lawmakers and legislation. Several kinds of governmental agencies create standards for the guidance of individuals and officials. These agencies include the convention or assembly, which establishes the basic instrument of government called the constitution; the legislature (or in the case of the federal government, the Congress) whose function is to enact statutes, sometimes called acts, public acts, or laws; cities, towns and villages, which enact ordinances; various executive and administrative officers and boards which exercise rule-making authority; and the courts, which lay down rules, principles and doctrines in the decision of cases.

To the extent that these various agencies produce standards of behavior, I shall speak of them henceforth as lawmakers, speak of their grist as law, and call their activity lawmaking. The word legislation, however, I shall reserve for enacted law and distinguish between legislation on the one hand and judicial lawmaking on the other. Accordingly, legislation will

* (I.R.) Suggestions for further reading:
Field, David Dudley, Centenary Essays (New York University, 1949), a group of papers dealing with codification and law reform.
Pound, “Sources and Forms of Law,” 21 Notre Dame Lawyer 246–314 and 22 ibid. 1–80 (1946), discusses sources of law, the traditional elements in law, and the imperative element; the last title covering legislation and codification.
Read and MacDonald, Cases and Materials on Legislation (1948), a very useful collection of material.
Sutherland, Statutes and Statutory Construction (3rd ed. by Horack, 1943), a large treatise recently revised; contains material on the legislative process as well as the interpretive process.
include three types of law: (1) constitutional provisions (2) statutes (3) executive or administrative rules.¹

Sec. 4-02. Scope of chapter—statutes as chief subject. The present chapter will be devoted to legislation as above defined. The process of judicial lawmaking will be considered fully in a later chapter. However, it does not seem to me necessary to consider all three types of legislation in equal detail. Statutes constitute the most prominent type of enacted law. The legislature is a body established for the very purpose of enacting statutes; it acts frequently and prolifically; it creates the lion's share of standards applicable to individuals and to officials. I believe therefore that the character and significance of legislative activity will be amply developed by a discussion of the making and the effects of statutes. And, apart from occasional remarks about the effects of constitutional provisions and three sections in which subsidiary lawmaking is briefly considered, all the following discussion of legislation will center on the acts of the legislature.¹

The material of this chapter will be taken up under the following heads:

The legislative process.
Standards for the lawmaker.
Subsidiary lawmaking.
Lawmaker’s statement of standards.
Significance of legislation.

¹ Patterson uses "legislation" in essentially this manner. He includes in the term all forms of law which are characterized by "textual rigidity." He mentions as specific examples the Constitution of the United States, treaties, federal statutes, federal executive orders and administrative regulations, state constitutions, state statutes, administrative regulations, municipal ordinances, and rules of court. Dowling, Patterson, and Powell, Materials for Legal Method 2.1–2.9 (1946).

¹ Except where I specifically refer to the Congress or to a state legislature, I shall use the word legislature henceforth in the generic sense to refer to the Congress, to a state legislature or to either without distinction. This usage will avoid a cumbersome reference to the Congress each time I wish to refer to the act of statute making.
Sec. 4-03. Enactment of statute—a series of steps. A statute does not spring full-blown from the legislative brow as Minerva did from the brow of Jove. The process of getting a law on the books usually extends over a considerable period of time. It involves many distinguishable acts of different persons.\(^1\) A law is suggested, formulated, debated, revised, amended, and adopted. Its completion involves such separate steps or acts as the preparation of a bill, the introduction of the bill in one house of the legislature,\(^2\) the reference of the bill to a committee, the consideration, revision, and redrafting of the bill by this committee, the return to the house of the bill with the committee’s report, the debate on the bill in the house, its adoption by the house, the signature and certification of adoption by the presiding officer and clerk, the repetition of all these steps in the second house of the legislature, the signature or veto by the chief executive of the state, the repassage of the bill by the necessary majorities in case of veto, and finally the publication of the enacted law in some official form. In other words the legislative process is not a solid indivisible unit but a series of interconnected steps; it is not a simple instantaneous occurrence but a sequence of acts.

Sec. 4-04. Occasion and purpose of legislation. The legislative act, like all forms of human action, originates in a felt need to change the environment.\(^1\) In the legislative situation

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\(^1\) The adoption of a constitution or a specific constitutional provision is also a series of acts in which various agencies participate. There are not only distinguishable acts in the constitutional convention itself, but the work of the convention is ordinarily submitted to the voters to be accepted or rejected.

\(^2\) Before the process of enactment is complete the proposed law is commonly called a bill or draft. When the process of enactment is complete the bill or draft becomes an act, statute or law.

\(^1\) By “change the environment” we can mean either an alteration of the environment itself, or a change of the environment in the sense that the actor
the actor recognizes a need to change the patterns of action which govern the behavior of his fellows. He becomes aware of the fact that these patterns of action, or standards, are not the best available or that they are not as effective as they should be under prevailing conditions. He recognizes the need to change standards or to set up new ones. Often the perception of the need for change originates outside the legislature; the legislature’s attention is directed to the need by some individual or group of persons. But in any event the legislature itself must recognize this need. The need is the occasion for legislation; it is, to paraphrase a statement of Lord Coke, the mischief and defect for which the existing law does not provide. 2

Closely related to the occasion for legislation is the purpose of legislation. In fact this purpose is nothing more than what the legislature aims to do about the need which it recognizes. The purpose of action and the occasion for action cannot really be severed from one another; the purpose of action springs from an existing occasion. The lawmaker acts to meet a need, as I have just said. His action is remedial; his purpose is to change existing standards. First of all he has to decide upon a general purpose—what he wants to accomplish by amending or creating standards. What behavior of A or O does he wish to foster or bring about? What ends or objectives does he wish to achieve by amending or creating legal standards? It is not too important how we characterize such questions: whether we call them questions of objectives or ends, or whether we call them questions of purpose or of policy. All of these characterizations—and they are all used—come to about the same thing. All mean that the

moves from one environment to another. The legislative change in the environment is, needless to say, of the former type. It involves a change of surrounding social conditions by altering prevailing legal standards.

2 Heydon’s Case, 3 Co. 7a (1584). Coke is speaking of the factors which have to be considered in interpreting a statute. Among them he counts “what was the mischief and defect for which the common law did not provide.”
lawmaker has to face the problem of deciding what is socially desirable; he has to decide what results he wants to bring about by amending or creating legal standards. This is the basic legislative problem.

Suppose, for example, it is suggested to the lawmaker that there is a liquor problem, a need to eliminate the use of intoxicants by establishing and enforcing prohibitory standards. He must decide whether it is a real need and, if so, what to do about it. He has to make a choice among such alternatives as these: (1) to undertake to prevent the harm, individual and social, that flows from overindulgence in intoxicants, perhaps by outright prohibition of the traffic in intoxicants; (2) to check the misuse of intoxicants, by forbidding their sale at certain times, e.g., after midnight, or by preventing their use by certain persons, e.g., minors; (3) to induce the individual to be temperate in the use of intoxicants, by employing the educational machinery of the state; (4) to adopt a hands-off policy and so allow each individual to decide for himself how far he will indulge in the use of intoxicants, or at least allow him to decide for himself except as he is checked by the standards of other social institutions, such as the family or the church; (5) to pursue a policy quite the opposite of that which is suggested and encourage each individual, by education or otherwise, to make the most of his opportunities for alcoholic indulgence, on the theory of the saying "eat, drink, and be merry for tomorrow you may die." All these are possible alternatives for the lawmaker. Which of these alternatives is to be chosen? Which is to be the objective of the state as expressed in its legal standards?

Ordinarily, the occasion for enactment is not mentioned in the legislation itself, nor is the purpose for which it is intended announced. The lawmaker takes need and purpose for granted and simply issues directives for the guidance of
individuals and officials. This, I mean to say, is the common type of legislative act; it sets forth standards of behavior without indicating the reasons of need and purpose which lie behind them. But only recently the Congress and the legislatures of some of our states have revived the practice, not unusual several centuries ago, of declaring in their important legislative acts the needs on which they are based and the purposes to be promoted by their enactment. The following section from the federal Fair Labor Standards Act is typical of this modern practice:

“Congressional finding and declaration of policy. (a) The Congress finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

“(b) It is declared to be the policy of sections 201-219 of this title, through the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.”

The importance and helpfulness to the interpreter of a declaration like this, can hardly be overestimated. The point

3 Good examples of the former practice are two famous statutes which you will encounter in your first-year property course: the Statute De Donis Conditionalibus, 13 Edw. I, Westm. II, c. 1 (1285) and the Statute of Uses, 27 Hen. VIII, c. 10 (1536). Both statutes contain elaborate statements about the need for legislation and the purposes intended.

is one which you will see better when we consider, in the next chapter, the roles played by legislative need and legislative purpose in the processes of interpretation.*

Sec. 4-05. Legislative provisions as means. The first major problem of the lawmaker, as I have just said, is to determine what he wants to accomplish. His next problem is to decide how he will accomplish the purpose or purposes which he has set for himself. This is the problem of choosing means. What are the appropriate standards to establish for individuals and officials in order to accomplish his general objective? What are the best devices to use to effectuate the standards he sets up, and thus carry out his general plan? 1

Various phases of the problem of means have already been discussed. In section 2-01 it was pointed out that the lawmaker uses legislation as a means to ends; it was said "The lawmaker, L, issues general directives to the community as the owner of a factory might issue instructions, blueprints and models to guide the work of the men in his factory." In section 2-43 it was said that the lawmaker "uses standards instrumentally, to control the behavior of others. He creates them as one might devise tools for particular purposes. He sets them up in order to achieve results which he wishes to bring about. These observations hold equally of all standards; whether for obligatory, prohibited, effective, permitted,

*(I.R.) Discussion of the occasion for legislation and of legislative purpose, arises most often in connection with interpretation. Until a doubt about the meaning of legislation arises these factors are taken for granted; and, as I have said in the text, they are not usually mentioned in the legislative enactment. However, the importance of these factors in interpretation derives from the fact that need and purpose represent important aspects of the legislative act. And I believe that the student obtains a better conception of the legislative act and of the relation of legislation to interpretation, if he is introduced to legislative need and legislative purpose as factors in the legislative process.

1 From this viewpoint, both the standards which his statute establishes and the effectuative devices which he provides for (e.g., penalties, etc.) are means used by L to accomplish his legislative purpose.
discretionary or ineffective acts. All standards alike are related to a maker as his handiwork; all are employed to guide the activity of others, by furnishing them with verbal patterns to follow." And in sections 2–29 to 2–42 we dealt in some detail with problems of effectuating standards. Here the problems were all essentially problems of choosing appropriate means; in particular the need to consider the attitudes of persons to be controlled by standards was emphasized, and available methods and devices for motivating their behavior were discussed. In chapter 3 similar problems relating to methods of controlling officials were analyzed. All these materials have illustrated the approach to legislative provisions which we are talking about. The materials do not need to be discussed again. I have only referred to them here because they represent an important approach to the legislative process and one that is essential to a well-rounded view of the lawmaker’s job.

However, legislative ends and means cannot be weighed quite independently of one another. Means signify nothing apart from an end or purpose which they serve, and an end is only realized through the use of appropriate means. Like legislative occasion and legislative purpose, legislative purpose and the means of execution are inseparable in practice. Try, for example, to distinguish between purpose and means in the legislative problem mentioned in the following news item in the Detroit Free Press, April 23, 1949:

"SENATE DELAYS LIQUOR BILL. The [Michigan] Senate almost stopped grocery clerks under 21 years from carrying a customer’s case of beer.

"In a drive to prevent all persons under 21 years of age from handling liquor, the Senate passed the bill.

"Then Senator Henry R. Kozak, Detroit Democrat, induced the Senate to reconsider the bill so he could offer an amendment."
"But the amendment was so broad it was considered as bad one way as the bill was the other way and the whole question was put over till Monday."

Obviously, the Michigan Senate could not completely divorce the purpose to keep intoxicants out of the reach of minors from the problem of devising ways to carry out this purpose. The distinction between the lawmaker's purpose and the means of accomplishing it is not a final physical division of matter, like sawing an object in two; it is just a useful differentiation of two approaches to the legislative problem. Both approaches are possible and both are fruitful, but often the two approaches show us pretty much the same matters.

Sec. 4-06. Sources of legislative provisions—social context. What are the sources of statutory enactments? Where does the lawmaker find the standards and legal ideas which he declares in statutory form? He must find them somewhere in his own social heritage. His ideas do not spring from nowhere; he is limited by the knowledge of his time; he acts within a social context or background.* Genuine legislative inventions are rare; ordinarily the legislator does not show marked originality. Types of legislative provisions grow and change with the centuries, but they change very slowly. The great mass of legislation repeats, imitates, and adapts oft-used models.

* (I.R.) The social background of the lawmaker's act—what we here call the social context—serves four important functions: (1) It furnishes materials on which the lawmaker may draw in composing an enactment; it is a source of legislation in this sense. (2) The social context provides standards for the lawmaker's own act; thus provisions of the constitution govern L's act and the standards of moral, natural or divine law may set limits to L's activity; all these are background of L's act and in this sense are part of its social context. (3) The social context provides material for the process of interpretation; the interpreter performs a supplementary legislative function and draws on source materials just as the lawmaker himself does. (4) The context also provides standards to guide the interpreter. The first of these functions is developed in section 4-06 of the text; the second in secs. 4-08 to 4-11 and 4-31; the third and fourth functions of social context, in chapter 5.
Sometimes the lawmaker borrows statutory provisions verbatim from the statutes of another state, as where he copies the Workmen's Compensation Law already in force in the other state. Often he finds the essential pattern for a statutory provision in the decisions of his own or another state. Or he finds the suggestion of the need for legislation in the decisions of his own state and works out the details of an enactment by following the lines of analogous legislation of his own or another state. Or he derives the suggestion for an enactment from the standards of Holy Writ, or the moral ideas of the community,\(^1\) or the writings of some author who discourses on legal or social subjects. Or he finds and adopts a standard already formulated, more or less definitely as the norm of some social institution, such as a church, a professional association, or a labor union. Or he finds a standard already implicit in the habits and practices of the majority of the community, as where he finds that most persons are accustomed to drive in a certain manner and, framing a traffic code, adopts the common practice as the legal rule for driving.

Sec. 4-07. Problems. Analyze the two following items in terms of occasion, purpose, means, and sources of legislation:

1. *Enactment of the Mann Act* (White Slave Act).\(^1\)

Before considering specifically the enactment of the Mann Act in 1904, it will be worthwhile to set forth some of the legislative and social background within which the enactment falls. As early as 1875, Congress had taken steps to prohibit "the importation into the United States of women for the

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\(^1\) In sec. 7-45 we shall discuss the "higher law" theory according to which human law is ultimately derived from natural law or Divine Law.

\(^1\) 36 Stat. 825, sec. 2, 18 U. S. C., sec. 398, May 18, 1904. Both this statement regarding the enactment of the White Slave Act and the statement about the enactment of the Wisconsin Workmen's Compensation Law were prepared for me by Mr. Charles Hanson of the law class of 1950.
purposes of prostitution." 2 That this prohibition apparently proceeded through both houses of Congress without the slightest degree of opposition is evidence of the fact that in so acting, the Congress was merely giving voice to a community standard of conduct definitely opposed to such practices. 3 This and succeeding acts, however, left much to be desired with respect to the solution of the problem of the white slave traffic, a trade which by the early part of the 20th Century had reached considerable proportions. 4

The reasons for the inadequacy of the then existent legislation were several. First, although in 1904 the United States had entered into a multi-nation treaty for the purpose of stamping out the traffic, this agreement proved to be of little practical worth. 5 Without considerable aid at foreign points of debarkation, enforcement of the immigration laws as a sole means for eliminating the trade were almost bound to prove insufficient. In addition, even completely effective operation of such laws could not strike strongly at the large number of persons already engaged in the traffic within the borders of this country. 6 Further, the participants were not easily amenable to state regulation since it was discovered that they moved frequently from place to place. 7 In addition, because of the absence of federal legislation, the interstate

2 Act of March 3, 1875, 18 Stat. 477, sec. 5.
3 Further confirmation of this view may be had by examining statements made in the course of Congressional debates and others appearing in Congressional reports with respect to later, but closely allied measures. See 45 Cong. Rec. 1037, 1039, 61st Cong., 2d Sess., "Importing Women for Immoral Purposes"; Senate Document, No. 196 (Jan. 26, 1910) 32, 61st Cong., 2d Sess. (Dec. 10, 1909).
traffic was looked upon as being safer than that carried on intrastate. 8 This was the situation facing the draftsmen of the Mann Act, section 2 of which will be considered here.

The objects of this legislation, although not fully spelled out in the enactment itself, are indicated to some degree in the title: "An Act to Further Regulate Interstate and Foreign Commerce by Prohibiting the Transportation Therein for Immoral Purposes of Women and Girls, and for Other Purposes." Further elucidation of the societal changes sought to be accomplished, can be gotten from an examination of several previously noted references. First, the measure apparently was designed to supplement the immigration laws in solving the problem of excluding new additions to the trade by providing for further penalties as to interstate activity. These additional sanctions were perhaps considered valuable as providing a degree of deterrence which would serve to limit the number of persons who might attempt to run the immigration gauntlet where the penalties imposed by the immigration laws taken alone would not so operate. 9 Secondly, because of the prevalence of interstate activity in the trade, it was felt that a step toward preventing its existence could be taken by preventing such movement. 10

To achieve these objects, penalties were imposed upon those who violated the provisions of section 2 of the Act through use of the instrumentalities of interstate or foreign commerce for the transportation of females for immoral ends. These penalties consisted of a fine of not more than $5000 and of imprisonment of not more than five years. It should be mentioned in passing that since, as previously noted, the white slave traffic existed in opposition to the established

social standards of the country, no broad problem of effecting social change was involved, and utilization of federal officers to apprehend the relatively few engaged in the trade would seem to have been appropriate.\textsuperscript{11}

2. \textit{Enactment of the Wisconsin Workmen's Compensation Law.}\textsuperscript{12} "It is a matter of common knowledge that this law forms the legislative response to an emphatic if not a peremptory, public demand. It was admitted by lawyers as well as laymen that the personal injury action brought by the employee against his employer to recover damages for injuries sustained by reason of the negligence of the employer had wholly failed to meet or remedy a great economic and social problem which modern industrialism has forced upon us, namely, the problem of who shall make pecuniary recompense for the toll of suffering and death which that industrialism levies and must continue to levy upon the civilized world. This problem is distinctly a modern problem. In the days of manual labor, the small shop with few employees, and the stagecoach, there was no such problem, or if there was, it was almost negligible. Accidents there were in those days and distressing ones, but they were relatively few, and the employee who exercised any reasonable degree of care was comparatively secure from injury. There was no army of injured and dying with constantly swelling ranks marching with halting step and dimming eyes to the great hereafter. This is what we have with us now thanks to the wonderful material progress of our age, and this is what we shall have with us for many a day to come. Legislate as we may in the

\textsuperscript{11} At the time immediately preceding the passage of the act there was considerable doubt as to whether Congress had the means at its disposal under the commerce power for preventing the use of interstate and foreign commerce for the transportation of women for immoral purposes (45 Cong. Rec. 809, 61st Cong., 2d Sess., Jan. 19, 1910). However, fortified by the "Lottery Cases," 188 U. S. 321 (1902), the sponsors of the bill succeeded in meeting this objection.

\textsuperscript{12} Ch. 50, Laws of 1911, Stats., Secs. 102.01 to 102.65.
line of stringent requirements for safety devices or the abolition of the employer's common-law defenses, the army of the injured will still increase, the price of our manufacturing greatness will still have to be paid in human blood and tears. To speak of the common-law personal injury action as a remedy for this problem is to jest with serious subjects, to give a stone to those who ask for bread. The terrible economic waste, the overwhelming temptation to the commission of perjury, and the relatively small proportion of the sums recovered which comes to the injured parties in such actions, condemn them as wholly inadequate to meet the difficulty. 13

To remedy this situation it was recognized at the outset that the legal relationship between the employer and the employee would require a basic reconsideration. As one writer stated the matter, "Many suggestions have been made as to a remedy, but commissions on Employer's Liability are strongly of the opinion that the industry itself should bear the burden and not the employee. The industry now bears the burden of the wearing out and destruction of machinery necessarily resulting from its use, and civilization now demands that the industry bear also the burden of the wearing out and destruction of the efficiency of the human machines without which the industry could not survive. . . . When a man's life is lost, or his efficiency decreased through injury in his employment, humanity demands that his dependents in case of his death, and he himself in case of injury, shall be cared for." 14

13 Borgnis v. Falk, 147 Wis. 327 at 347, 133 N. W. 221 (1911). For a summary of a consideration of the problem by a New York commission, see BULLETIN OF THE UNITED STATES BUREAU OF LABOR STATISTICS, WORKMEN'S INSURANCE AND COMPENSATION SERIES: No. 5, Whole Number 126, p. 19 (1913).

14 I Boyd, WORKMEN'S COMPENSATION AND INDUSTRIAL INSURANCE 10 (1913). This view was concurred in by the Wisconsin Special Committee on Industrial Insurance. BULLETIN OF THE UNITED STATES BUREAU OF LABOR STATISTICS, WORKMEN'S INSURANCE AND COMPENSATION SERIES: No. 5, Whole Number 126, p. 26 (1913).
To achieve this end, the Wisconsin legislature drafted a law making several changes in the employer-employee relationship. First, the defenses of negligence of a coworker and of assumption of risk were eliminated; and secondly, a comprehensive scheme was provided whereby any substantial injury received by the employee, in the course of or incidental to his employment would be compensated for according to certain definite rules laid down by a simultaneously created administrative agency.\(^\text{15}\) A further avenue for effectuating the desired social change lay in making application of the law compulsory.\(^\text{16}\) However, because there was considerable authoritative opinion to the effect that such a law would be later declared unconstitutional,\(^\text{17}\) the bill as passed required an affirmative election on the part of both employer and employee before the provisions of the act were applicable.

Thus, on September 1, 1911 when the Act became effective, Wisconsin was added to the growing list of jurisdictions which, led by Germany in 1883,\(^\text{18}\) had recognized the impact of the Industrial Revolution on the employer-employee relationship, and had softened that impact by bringing about conformation of this relation to the altered social need.

**Standards for the Lawmaker**

Sec. 4-08. Standards—where found. The acts of all our lawmakers are themselves guided and controlled by standards. To be sure, the framers of the original constitution begin with a slate which is clean and perform their funda-

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\(^\text{15}\) Borgnis v. Falk, 147 Wis. 327 at 346, 133 N. W. 221 (1911).

\(^\text{16}\) It should be noted that some legislative bodies felt that this was the only practical way of enforcing such a law. BULLETIN OF THE UNITED STATES BUREAU OF LABOR STATISTICS, WORKMEN'S INSURANCE AND COMPENSATION SERIES: No. 5, Whole Number 126, p. 27 (1913).

\(^\text{17}\) BULLETIN OF THE UNITED STATES BUREAU OF LABOR STATISTICS, WORKMEN'S COMPENSATION AND INSURANCE SERIES: No. 5, Whole Number 126, p. 26 (1913); Borgnis v. Falk, 147 Wis. 327 at 350, 133 N. W. 221 (1911).

\(^\text{18}\) For a historical review and analysis of the German scheme, see I BOYD, WORKMEN'S COMPENSATION AND INDUSTRIAL INSURANCE 25-52 (1913).
mental legislative acts with no other guidance than the traditional legal ideas of the community. After a constitution is once established, however, the amendment of it (and even the adoption of a new constitution) usually has to be carried out according to the tenor of an amendment clause of the existing instrument. The acts of the legislature in enacting statutes are covered by a variety of constitutional provisions. The legislature itself also establishes statutory standards to govern the processes of lawmaking; and each house of the legislature creates rules of procedure for the governance of its legislative and other business. The legislative acts of subordinate lawmaking bodies, such as cities and administrative agencies, are governed by constitutional provisions to some extent, but in the main by statutes. And finally, in the course of the centuries, the courts have developed many common-law standards which regulate their own lawmaking activities as well as the lawmaking activities of other organs of government, insofar as the latter are not controlled either by provisions of the constitution or by statutory enactments.

The standards controlling the enactment of statutes will be considered in the following sections; they fall into three types:

1. Constitutional provisions which confer general and specific power to legislate

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1 This of course was true only of the original thirteen colonies, which adopted their own constitutions, and also of the Republic of Texas. Other states which have been formed were controlled by the provisions of the Federal Constitution and to some extent by acts of Congress.

2 Certainly this is the normal conception of the manner in which change is to be effected; but change can be brought about by revolution, and in our own constitutional history there are a few instances in which changes have been wrought without obeying the mandates of the earlier instrument. The adoption of the Federal Constitution itself is an outstanding example. The Articles of Confederation of 1777 required that amendments be adopted by unanimous consent of the states. These Articles were superseded by our Federal Constitution by a method which did not conform to the Articles, i.e., when nine of the thirteen states approved. As we all know, all of the states did ultimately approve but ratification did not depend on unanimous consent.
2. Provisions of constitution, statute, or rules of order, which prescribe the form and manner in which legislative power is to be exercised

3. Constitutional provisions which prohibit certain kinds of legislation.

Sec. 4-09. Grants of power to legislate. The first type of standard applicable to statute making, and obviously the most basic and important type, is the constitutional grant of power to legislate. Such a grant confers authority on the legislature to do effective acts. The constitution maker announces to the world that L can establish standards for the guidance of others; he determines the purpose for which, and the field in which, L’s acts shall be effective. For example when the Federal Constitution provides that the Congress shall have “power to regulate commerce . . . among the several States,” it authorizes Congress to create effective standards for the regulation of conduct in a particular area. The analogy is close between such a grant of legislative power and the grant to A of power to do an effective act such as the making of a will; both grants provide for acts which will have effects within the legal system and both provide for acts which are to be done with foresight of these effects. The analogy is even closer between the grant of power to legislate and the statutory grant of authority to executive officials; the lawmaker and the policeman alike are authorized to do effective acts, the one to create legal standards, the other to enforce them. So that I think I am warranted in

1 The reader must not forget that I am speaking here of the typical American legal system, in which statute making always stands on a constitutional foundation.

2 There are differences in the bases of different effective acts. The effects of L’s acts are determined primarily by constitutional clauses; usually the effects of O’s acts depend on either constitution or statute or both. But these differences of foundation are not important in the present connections; the acts of L, A, and O alike produce intended legal effects, i.e., they have purposive significance within our legal system.
saying one prime characteristic of the statute maker's act is that it is an effective act, an act depending for its operation on a constitutional grant of power.

The constitutional grant of legislative power may be general or specific. The general grant of legislative power is characteristic of our state constitutions. These instruments ordinarily confer legislative power in broad terms which authorize the legislature to enact standards of behavior in any field whatever. But there are also constitutional clauses which make specific grants of power—power to legislate in specific fields or in regard to specific subjects. This type of provision, while not uncommon in the state constitutions, is predominant in the Federal Constitution. In terms of traditional doctrine, the Federal Constitution establishes a government of limited powers; this means simply that the legislative branch of the federal government (and other branches too) can do effective acts only in specified areas. Thus Congress is not given a general power to enact standards on any subject; instead, the Federal Constitution contains provisions that Congress shall have power "to regulate commerce with foreign nations and among the several States, and with the Indian tribes"; "to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations"; and power "to promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." Of course the distinction between general and specific grants of power is one of degree; even the specific grants of power to the Congress are very wide and comprehensive in practical application as I have previously pointed out.  

3 All of the grants herein quoted are found in Art. I, Sec. 8.  
4 See sec. 3–03, note 2. And the grant of power to lay and collect taxes to provide for the common defense and general welfare of the United States, would have to be regarded as a general grant of power, by any criterion of generality. See Art. I, Sec. 8, Cl. 1.
One might even maintain that provisions granting legislative power are not only enabling but obligatory in effect. They can be said to be obligatory in the sense that they implicitly impose a duty to exercise the power granted. They tell the legislature what it is expected to do, i.e., make standards for the community to live by. However, while such an implication of duty can perhaps properly be spelled out of any investiture with power, the fact remains that the constitutional provisions in question are actually expressed as grants of power, not as impositions of duty. Furthermore, a duty to legislate for the welfare of the community has little meaning except so far as the legislature itself recognizes an obligation. The exercise of its lawmaking power lies almost wholly within the legislature’s discretion. If it fails or refuses to act when it should, there is no real remedy except to choose a new legislative body that will act, or, more specifically, to replace its inactive or obstructive members by others who will do what needs to be done. The duty, if any, of the legislature to act for the general good is vague and tenuous; the dominant element in these constitutional clauses is power, not obligation.*

Sec. 4-10. Formal requirements. The second type of standard applicable to L’s act is that which prescribes the form and manner in which his authority to legislate is to be exer-

* (I.R.) As regards legislative acts lawyers and judges are almost exclusively preoccupied with the questions whether the act is effective and if so, what its effects are. This fact will explain why I find it desirable to look at the legislative act chiefly as an effective act and why I do not try to work out a sixfold classification of legislative acts such as I used in discussing acts of individuals. Most of the categories of acts in our sixfold classification would be empty, or almost empty, if we were applying them to acts of the legislature. The legislature is not expected to commit crimes or torts in the performance of its lawmaking functions. The standards which one finds in constitutions or elsewhere do not mention any such injurious acts. Nor does one find among these standards any reference to the legislature’s privilege of enacting law. The great bulk of standards applicable to acts of the legislature are cast in terms of what the legislature can do, and cannot do, effectively. This means, to refer again to the sixfold classification, that almost everything falls under the head of standards for effective acts.
cised. Some standards of this type—the most fundamental—are found in constitutional provisions. Thus, common constitutional provisions require that statutes be entitled in specified ways; that they be enacted a certain period of time before they take effect; that they be published in a certain manner;¹ that they be adopted by both legislative houses; that adoption by the respective houses be certified by the signatures of the presiding officer and clerk thereof; that statutes be signed by the governor, except when they are passed over his veto; and that the houses of the legislature keep certain records or journals of their proceedings. Other standards to control the legislature's act are found in statutes or resolutions adopted by the two houses and in the rules of order of the separate houses of the legislature. Ordinarily these statutes, resolutions, and rules deal with less important matters than the constitutional provisions and go into more detail; they are analogous to the rules of form and procedure which one finds in the bylaws of a society or corporation.

Sec. 4–11. Prohibitions. The third type of standard applicable to L's acts is that which expressly or impliedly prohibits lawmaking of certain types or on certain subjects. Examples of express specific prohibition are the Contracts Clause of the Federal Constitution which declares that “No State shall ... pass any ... Law impairing the Obligation of Contracts ...”; and the clauses of most, if not all, of the constitutions which forbid enactment of ex post facto laws: i.e., legislation which would operate to make an act criminal which was not so when done. Wider and more general prohibitions are represented by the Due Process clauses of the Fifth and Fourteenth Amendments to the Federal Constitution, which forbid the federal and state governments respectively to deprive persons of “life, liberty or property,

¹ As regards the requirement of publication, see also what is said in sec. 4–18 below.
without due process of law." These clauses do not, in terms, apply to legislative acts, but their terms are general and embrace any and all acts of government, including legislative acts; and, according to the settled interpretation, this is their effect.

Implied prohibitions are exemplified by the negative side of the "separation of powers" doctrine. According to this doctrine, prohibitory implications are to be drawn from the fact that the constitutions invest the legislature with the power of making laws, the executive branch with the power of administering the business of government and enforcing laws, and the judiciary branch with the power of adjudicating controversies. The fact that the constitutions invest the legislature with the lawmaking power is treated as an implied prohibition against its exercising other kinds of power, i.e., executive or judicial. Parallel results can be implied from the fact that executive and judicial powers are invested explicitly in those respective branches.

These prohibitory provisions and implications applicable to L's acts bear an obvious resemblance to the prohibitory standards applicable to A's acts; in this respect they appear to impose negative duties upon L. However, L cannot be sued or punished if he violates a prohibition, as A might be. The only important effect of a prohibition, such as that barring ex post facto legislation, is that it renders L's counter­vailing act ineffective. The courts do not approach the consider­ation of the question whether an act of the legislature is violative of a constitutional provision as if they were concerned with a duty problem. They talk and think in terms of legislative power or the lack of it; and so do all the rest of us.*

*(I.R.) The situation is similar to that in which we consider whether a particular contract is violative of law. It is true that one can commit crimes and other wrongs by making contracts, e.g., by contracts in restraint of trade. Yet contracts are acts which raise chiefly questions of legal effects; they are
Sec. 4-12. Problems. Consider the following items in relation to the matters presented in sections 4-08 to 4-11 above:

1. The Michigan Constitution, like many other state constitutions, provides that “No law shall embrace more than one object which shall be expressed in its title.”

Which of the three types of standards applicable to legislative acts is represented by this clause?

Suppose you were called upon by an interested group to draft a bill to be submitted to the legislature. You were expected to prepare provisions to achieve the following objectives: (1) to provide for the sterilization of mental defectives, (2) to authorize sterilization of such defectives on court order and also to authorize voluntary sterilization of such persons, (3) to prohibit the advertisement and sale of contraceptive devices, (4) to make punishable the acts of any doctor who performs a sterilization operation on a patient for purely contraceptive purposes. What would you do in view of the provisions in the foregoing constitutional clause?

2. “No law shall be revised, altered or amended by reference to its title only; but the act revised and the section or sections of the act altered or amended shall be reenacted and published at length.”

To which of the three types of standards does this clause belong? Just what does this clause require be done?

3. “Congress shall make no law . . . abridging the freedom of speech, or of the press. . . .”

Which type of standard is here employed?

4. “The Congress shall have Power . . . To regulate Commerce with foreign Nations and among the several acts done with the purpose of producing legal effects. And so of statute-making. The power to legislate can be misused but this does not alter the fact that legislation is essentially an effective act.

2 Ibid.
3 U. S. Const., 1st Amendment.
States, and with the Indian tribes. . . ." This is a specific grant, as is stated in section 4–09. This clause allocates control of interstate commerce to Congress. Other clauses of the Constitution recognize that the power to regulate intrastate commerce is preserved to the states. What prohibitive standards might be implied from these allocations of power?

Sec. 4–13. Effectuation of standards—discretion. As stated above, the positive obligation of the legislature to create enactments for the general welfare, has little meaning beyond the needs which the legislature itself recognizes. There are practically no sanctions within the legal system to induce the legislature to exercise its functions. The exercise of law-making power lies almost wholly within the legislature's discretion.

But the standards which limit legislative powers to certain fields or subjects are capable of effective enforcement under our American constitutional system. The courts can, and do, refuse to give effect to laws which transcend constitutional grants of power, or which offend against prohibitions in the constitutions. This method of refusing judicial recognition to a legislative act, i.e., holding it ineffective, would for example strike down a statute which violated the prohibition of ex post facto legislation. The method is equally efficacious in regard to constitutional standards which prescribe formalities or methods for the enactment of laws; the courts consistently refuse to give effect to laws which do not comply with these requirements.¹

¹ However, according to the usual view, the deficiency must be evident on the face of the statute; e.g., the defects involved in problems 1 and 2, sec. 4–12. The court does not go behind the certificate of proper officials that standards governing methods of enactment have been complied with: e.g., it will not permit a showing that a quorum was not present when an act was passed, or that an act was passed by less than a majority of votes. See generally Field v. Clark, 143 U. S. 649 (1892).
Sec. 4-14. Legislative inertia—law revision commissions. The lawmaking process, especially as carried on by the legislature, is strongly affected by inertia. Laws are not made and changes are not brought about when they should be. Laws often remain on the books long after they have ceased to serve any useful end. Sometimes they remain after they become positive deterrents to the community. More often they simply lose their practical importance by reason of change of circumstances. They are in a class with a regulation, which I understand still stands among the house rules of one of the Harvard dormitories, penalizing any resident student the sum of one dollar for rolling a cannonball down the hall. This may have been an appropriate prohibition right after the Civil War, when men were returning to school with souvenirs of this type in their possession, but the rule has ceased to serve any real function. And so of some of our laws; regulations of hitching posts, of fords over streams and of other subjects once important have become practically inoperative.

The reason for legislative inertia in the matter of revision and change is not hard to discover. The legislative process, like other legal processes, is motivated chiefly by immediate interests of individuals. The members of the legislature are busy. They have many pressing matters to attend to, matters in which their constituents are vitally interested, especially matters of taxation and of local expenditure. The legislator who has a pet project for the expenditure of money in his own district will be very active in promoting it, and he will also press for a particular measure which many of his constituents want. But he has little incentive to push through a measure which neither he nor a substantial body of his constituents finds immediately urgent. When, for example, a revision of some detail in the law of property is needed,
the necessary pressure for change is apt to be lacking; probably only a limited group of persons is aware of the need for change, and this group is too little interested, or too small in number to set the legislative mill grinding. The consequence is that legislative needs of real, but less immediate, interest are often crowded out and are completely neglected for years.

The need for methods of activating the processes of legislative revision is recognized by all persons familiar with the subject. A meritorious experiment to this end has recently been tried in a few of our states, notably in New York. The method is to create a permanent agency responsible for suggesting revisions to the legislature. In New York two bodies are established by law and charged with the functions of examining the existing law of the state, searching out needed changes in it, and drafting and proposing to the legislature, bills through which the changes can be made. One of these bodies is the Law Revision Commission, which studies and proposes changes in the body of the substantive law, i.e., the ordinary rules of law governing the rights and relations of individual to individual, and of individuals to the public. The other body is the Judicial Council, which performs similar functions as regards the law of procedure and the law governing the administration of justice. The work of such agencies results in calling the legislature's attention to needed changes and saves the effort and delay which is involved in preparing legislation for passage. Several other states have developed similar devices, and I believe that other states will eventually follow suit. While too much must not be expected from any single improvement in legislative procedures, devices are badly needed to keep the law up to date and eliminate outmoded legal standards from the statutes and the common law of the state.
Sec. 4-15. Subsidiary agencies—delegation of legislative authority. The constitution and statutes of all our states contain provisions investing local agencies such as cities, villages, townships, and counties with legislative authority in reference to matters of local concern. The subjects of legislation include local highways and traffic, the use of land and methods of building thereon, and similar subjects. Furthermore, legislatures invest a great deal of rule-making authority in boards and administrative agencies. Thus the state bank examiner is authorized to make regulations for the business of banking, the state insurance commissioner for insurance companies and agencies, the public service commission for public utilities and transportation companies. In the federal field, rule-making authority of the Interstate Commerce Commission, the Bureau of Internal Revenue, and the Federal Trade Commission, exemplifies a similar delegation by Congress of regulatory power to subsidiary law-making agencies. In short, we must count legislation by local and administrative agencies, agencies with limited and specialized functions, as an important type of legislation to be put alongside statutory enactments.

You will encounter in your reading of cases the frequent assertion that legislative power cannot be delegated, or the somewhat broader statement that delegated authority cannot be delegated (delegata potestas non potest delegari). Such statements cannot be accepted without substantial qualification. Of course, the legislature cannot turn over the whole of its legislative authority to some other agency to exercise. But the legislature can, and does, empower various subsidiary agencies to make standards. Until relatively recent times courts were reluctant to admit the existence of this type of delegation of authority; instead of doing so, they often made
a distinction between delegation of legislative authority, which was said not to be possible, and delegation of quasi-legislative authority, which was said to be permissible. The resort to such a distinction was, of course, simply a method of saving the face of the nondelegation doctrine which was cast in absolute and unqualified terms, at the same time allowing actual delegations by calling them by another name. Today courts no longer resort to this device. They acknowledge that legislative authority can be delegated as such.

Sec. 4-16. Problems: reasons and conditions of delegation. The only serious questions which remain are questions regarding the extent of authority which can be delegated and the conditions which must be attached.

Consider these two excerpts in the light of the foregoing observations:

1. Taft, C. J.:
   “The Interstate Commerce Commission was authorized to exercise powers the conferring of which by Congress would have been, perhaps, thought in the earlier years of the Republic to violate the rule that no legislative power can be delegated. But the inevitable progress and exigencies of government and the utter inability of Congress to give the time and attention indispensable to the exercise of these powers in detail, forced the modification of the rule.”  

According to this statement by Chief Justice Taft, what is the reason or basis for the delegation of rule-making authority?

2. Lamar, J.:
   “It must be admitted that it is difficult to define the line which separates legislative power to make laws, from administrative authority to make regulations. This difficulty has often been recognized, and was referred to by Chief Justice Marshall in Wayman v. Southard, 10 Wheat. 1, 42, where

1 257 U. S. xxv-xxvi (1921).
he was considering the authority of courts to make rules. He there said: 'It will not be contended that Congress can delegate to the courts, or to any other tribunals, powers which are strictly and exclusively legislative. But Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself.' What were these non-legislative powers which Congress could exercise but which might also be delegated to others was not determined, for he said: 'The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such provisions to fill up the details.'

"From the beginning of the Government various acts have been passed conferring upon executive officers power to make rules and regulations—not for the government of their departments, but for administering the laws which did govern. None of these statutes could confer legislative power. But when Congress had legislated and indicated its will, it could give to those who were to act under such general provisions 'power to fill up the details' by the establishment of administrative rules and regulations, the violation of which could be punished by fine or imprisonment fixed by Congress, or by penalties fixed by Congress or measured by the injury done."²

What are the limitations suggested by Justice Lamar as regards the delegation of rule-making authority? Note that this Justice, speaking in 1911, was not quite willing to recognize that the authority which was delegated by Congress is "legislative."

Congress has delegated a large degree of power to the Supreme Court to make rules of procedure for actions at law, suits in equity, criminal prosecutions, etc. Similar delegations of rule-making authority have also been made in many of the states. What is the advantage of this type of delegation of power?

Sec. 4-17. Standards for the subsidiary lawmaker. The rule-making activities of subsidiary legislative agencies are controlled by a variety of constitutional and statutory standards. To start with, all the constitutional limitations which apply generally to the exercise of legislative power apply to them, such as the prohibition of ex post facto legislation and legislation which deprives persons of life, liberty, or property without due process of law. But there are also particular limitations which define the legislative competence of these subsidiary agencies and regulate the manner in which their rule-making authority is to be exercised. The authority of the city council to enact ordinances is restricted to certain subjects of local concern and the manner of enactment is definitely prescribed. The administrative body can establish rules and regulations only in a certain narrow field and only in the manner authorized by law.

It is interesting to note how some of these legislative acts depend upon others and how some furnish standards for others. Take for example the enactment of a city ordinance such as we have been discussing. This enactment really involves a series of three legislative acts: (1) the act of the constitution maker, (2) the statute establishing a city government and conferring the power to make ordinances, and (3) the ordinance in question. The ordinance is dependent upon the other two acts. It presupposes them, so that when one speaks of a city ordinance regulating parking of automobiles, one is merely giving attention to the last of a series of law-making acts which establish standards of behavior for the public, and is taking for granted two more fundamental acts on which the ordinance is predicated and which furnish standards for the ordinance-maker. A like analysis may be

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1 This series of three acts represents the typical situation; but in some states the constitution confers power directly on cities. In such cases only two acts are involved; the constitution and the ordinance.

2 The same analysis can be applied to the enactment of a statute, except that only two distinct and interrelated acts are involved. The first is the basic
made of the rules and regulations of an administrative body. These likewise constitute the third in a series of three legislative acts: a constitutional provision, a statute which confers and governs rule-making authority, and the exercise of that authority by the adoption of rules. To be sure, it is not necessary to mention on every occasion the basic and presupposed elements in such a series. One need not speak of the constitutional and statutory basis of a city ordinance or administrative rule every time one mentions the ordinance or rule. But for some purposes it is important to make explicit the precedent elements which are presupposed, notably when there is reason to doubt whether the dependent act stands on a solid foundation of authority, or whether it conforms to all the standards which pertain to its enactment.

**Lawmaker's Statement of Standards**

Sec. 4-18. Communication of legislative message. In preparing and issuing his message, the lawmaker has three major problems to consider: (1) the problem of fixing a purpose or policy, i.e., what general results he wishes to bring about through his legislative act (section 4-04 above); (2) the problem of means and methods, i.e., what standards and what effectuative devices are appropriate to bring about the purpose he aims to achieve (section 4-05 above); and (3) the problem of communicating his message to those to be affected by it. The first two of these problems have already been stressed. The third is no less important; the communication of his message ought to be planned no less carefully by the lawmaker than its content. The problem of communication really falls into two—the problem of stating his message so that it will be understood and the problem of

act by which the constitution is adopted, establishing the framework of government and authorizing the legislature to enact statutes. The second is the act of the legislature in enacting the statute in question. The constitutional act confers legislative power and governs the form and manner in which statutes are to be enacted.
transmitting it so as to make sure that the message reaches the ears of the persons to be guided or controlled.

The problem of stating the message, which will engage our chief attention throughout the rest of this subtopic, is one of the most difficult that I know of. A poorly drawn statute can cause more confusion and upset more applecarts than almost any act under heaven. The slightest looseness or slip in phrasing can result in serious problems of interpretation; it can cause uncertainty, delay and costly litigation, to individuals and officials who have to act or refrain from acting and who must carry cases to the Supreme Court for the clarification of points which affect their actions. Realizing the momentous consequences of what he says and does not say, the conscientious lawmaker will do all he can to state his meaning so clearly and certainly that it will be understood, and understood in the same sense, by everybody. Yet the lawmaker can never be quite successful in this aim. His messages are addressed to a great variety of persons, persons of every degree of intelligence, education, and language background, from the most intelligent and highly educated, to the very dull and illiterate. Drafting a statute which will be read in the same way by persons of all kinds and degrees is out of the question; the lawmaker simply does the best that he can.

The problem of transmitting the legislative message is intensified by two facts earlier mentioned: that the lawmaker sends his message over wide reaches of space, and that he hands it down through indefinite stretches of time.¹ These facts require that the lawmaker, above all speakers, transmit his message in a form which cannot miscarry or be lost to view. Moreover, the problem of transmitting the legislative message, like that of stating the message, is enhanced by the

¹ See sec. 1–08.
variety of persons addressed. In regard to transmission the lawmaker needs to consider not only levels of intelligence and education but also the alertness of the persons addressed. Are they ready to seek out what he enacts? Or are they inclined to wait for casual information about what he has declared? If his message is intended primarily for lawyers, he can probably depend upon real effort to discover what he has laid down. If the message is directed to the common man, he will probably have to expect that knowledge of enactments will reach its intended hearers chiefly through the newspapers and through neighborhood gossip.

Under the circumstances mentioned in the last two paragraphs you will understand why the statement and the transmission of his message are not minor problems for the lawmaker. But our constitutions do not provide much guidance to the lawmaker in regard to the way he states his mandate or the way in which he transmits it to persons affected. These problems are left by the constitutions almost wholly to the lawmaker's discretion and ingenuity for solution. He can state his legal mandate in any manner he chooses, so long as he does not violate the requirements of form previously mentioned, and does not state it so indefinitely that the courts will declare it void. Also the constitutions do require, expressly or by implication, that laws be put in printed form as they are enacted. The Michigan Constitution, for example, requires that "All laws enacted in any session of the legislature shall be published in book form within sixty days after final adjournment of the session. . . ." But, in almost all states, statutes become operative when they are passed by both houses of the legislature and signed by the chief executive. The process of enactment is then complete. Even under a provision like that just quoted from the Michigan Consti-

2 See sec. 4-10.
3 Const. 1908 Art. V, Sec. 39.
tution, the operation of a statute does not depend upon publication. Publication is not a part of the process of enactment in the Anglo-American systems as it is in the systems of the states of continental Europe. Whatever is done by way of advertising the fact that a law has been passed, is done by the legislature in its discretion, or is undertaken unofficially by newspapers or other news disseminating agencies, or by interested groups such as trade and bar associations.

Sec. 4-19. Parts of statute. Statutes, for the most part, follow traditional lines of form and structure. (1) There is usually a title clause describing more or less accurately the content of the enactment; this clause is made mandatory by constitutional provisions of many of the states. (2) Following the title clause is often found a preamble in which the occasion of the legislation, its purpose, or both, are explained. Sometimes these explanations are found not in a preamble but in the first sections of the body of the act. (3) After these preliminaries comes the main body of the act. This is usually introduced by some such clause as "Be it enacted that." The body of the act is divided up into sections, if the statute is one of any size and complexity. The sections set forth standard acts of individuals and officials, which are to be done, not done, etc., together with their consequences and legal significance. All the sections are interconnected so as to constitute a unified legislative plan. (4) Following the main body of the act, one often finds a section which contains definitions of important terms used in the act; sometimes, however, the section containing definitions is placed ahead of the main body of the act. (5) Another section commonly found in statutes is one which deals with the possible contingency that part of the act be held unconstitutional.

4 In a few states publication is made a prerequisite to the effectiveness of a statute. For example, the Kansas Constitution provides: "No law of a general nature shall be in force until the same be published," Art. II, Sec. 19. See also Wisconsin Constitution, Art. VII, Sec. 21.
(6) Most statutes contain a concluding section *repealing or amending* other acts which are inconsistent in whole or in part with the statute in question. Such a provision is not absolutely necessary (see section 4–32 below) though it is desirable and is almost always included.

You will appreciate the parts and structure of a statute more readily if you see an example. I have chosen for the purpose a federal statute, enacted in 1932, to control the *issuance of injunctions in labor disputes*. I quote the first three sections in full and also the last two sections of the Act; the others I state in summary form:

"AN ACT ¹

"To amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no court of the United States, as herein defined, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this Act; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this Act.

"Sec. 2. In the interpretation of this Act and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are herein defined and limited, the public policy of the United States is hereby declared as follows:

"Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his

¹ 47 Stat. 70.
fellow, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of, and limitations upon, the jurisdiction and authority of the courts of the United States are hereby enacted.

"Sec. 3. Any undertaking or promise, such as is described in this section, or any other undertaking or promise in conflict with the public policy declared in section 2 of this Act, is hereby declared to be contrary to the public policy of the United States, shall not be enforceable in any court of the United States and shall not afford any basis for the granting of legal or equitable relief by any such court, including specifically the following:

"Every undertaking or promise hereafter made, whether written or oral, express or implied, constituting or contained in any contract or agreement of hiring or employment between any individual, firm, company, association, or corporation, and any employee or prospective employee of the same, whereby

"(a) Either party to such contract or agreement undertakes or promises not to join, become, or remain a member of any labor organization or of any employer organization; or

"(b) Either party to such contract or agreement undertakes or promises that he will withdraw from an employment relation in the event that he joins, becomes, or remains a member of any labor organization or of any employer organization."

Sec. 4. Expressly enumerates various acts of participants in labor disputes which do not constitute grounds for the issuance of an injunction, such as refusal to continue employment relations, retention of organization affiliations, giving publicity to disputed facts, peaceably assembling, etc.

Sec. 5. Declares that concerted acts of disputants do not constitute unlawful combinations.
Sec. 6. Declares that organizational officers are not liable for acts of individual members unless they participate in those acts or ratify the same.

Sec. 7. Regulates the issuance of injunctions and the procedure in connection with the hearing thereof.

Sec. 8. Provides that the complainant shall not be allowed an injunction unless he has fully complied with his own legal obligations.

Sec. 9. Defines the findings which must be made by the court in order to justify injunctive relief.

Sec. 10. Deals with procedure for review.

Secs. 11 and 12. Deal with proceedings for contempt in violating injunctions issued.

Sec. 13. Contains definitions of important terms used in this Act, such as labor dispute, association, etc.

"Sec. 14. If any provision of this Act or the application thereof to any person or circumstance is held unconstitutional or otherwise invalid, the remaining provisions of the Act and the application of such provisions to other persons or circumstances shall not be affected thereby.

"Sec. 15. All Acts and parts of Acts in conflict with the provisions of this Act are hereby repealed.

"Approved, March 23, 1932."

Sec. 4-20. Statement in popular and in technical language. The lawmaker may state his directive message in popular or in technical language. By popular language I mean that which is in common use in the community. By technical language I mean the special terminology used by men belonging to a particular craft or profession. The peculiar terms of almost any profession may be used in statutes, e.g., a building code may use terms ordinarily used only by contractors, plumbers, and carpenters, and a statute regulating the sale of drugs may use names known only to pharmacists and physicians. But the technical terms in which we are primarily interested and which are most commonly found in legislation are the peculiar terms of the legal craft. Statutes are usually drafted by lawyers. They are chiefly read and
used by lawyers. They are applied by judges who are legally trained. It is not surprising, therefore, that statutes do contain a great deal of lawyers' language.

The facts just stated may explain the use of legal terms in statutes; do they justify this use? Is the introduction of these technical terms into legislation desirable? Why should not all legislation be cast in popular terms? Popular terms have the advantage of being understood by everybody or at least by everyone who has had a moderate amount of education. Technical terms are understood only by the few who have undergone technical training.

Before we address ourselves to these questions it must be noted that the vast majority of the words which even the technical man employs are of the popular sort. Legal terms do not constitute a complete language. The lawyer cannot express himself exclusively in legal terms. Like everyone else the lawyer uses such common terms as “and,” “the,” “house,” “street,” “go,” and “kill.” He inserts legal terms only when he is discussing subject matter and activities which are of peculiar interest to lawyers. Accordingly our question about the desirability of using technical terms is considerably narrower than it might appear to be at first glance. The question is why it is desirable or necessary to use some legal terms in legislation, since legislation is never cast wholly in such terms.

One reason for using a technical term may be the fact that there is no popular term for the subject matter involved. “Carburetor” and “penicillin” are examples; such terms are unique; there are no equivalents for them in the common language. However, if their subject matter is important and becomes generally known, these technical terms become popular by a gradual process of adoption. In this sense one finds many legal words for which there can hardly be said to be any popular equivalent. And, on the other hand, there are
not a few legal words which have in the course of time become popular words by adoption, such words as "possession," "contract," "corporation," "crime," and others. There can be no valid basis for objecting to the use either of unique legal terms or of legal terms which have become popular, in the enactment of statutes; although, if a unique term is to be used, it should probably be specifically defined in the statute itself.

Another reason for the use of technical terms is that they can be and usually are carefully chosen and defined. This means that technical terms can be used more specifically and accurately than popular terms. The latter are almost always indefinite in meaning and loosely used. The use of technical terms is, therefore, justified by the needs for accuracy and certainty. These needs are especially felt in relation to the execution of effective acts. Where individuals and officials act with foresight of results and where specific guidance of acts is aimed to be furnished by legal standards, the actor must be told specifically and accurately what he is to do and what the consequences of his act will be. The needed degree of definiteness and certainty can usually be attained only by employing technical legal words whose meaning has been brought out and fixed by long experience and use. Moreover, in regard to effective acts which are normally done or engineered by lawyers, such as the drafting of pleadings, deeds, and wills, the organization of corporations and the preparation of contracts, statutes usually employ many technical terms. The ordinary lay client need not understand the statute applicable in such situations; he hires a lawyer to do a legal job for him and whether the lawyer is guided by a statute couched in popular or in technical terms is of no consequence to him. It is no more necessary for the client himself to understand the technical jargon which the lawmaker introduces into such statutes than it is for the patient
to understand the medical jargon in which a medical textbook instructs the doctor in the diagnosis and treatment of ailments.

Sec. 4-21. Problems. 1. Is the last argument to justify the use of technical terms in statutes entirely convincing? Here I make the fact that a transaction is one which is usually engineered by lawyers, the criterion for the use of technical terms in the relevant statute. Is there a possible fallacy in making this fact the basis for the use of technical terms in legislation? Does one who uses such an argument lift himself by his own bootstraps?

2. Bentham, writing in the early 19th century, compared the use of technical terms in jurisprudence and other sciences as follows:

"The case is, that in the language of every branch of art and science that can be named, a more or less extensive stock of words of a peculiar nature, in addition to all the words in familiar use, is an indispensable appendage: applied to these, what the appellation technical imports is nothing more than peculiar, as above, to some branch of art and science: to wit, in contradistinction to those which, being likewise employed in discourse relative to that same branch of art and science, have nothing to distinguish them from the words in universal use belonging to the common stock of the language;—or the import of them, from the import attributed to those same ordinary words. But the difference between these jurisprudential peculiar words, and the other peculiar words, is this: in the case of the other peculiar words, the deviation from ordinary words is matter of absolute necessity, and on the occasion of framing them the whole attention and skill possessed by the framers was commonly employed in the rendering them as expressive as possible; whereas in the other case, the deviation from ordinary language being as wide commonly as can be imagined,—no attention has been paid to render it expressive, by rendering it as near akin as possible to the words appertaining to that same common stock;—to that end no attention whatsoever was employed,
the attention, if any, applied to the subject, having the direct opposite end, viz., that of rendering them as inexpressive as possible, as unlikely as possible to convey correct conception;—the only purposes to which they are applicable or designed to be applied, are either conveying to the persons in question no conception at all, or if any, such as shall have the effect of leading them into error, either productive of burden to the persons thus deceived, or benefit to the deceivers.

"Terms of art, jurisprudence must have as well as every other branch of art and science. But in English practice, the terms of art are to what they ought to be, what the terms of astrology are to the terms of astronomy. . . .

"In medical art and science, improvement is rapid and extensive at all times and in all places; in legislation and jurisprudence, everything is either retrograde, or at best stationary.

"The cause is no secret. In medicine it is the interest of every practitioner to promote improvement, and to promote it to the utmost, to make whatsoever addition to the stock his faculties admit of his making:—of no judicial practitioner is this the interest—his interest is directly opposite." ¹

Bentham recognizes the need for technical legal terms. What is he complaining of? Is he correct in contrasting medicine with law? Do you agree that the legal profession attempts to render its language "as inexpressive as possible, as unlikely as possible to convey correct conceptions"?

Sec. 4-22. Incomplete statement of legislative message. The lawmaker’s handiwork is always incomplete. His message is never set forth in a manner to fully define a standard act or to declare all of its significance. Only a relatively small portion of any legal action picture and its meaning are expressly set out in the enacted provision. However, this is not a peculiarity of constitutional or statutory enactments; all verbal acts are incomplete in this sense. Since this incomplete-

ness is characteristic of verbal acts generally, a few observations regarding the expression of meaning seem appropriate and even necessary at this point.

Incomplete statement is to a considerable extent unavoidable. No matter how careful the speaker, his statement will always be unfinished, due to the inadequacy of his knowledge of existing conditions and his inability to foresee future events. The speaker can never make a complete and all-embracing statement for the simple reason that he cannot think out a complete and final plan on which to base prescriptions of this kind. In addition, there is always the necessity of cutting his expression short at some point. No statement can be complete in an absolute sense. To express any meaning in complete detail would carry the speaker to the end of time, since each statement would have to be explained and each explanatory proposition further explained and elaborated, ad infinitum.

But in both planning and expression the speaker always stops far short of practicable limits. He does not even try to figure out and state a full meaning. He leaves gaps as a matter of economy of effort. He does not state any more than he feels is necessary for the purpose in hand. Speakers may vary in their feeling of obligation to develop and express meaning. One speaker may act with meticulous care to avoid misunderstanding and oversight. Another may mention only immediately important points, and for the rest, like the bridegroom as he says "I do," he may trust in a benevolent Providence to shape the consequences of his verbal act in a proper way. Every speaker, careful or careless, takes many things for granted. He treats many facts as understood and known to the hearer, as well as to himself, and therefore as unnecessary to be expressed in verbal form. He leaves much unsaid which might be said, expecting the hearer to supply it. In short, any verbal act embodies only a part of the
meaning which the speaker might express. The hearer is relied on to fill up the gaps in what is said, from what he knows or what he can find out, if and when supplementation of meaning becomes relevant or necessary.

Economy of expression on the speaker's part does not imply neglect or fault. Reliance on the activity of the hearer to supply implicit elements from context, makes possible an enormous saving of time and effort. Only the bore or pedant explains the obvious. The ingenious speaker expresses just what he needs to express, neither more nor less. And, since the hearer and the speaker act in the light of the same context, no additional burden is cast upon the hearer in the normal case. In fact, the hearer is hardly aware that he derives the meaning of the speaker's verbal act quite as much from context and circumstances as from the words he hears. But, if the speaker misjudges the elements which need to be stated, if he takes too much for granted, if he leaves too much to Providence, the hearer will have to supply the lack by efforts of his own. The speaker's saving of effort is bought at the cost of even greater effort on the part of the hearer, who has to fill up the blanks in an inadequate declaration.

The lawmaker's declarations are incomplete as other verbal acts are and for the same reasons. There are unavoidable gaps due to the fact that the lawmaker cannot know everything about the situation he tries to control and cannot foresee future developments, and due to the fact that he cannot express his plan and desire in complete detail. There are also careless gaps and plain oversights in legislation.

But of greatest practical significance is the fact that the lawmaker, like other speakers, takes many things for granted. He economizes his own effort in expressing his legislative plan and thus leaves blanks which may, as conditions later develop, need to be filled by explicit judicial rulings. Suppose for example that the lawmaker passes a statute creating
a new crime. The statute uses common and legal terms without defining them; it refers to ordinary life situations without describing them; it implies a knowledge of many facts which it does not refer to even indirectly. The lawmaker assumes that the interpreter and other persons affected by the statute, will know, or can find out, the meanings of terms and other matters of common knowledge. The statute provides for a specified punishment, but it says nothing about the details of procedure in prosecution, nor about the functions of public officials in relation thereto. The lawmaker takes for granted that prosecution will follow the forms of existing criminal procedure except as the statute makes specific provision for a different form. He assumes that existing officials will perform their typical functions in reference to this crime as in reference to others. All these are matters which the lawmaker could have put into the statute but did not deem it necessary to mention. His expression of meaning is left in truncated form which will require supplementation by individuals and officials affected by its provisions.

Sec. 4-23. Statement of message in general terms. The lawmaker uses many general or class terms in framing his message. He employs such terms as “person,” “contract,” “injury,” “prosecute,” and the like. In fact the use of general terms is unavoidable. But a general term is to some extent, indefinite and in this sense incomplete, so that generality of expression involves incompleteness of statement. And generality varies in degree. Some terms and statements are more general and therefore less definite than others. Most legislative enactments are couched in terms which fall between the extremes of broad generality and minute specification.

From the lawmaker’s viewpoint general terms have the advantages of flexibility in application and of applicability to unforeseen cases. If his statute specifies details of appli-
cation with undue particularity, there is always the danger that important situations will be omitted, and that the language will fail to cover cases which the lawmaker would have wanted to cover if he had had sufficient foresight and could have stated his meaning perfectly. General provisions are adaptable to whatever conditions may arise.

"Statutes framed in general terms apply to new cases that arise, and to new subjects that are created from time to time, and which come within their general scope and policy. It is a rule of statutory construction that legislative enactments in general and comprehensive terms, prospective in operation, apply alike to all persons, subjects, and business within their general purview and scope coming into existence subsequent to their passage."¹

However, the flexibility and adaptability of general terms are bought at the price of indefiniteness and incompleteness as I have already pointed out. A general provision is very like one in which the lawmaker has failed to set forth his meaning fully. There is a formal difference between them; incomplete legislative statement leaves a subject quite untouched though it be taken for granted (see next preceding section); while the general statement covers the subject formally but in an undefined way. The coverage of detailed situations by general terms is rather apparent than real. As Holmes has said, general propositions do not decide cases. A general provision is one which is unfinished; the applier has the burden of supplying details of meaning which are only implied or suggested by the general terms.

The lawmaker may also use general language in order to conserve his own efforts in thinking out more detailed provisions; or he may recognize that he cannot give the close attention to rule-making for specific cases which is needed, or that he has not the facilities for investigation and for the

¹ 25 R. C. L. 778.
framing of detailed rules. He therefore delegates the job of detailed legislation to others. These are the cases of subsidiary lawmaking we have heretofore discussed. The lawmaker intentionally leaves to an administrative agency the task of filling in details of a broad legislative plan which he lays out. Theoretically, the lawmaker might make all the rules which the administrative agency is to apply, but for reasons of convenience, in order to provide rules which are flexible and well adapted to specific types of situations, the legislature is content to lay out a general design, and to authorize another agency to write in specific elements of the regulative scheme. Insofar as an administrative agency has to fill in these elements, it is clearly functioning as a supplementary lawmaker. The same is true of the processes by which ordinances are made by a city council. And one can fairly ask (and we shall do so in the next chapter) whether the activity of the judicial applier in filling in details of general legislation is not essentially the same. To be sure, the judge's activity is not usually called legislation; it goes by the name of interpretation. Yet it is nonetheless apparent that the judge is writing something into a general regulative scheme in the same manner as an administrative or other subsidiary lawmaker does.

So far as a standard is general, it fails to furnish assured guidance. To the applier it represents the necessity of exercising unguided judgment in the act of filling in details. To the person intended to be guided, generality represents uncertainty; it means reduced guidance value; a general standard fails to present a fully developed pattern of action. The person is told broadly what he is expected to do or not do, and that the rest of the pattern will be filled in by a subsidiary lawmaker as occasion requires. This spells for him the possibility of arbitrariness in application by officials who have to fill in detailed rules before they can apply them.

Spell out: (1) Some of the details of the general terms of the statute which the court had to supply; (2) some of the principal elements which were taken for granted by the lawmaker and not mentioned at all.

2. Consider in a similar way the Commerce Clause of the Federal Constitution, which reads as follows: “The Congress shall have power . . . to regulate commerce with foreign Nations and among the several States. . . .”

Note the principal general terms used. Would you know from reading this clause whether Congress can control inter-state transportation of passengers as distinct from commodities of trade? What about transmission of radio messages?

Again, what are some of the important elements of the control over commerce which are taken for granted and not even referred to?

3. Dickinson:

“It is therefore clear why the broader and more fundamental principles of the law are themselves almost never capable of being applied directly as rules of decision for the settlement of controversies. On the one hand the principle may be so broad—as e.g., that property rights should be protected—that it will embrace within its scope both the opposing interests in a particular controversy, and therefore give no clue as to which should prevail over the other. Thus in a nuisance case both parties can appeal to their right to have their property protected. On the other hand, if the principle is less broad in its scope, it is likely to express the interest of only one of the parties to the controversy, and so come into square collision with another equally valid principle expressing the interest of the opposing party. Take the case of a nuisance again. On one side stands the principle that

1 Art. I, Sec. 8.
a man may lawfully do as he wills with his own. On the other stands the principle, *Sic utere tuo ut alienum non laedas.*”

How are these statements related to our discussion in section 4–23? What does Dickinson add to the statement of Holmes that general propositions do not decide cases?

4. “The Legislature shall pass no local or special act in any case where a general act can be made applicable, and whether a general act can be made applicable shall be a judicial question.” 3 Similar prohibitions of local and special legislation are to be found in many state constitutions.

When is legislation general by contrast with special in the sense of this prohibition? Suppose a statute enacts a health code for all cities of ten thousand. Is this code general legislation? Suppose another health code applies to cities of one million, and there is only one such city in the state.

Does the constitutional clause prescribe the form of statutory statement? Suppose, for example, the legislature passed a health code applicable to “the City of Detroit.” Can you state the purport of the constitutional clause in terms of a distinction between general and specific directives, i.e., standards and orders (see section 1–08)?

Does the constitutional clause fix the number of items to which a statute must apply? Is it satisfied if the legislature makes a bona fide effort to classify cities, etc. according to their needs?

Sec. 4–25. Codification.* Now and again a legislature undertakes to adopt a comprehensive and systematic statute, called a code, to embrace all the legal provisions applicable

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* (I.R.) See bibliography on this subject in sec. 4–01 * note.
to a general field. The general purposes of codification are to render the law clear, certain, systematic, and complete.¹

On the continent of Europe almost all states, building on the foundation of the Roman *corpus juris*, have codified their laws quite completely. The same is true of the South American countries.² In England the process of codification has not gone far. In this country the development of codes has been rather irregular; most states have only codified part of their law but New York, California and a few other states have codified the law of most important fields.

Common types of codes adopted in the last century and a half have been a *civil code*, dealing with matters of property, contract, tort, family relationships, etc.; a *code of civil procedure* or a general practice act, dealing with practice and procedure in the courts; a *commercial code*, covering matters such as sales, negotiable paper, etc.; a *code of criminal law*, commonly called a penal code; and a *code of criminal procedure*. Narrower fields of law may also be covered in a systematic form, by what may be called minor codes. Of this character are general acts dealing with the subject of corporations, traffic on the highways, or probate matters, as well as the various uniform acts which have been developed by the Commissioners on Uniform Laws and adopted in most of our states (e.g., the Uniform Negotiable Instruments law, the Uniform Sales law, etc.).

The process of codification does not begin with a blank legal sheet. It is always a reworking of existing legislation and of law as laid down in judicial decisions. It not only revises and amends pre-existing law but builds upon it and

¹ An additional purpose has often been to unify the law of the country in which several competing systems exist in different states or provinces. Unification was one of the main reasons for codification in both France and Germany.

² The original modern codes were drafted in France at the time of Napoleon. All subsequent codifications in Europe and South America have built on the Napoleonic codes.
out of its materials. The task of reworking and reforming these legal materials to constitute a clear, simple and unified code, is no mean undertaking. It is an undertaking which requires a considerable period of time. The difficulty of the job and the time which it requires, exclude the possibility of preparing and enacting a code in any single legislative session. Either the legislature borrows a code already enacted elsewhere, or it authorizes the preparation of a code which its successors will have to accept or reject. Moreover, the preparation of a code requires a degree of expertness which the ordinary legislature does not find within its own ranks. Consequently codes have usually been framed at the instance of a legislative body by a group of experts and submitted in the form of drafts for adoption by the legislature itself. The German Civil Code, for example, was framed by a select group of lawyers, judges, and professors of law. It went through several drafts and was twenty years in preparation. While the Field Codes, which have been the foundation of the principal codes in this country, were not drafted with quite the meticulous care of the German, Swiss and recent Italian codes, their preparation did extend over a considerable period of time and involved great effort by David Dudley Field and his collaborators.

In the early part of the 19th century it was supposed that codification could be carried to the point where every case or situation would be provided for in advance. Bentham, the great English law reformer of that period, entertained this view; he stressed the idea that the law should be made "cognoscible," by which he meant that the law should be put in such form that everyone could know his legal rights without the least uncertainty. Accordingly the aspiration of codifiers of that day was to codify law completely and finally.

You would find interesting H. M. Field's Life of David Dudley Field (1898). Chapters 7 and 8 give a brief account of the battle for codification in New York in the 1850's and 1860's, and of the adoption of codes in the western and midwestern states.
But time has proved that the hope of making complete and final codes is a vain one. We fall far short of this ideal, as we do of all other legal objectives. The possibilities of human behavior are too varied to be specifically provided for in advance. Life conditions change too rapidly to be anticipated in a roster of patterns of prescribed behavior. The lawmaker has to be satisfied, in the main, with general statements which can be adapted to innumerable and changing situations. The ideal of a complete and final codification, good for all cases and all times, has had to be abandoned; it has been replaced by a practical working notion of a codification which is good for a particular place and time, but which will require periodic revision to meet changing needs.

Sec. 4-26. Compilation, consolidation, annotation and indexing of statutes. Even where the statutes of a state are not integrated in codes, they are usually grouped and organized according to topics. This work of compilation is sometimes done at the instance of the legislature and at public expense. Sometimes it is done unofficially by a publisher as a commercial venture. The objective in either case is to make the separate enactments of the state more readily available for use and reference by lawyers and individuals. This is a desirable objective since the person who wishes to find the statutes on a particular topic is thus spared most of the effort of seeking for them throughout the miscellaneous assortment of laws which are passed from year to year in the sessions of the legislature.

Sometimes the process of integration is pushed one step further. All the statutes dealing with a particular subject matter are consolidated. Such a consolidation does not ordinarily attempt to unify the case law with the statute law, nor does it aim primarily to improve existing statute law. It merely brings together in a unifying statute all existing legislation on a particular topic (e.g., a British consolidation
of 132 statutes dealing with perjury). The process of consolidation necessarily requires the ironing out of inconsistencies and the systematization of the existing statutes to some degree, but it is not intended to produce a complete statement or a systematic expression of the law.¹

The statutes of the United States and of the states have also been annotated with reference to decisions construing their various paragraphs and provisions. These annotations are very useful to the lawyer as they bring together statute law and case law.

Indexing is another method employed to make statutory material readily available. A great deal of attention has been given to this type of work in recent years. Most if not all of the statutes, federal and state, have now been completely and minutely indexed.

Two general criticisms apply to the compilation, consolidation and indexing that has been done. First is the lack of uniform plans according to which material is arranged and catalogued. The plans vary greatly from state to state so that the lawyer has to familiarize himself with new schemes of arranging and cataloguing each time he examines the laws of a different jurisdiction. The second criticism results from the nature of all these devices. None of them integrates the statutory provisions with which it deals. All of them represent an organization which is extrinsic to the statutes. They constitute an organization of material which is imposed from the outside, a mere arrangement of existing material and not a reworking of the material handled. In this respect consolidation and indexing are different from the type of organization which is injected by the lawmaker when he creates a code

¹ Names are not always safe guides in this respect. For example, the so-called United States Code is really a consolidation rather than a codification of the federal statutes. "No new law is enacted and no law repealed." The code is "the official restatement in convenient form of the general and permanent laws of the United States" in force on the date when the code is issued.
and fits each of its provisions into a pattern with the rest so as to establish a unified, complete, and systematic whole.

Sec. 4-27. Problems. In an article in the American Law Review,¹ David Dudley Field said:

"I will mention here four reasons for codification, and four sophisms against it:

"First. There are certain propositions which have become maxims of government, one of which is that the legislative and judicial departments should be kept distinct, or in other words, that the same person should not be both law-giver and judge. There is no need of arguing about it. The maxim is founded on philosophy and experience. It has taken ages of struggle to establish it. And here it is. We profess to take it for absolute truth; we talk of it as one of the fundamental doctrines of modern government; we write it at the head of our constitutions; but we violate it every hour that we allow the judges to participate in the making of the laws.

"Second. Another of these maxims is, that they who are required to obey the laws should all have the opportunity of knowing what they are. These laws are now in sealed books and the lawyers object to the opening of these books. They can be opened by codification and only by codification. Do not say that this is a figurative expression which proves nothing. It proves everything. The law with us is a sealed book to the masses; it is a sealed book to all but the lawyers; and it is but partly opened even as to them. It is an insult to our understanding to say that the knowledge of the law is open to everybody.

"It should be open. That none can deny who has common understanding and a decent regard for truth. How can it be opened? In one way, and one only; writing it in a book of such dimensions and in such language that all can read and comprehend it. What if lawyers should say unwritten law is good enough for them? They are used to delving in it; they like it; they live by it. What then? Supposing it to be so does not mend the matter, unless it be assumed that the law is made for the lawyers and not for the people.

¹ Field, "Codification," 20 Am. L. Rev. 1 at 2 (1886).
"These two reasons for codification should of themselves be decisive.

"Third. Another and a third reason is the lawyer's own experience; the experience, I might say, of every lawyer. What does he do when a case is brought to him, for the courts or for his private opinion? The first question he asks himself is, has the point been decided? He looks for a decision. Where does he look? First in the volumes of his own State reports. It may be that he finds a case just decided in the highest court on all fours with his own, and he fancies that he may rely on that. Can he? We lawyers know that there is still a chance of mistake. Look at the list of 'cases cited, criticised, distinguished, or overruled.' This is the very best aspect of the lawyer's position in the case supposed. But what if there be no such decision? Then he looks into the decisions of inferior courts in his own State. If he finds one that he thinks is applicable, he ventures to take it, though with less confidence, because he knows that he is to go through the ordeal of the higher court, and his chances there are uncertain. Should he happen to find no decision at home applicable to his purpose, he goes abroad into other States or across the sea. Now he has got beyond the hundreds of volumes of his own State he resorts to the thousands of volumes of other States and countries. What 'a codeless myriad of precedents' to look through! What 'a wilderness of single instances' to explore! Consider the nature of the search and what is found, after all? He peers into volumes upon volumes, with no other guide than an index at the end of each volume, or a compilation or collection of indexes called digests, of many volumes. These are made sometimes by men of sense, and sometimes by men of no sense, without any agreement upon a plan or classification of subjects. The result is, as might have been expected, that the lawyer, with an earnest desire to get the 'best opinion' or the 'weight of opinion' has, after all, to make a guess. Now, if he had been asked at the outset whether he would not prefer to look for an authoritative statement of the rule for his case in a statute-book, If He Could Find It There, he would have answered yes.

"Fourth. The fourth reason that I will mention is that no people, which has once exchanged an unwritten for a
written law, has ever turned back. One might as well expect the sun to return upon the dial. Even where the written law has been imposed upon a conquered people, to whom it must have been at first distasteful for that reason, it has held its place after the foreign domination has departed. The eagles of Napoleon were driven back across the Rhine, but the code which went forward with the eagles did not return with them. These facts are arguments worth all the theories in the world. Scholars may write as many treatises as they will; the experience of mankind is worth all the books that were ever written. You cannot explain away this experience; you cannot reason it down; it proves the superiority, beyond dispute or cavil, of written to unwritten law, of statute law to case law, or, as it might be better called, to guess-law.

"Now for the sophisms against codification:

"First. It is said that the law will be 'cabined, cribbed, confined,' if it be written. . . .

"Second. A second sophism is that a perfect code can not be made, and therefore, inasmuch as none but an imperfect one is possible, there had better be none at all.

"Third. A third sophism is this one: we have grown strong and prosperous without a code, why get one now? What need is there of a change? . . .

"Fourth. A fourth sophism is, that legislatures are always at work changing the laws, and therefore if a code is made it will be subject to continual change and so it is better to have none of it. . . ."

Do you agree with Field's four reasons for codification? How would you answer each of the four sophisms?

Significance of Legislation

Sec. 4-28. Significance in various aspects. In preceding chapters we have analyzed the operation of laws in terms of effects on persons. We have considered the ways in which standards for the individual affect the individual himself and the significance which they have for officials and other individuals. We have discussed standards for officials in similar manner.
It is also possible and quite common, to relate the operation of legislation to place, time, and other legislation. Where does the legislation operate? How long does it operate? And how does it affect prior existing, or subsequently created, laws? The answers to these questions are found in the same places as the laws themselves: in constitutional provisions, statutes, and decisions. They are to be the subject matter of the following sections.

Sec. 4–29. Territorial operation. Generally speaking, the Anglo-American legal systems adhere to a theory of "territorial jurisdiction." Applied to the operation of legislation, this theory means that standards which are found in the constitution, statutes, and decisions of a state or country, operate only within the territorial limits of that state or country. An act of the legislature of Michigan regulates only things, persons, and acts within the State of Michigan; a federal statute only matters which fall within the domain of the United States. This theory is implicit in many provisions of the constitutions, especially in those which distinguish between state and state, county and county, etc. It is a fundamental postulate of common-law thinking. There are some exceptions to this general theory, some instances in which Michigan legislation will affect persons and transactions beyond the borders of the state, or in which federal legislation affects persons and transactions beyond the territorial boundaries of the United States. But the theory of territorial jurisdiction to legislate, holds good on the whole; it states a common limit on the operation of legislation in the Anglo-American legal systems.

Sec. 4–30. Time of operation. Acts of Congress take effect from the date of passage if no other date is specified therein.

1 Among jurisdictions where this theory prevails are Great Britain and its dominions, and the United States and its states and territories.
The same principles apply to the enactments of the various states, apart from controlling constitutional clauses. However, many states do have constitutional provisions which fix the ordinary date at which statutes are to become effective at sixty or ninety days after enactment or at some specified date such as July first following enactment. Even in these states, the legislature always has authority to give immediate effect to emergency legislation.

Ordinarily the operation of a statute is of indeterminate duration. Once established by the lawmaker, a legal provision continues in effect indefinitely in time. Or as we would more often say, a statute remains in force until changed. Of course the legislature can, and not infrequently does, include in a statute a specific provision limiting its operation to a definite period.

There are nevertheless important limits on the temporal operation of legislation. Most significant is the principle that legislation is to have only future operation. The federal and state constitutions contain a number of provisions which bar retroactive changes in existing law. These aim to protect vested rights and established expectations. It is not worth our while to specify all these provisions in the present place. They are exemplified by the Due Process clauses which bar changes in the law that destroy the owner’s existing property rights. They are also illustrated by the prohibitions against ex post facto legislation and against laws impairing the obligation of contracts. Our points of interest here are that, so far as clauses of this type furnish standards for the legislative act, they put existing laws beyond the reach of legislative change; and that so far as they declare limits on the operation of legislative acts, they mean that the lawmaker can change

1 Also important is the type of constitutional provision which permits a legislative act to operate only after a certain period of time has elapsed following the date of its enactment.
existing legislation, but only for the future; that new laws can be established, but only with a prospective operation.

Sec. 4–31. Constitutional provisions and other legislation. Since we have more than one lawmaking agency within the state—the framers of the constitution, the legislature, various subsidiary agencies, and the courts—we need criteria (standards) by which to decide whose lawmaking act prevails in case of conflict or overlapping. The most basic of these criteria, that which governs the case of conflict between a statute and a constitutional provision, has already been frequently referred to. Needless to say, a constitutional provision prevails over legislation of any other kind; statute, decision, or subsidiary rule. The distinction between fundamental legislation represented by our constitutions, and ordinary but subordinate legislation, represented by statutes, common law, etc., is fundamental in the American legal system. It marks the most important departure from English models made by the founding fathers.

Sec. 4–32. Repeal and amendment of statutes. The operation of a statute may be terminated by repeal or changed by amendment. In the most general sense this involves the principle that where two statutes of the same state are in conflict with each other, the statute which is later in time prevails. The repeal or amendment of a statute is tantamount to making a new statute. The legislature’s power to repeal or change law is as complete as its power to enact law originally,¹ and the standards which govern the processes of lawmaking are applicable to the legislative repeal or change of existing laws.²

¹ But see final paragraph of sec. 4–30 above.
² The relations of statutes and common law will be discussed in chapters 5 and 6.
But the legislature does not always explicitly repeal or change an existing statute. Often it merely enacts another statute which is inconsistent, wholly or partially, with existing legislation. Here the later statute also prevails, on the principle already mentioned; but we speak of implied, not express, repeal or amendment. The principle of implied repeal, like that of the prevailing force of the later statute, is one common to all the Anglo-American legal systems.

Sec. 4-33. Federal versus state legislation. In our federal system there are not a few possibilities of conflict between federal and state action. There are areas in which the Congress and the state legislature exercise concurrent legislative power. For example, Congress is authorized to regulate interstate commerce, yet the state legislatures have always adopted certain types of local regulations which affect interstate commerce. Which of these regulations is to prevail in case of conflict or inconsistency, the federal or the state? A similar question can arise out of a conflict between a treaty with a foreign nation, and the statute of a single state. Suppose for instance that a statute of the state of Washington forbids aliens to engage in certain occupations, but a treaty between the United States and a foreign state permits citizens of the latter to engage in those occupations anywhere in the United States. Which is to control, the United States treaty or the state statute? The answer to both these questions is furnished by a section of the Federal Constitution which provides:

“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof, and all treaties made, or which shall be made, under the Authority of the

3 It is obviously preferable to repeal explicitly all prior statutes, or parts of statutes, which are in conflict with the new enactment; this avoids difficult questions whether such prior enactments do conflict and whether they are repealed—questions that may only be settled by litigation.
United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the Contrary notwithstanding.”

The purport of this section is that where there is any conflict between federal and state legislative acts the federal act prevails. It not only supersedes any pre-existing state legislation of contrary tenor, but stands as an insurmountable obstacle to any subsequent state statute which runs counter to it.

Sec. 4-34. Problems. 1. It is often said that the legislature cannot pass an irrepealable law. Which of the foregoing general propositions regarding the operation of legislation (sections 4-28 to 4-33) declares substantially the same idea?

2. It is a generally accepted view that a statute cannot be repealed by desuetude, i.e., abrogated by disuse. Which of the above propositions regarding the operation of legislation is, in effect, another way of stating this view? Is there a difference?

3. Suppose a city council enacts an ordinance forbidding driving within the city limits at any speed exceeding 15 miles per hour; a later general statute of the state is passed prohibiting driving in residential districts of cities and towns, at any speed in excess of 25 miles per hour. Would the state law repeal the ordinance? Would it matter if the statute were prior in time?

What would be the proper conclusion if the ordinance provided for a maximum of 25, and the statute for one of 15, miles per hour?

1 Art. VI, Sec. 2.
2 It need hardly be said that these statements assume that the federal act is a valid one.
3 See generally Gray, The Nature and Sources of the Law (1916), secs. 4-01 to 4-19, 7-06 to 7-19.
Sec. 4-35. Summary. In the above chapter I have tried to give you a general view of the legislative process. (You will get a much more complete view later if you elect the course called Legislation.) I have laid emphasis on the human factors involved in the making and operation of legislation. More specifically, I have indicated when, how and why statutes are made; how far their enactment is controlled by standards; and the extent to which legislative power may be delegated. I have called your attention to certain important problems of stating the legislative message so that it will be clear and available to the persons who will be affected by it. And finally I have tried to furnish you with basic notions of the manner in which any piece of legislation operates as regards time, place, and other legislation.