

# Washington University Law Review

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Volume 1950 | Issue 1

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January 1950

## Review of “Materials and Problems on Legislation,” By Julius Cohen

Edward D. Re  
*St. John's University*

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### Recommended Citation

Edward D. Re, *Review of “Materials and Problems on Legislation,” By Julius Cohen*, 1950 WASH. U. L. Q. 173 (1950).

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program in this country is not lacking several fairly successful pocket books or teaching vehicles. The question remains, however, just how much can be successfully packed into one course, or into one book. Perhaps the best gains will always come not from any one book but from several, the smaller and the less formidable the better. Various features of these two books may suggest what sort of thing we may still be looking for. Neither book is likely to become required reading for many law students in American schools. Still, both books might safely be made required reading for teachers, and for prospective authors, in this field.

Thomas C. Chapin\*

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**MATERIALS AND PROBLEMS ON LEGISLATION.** By Julius Cohen.<sup>1</sup> First Edition. Indianapolis: The Bobbs-Merrill Company, Inc., 1949. Pp. vi, 567.

Before having read Professor Cohen's book on Legislation, your reviewer had been of the opinion that to review a law school "casebook" was a formidable undertaking of a rather dull and uninteresting nature. Surely that was the belief if, as a condition precedent to the writing of the review, one would have had to read all of the materials and all of the (often too many) cases printed between the covers of the book. Although perhaps that may very well be the situation in the case of the ordinary or conventional "casebook," such was not the fact with Professor Cohen's book. The reading of the book, together with its only forty-three cases, was a pleasant as well as a very worth-while experience. However, it must be stated at the outset that this book is not the ordinary casebook on one of the traditional law school subjects. Actually it is not a casebook. The book is entitled **MATERIALS AND PROBLEMS ON LEGISLATION**, and its contents justify the title. Although recently there seems to be a trend favoring the "Cases and Materials" type of a casebook, usually the book is no more than the conventional casebook with its over-abundance of cases, together with a sprinkling of introductory notes and text, an occasional statute, and a sufficient number of footnotes and references to permit the use of the word "materials" in the title. Occasionally "the materials" may tend to create an atmosphere befitting scholarship and erudition.

Professor Cohen's book does not possess the bulk of the average "materials" book. Nevertheless this book of only 567 pages contains a wealth of material consisting of some of the finest literature in the field of legislation.

The topics chosen for treatment have been adequately explored. Although the student may not always be given "the answer" to many of the questions asked by the author, the student will feel competent to discuss the matter and to venture an intelligent answer based upon the technique that he has acquired. By virtue of the many problems and questions found therein, the book possesses an admirable flexibility as a teaching tool. This enables the teacher to devote to any particular phase of the subject as

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\* Assistant Professor of Law, The University of Connecticut.  
1. Professor of Law, University of Nebraska.

much time as is desired. The problems set the stage for what can easily become a lively and interesting class discussion. Although that is also the purpose of the case method of teaching law, it is clear that in certain fields the case method is not always the best pedagogic device. Of the forty-three cases in the book more than one-half of them are found in Chapter II, entitled Ascertaining the "Meaning" of Ambiguous Legislative Language, wherein the judicial technique of statutory construction is treated. It can be seen from this chapter that when, in the opinion of the author, a given phase of the subject can be best taught by the reading and discussion of judicial decisions, the necessary number of cases is included in the book.

The content of Professor Cohen's book raises a serious question as to the wisdom of the present law school curriculum. Over the years the traditional law school courses have been perpetuated as though society, like everything about us, has been standing still. Are the skills required by the lawyer today the identical skills that were required several decades ago? Does the curriculum today reflect the change in the relative importance of the traditional subjects? For example, have our lawyers been trained to understand and cope with the ever-expanding administrative process and increased scope of governmental activity? Perhaps the issue may be framed by asking whether the law school training is based upon a nineteenth or twentieth century standard. It would seem that honesty would warrant the elimination of an answer to the effect that certain "new" courses, e. g., the administrative process, are offered as "electives" in the already crowded third year or as postgraduate courses. The issue is one of basic skills and indispensable techniques to fill the lawyers' present day needs, not one pertaining to an intellectual luxury. Even a superficial investigation will reveal that some of the luxuries of the past have become the indispensable staples of today.

The training of the lawyer has been almost exclusively limited to the judicial process. In no course in the law school has he been trained in the legislative process. In his introduction,<sup>2</sup> Professor Cohen states that "the lawyer's skill as a hired soldier is not limited to the judicial battlefield. He often may find it more expedient to do his fighting on the legislative front."<sup>3</sup> For example, "the lawyer may be called upon to organize support and map the political strategy for an offensive against undesirable legislation, to draft legislation, submit amendments to counter legislation, or testify or aid his client in testifying before Congressional or state legislative committees. Just as there are techniques and skills to be mastered in fighting on the judicial front,—for example, skills of the advocate in utilizing the tools of statutory construction,—so there are skills to be mastered on the legislative front."<sup>4</sup> Hence it will be seen that this book introduces the law student to the legislative arena. It is planned to "familiarize the would-be lawyer with some of the roles he will be called

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2. The author states that the introduction borrows heavily from his article on the *Teaching of Legislation*, 47 COL. L. REV. 1301 (1948).

3. Text at p. 1.

4. *Id.* at 2.

upon to play while representing clients in connection with legislative interests, some of the problems he might encounter and the skills which will be required to meet them."<sup>5</sup>

To the reader who may feel that some of the materials used are "political" rather than "legal," Professor Cohen would reply that "to set up a quarantine around them would seem as unreal as to deny medical students access to birth control films on the ground that they are 'immoral' and not 'scientific'. It loses sight of the fact that, when individuals or groups employ legal talent to achieve certain ends, they often do not put artificial strictures on the type of power which must be harnessed."<sup>6</sup>

The book, intended for use in an introductory course in Legislation, is designed to develop certain skills necessary for success in the legislative arena. With the exception of Chapter II on Ascertaining the "Meaning" of Ambiguous Legislative Language, Chapter V on Problems Relating to Administrative Legislation, and Chapter VII entitled Problems Relating to Investigations Under Legislative Authority, that may receive some treatment in the traditional course on constitutional law and more so in courses on the administrative process, the materials in the remaining four chapters are not treated in any of the traditional courses in the orthodox law school curriculum.<sup>7</sup>

Chapter I on Gauging the Efficacy of Proposed Legislation concerns itself with the problem of ascertaining whether proposed legislation will accomplish the desired result. Chapter III on The Drafting of Legislation discusses the role of the lawyer as a legal architect. "Problem A" in that chapter is as follows:

In the light of the standards of good draftsmanship which are set forth in the foregoing materials, what is your evaluation of the quality of the draftsmanship of the Federal Food, Drug and Cosmetic Act of 1938 (5 F.C.A., Title 21, §§ 301 to 392)? What suggestions would you have had for improving it, had you been given the job of putting it into final form? Consider the following questions in addition to those you are able to conjure up for yourself: (30 specific questions are asked about the legislation in question).<sup>8</sup>

"Problem B" quotes three sections of the Federal Food, Drug and Cosmetic Act of 1938 as being "Good examples of how *not* to draft legislation:" and concludes by asking the student to redraft the sections, im-

5. *Ibid.*

6. *Id.* at 3.

7. Although some of these materials receive some treatment in courses on Legal Method, it is believed that such a course is certainly no substitute for an introductory course on Legislation. Although your reviewer does not know exactly how many schools offer a course on Legal Method, he is of the opinion that the number is very limited. Furthermore, from the standpoint of adequate training in the legislative process, the materials on legislation in such a course are pitifully inadequate. In Dowling, Patterson and Powell, *Materials for Legal Method*, Chapter VI is devoted to the Interpretation of Statutes and Chapter VII to Coordination of Judge-Made and Statute Law.

8. Text at 228-230.

proving the clarity and arrangement of the language without impairing its substantive content.<sup>9</sup>

Chapter IV, entitled Influencing and Guiding Legislative Activity, involves what some may choose to call the "political" role of the lawyer,<sup>10</sup> whereby the lawyer is retained as the spokesman for a group and must know the areas of permissible lobbying. Chapter VI, entitled Utilizing Legislative Precedent and Analogy, will introduce the student to what Professor Horack has come to call *stare de statute*.<sup>11</sup>

There is another feature of the book that requires comment. A considerable portion of the materials in the book deal with legislation or proposed legislation concerned with the adulteration and misbranding of foods, drugs and cosmetics. Prof. Cohen explains that the purpose, obviously, is not to make a food and drug lawyer out of the student, but rather, these materials were selected "as a convenient pedagogic device, because of their unusual suitability as a springboard for considering a wide range of typical legislative problems, for developing skills and for imparting to the operating legislative lawyer basic information with regard to the process of legislation generally—no matter what the subject matter of the legislation may be."<sup>12</sup>

Actually since some of the chapters are so closely related, the choice of a single legislative topic was a wise one. The student is thereby made to appreciate the legislative pattern while becoming proficient in that specific legal field with which the subject matter is concerned. The latter is really a gratuitous benefit imperceptibly flowing from the training received in the acquisition of the basic legislative skills.

The materials in the last chapter, i. e. Chapter VII, on the problems relating to investigations under legislative authority, will be found to be vitally interesting. Under the topic of "pertinency" as a limitation upon the investigative power and the right against self-incrimination, there is an interesting excerpt taken from the hearing before a Special Committee Investigating the National Defense Program. In an investigation into the activities of an aircraft corporation one finds a witness being asked questions pertaining to his draft status. The witness asks for permission to seek the advice of counsel. At that point Professor Cohen asks "What counsel would you give . . .?"<sup>13</sup> From the same investigation under the topic of Issuance of Subpoenas a witness is ordered to produce "all of the papers" that "are relevant in this matter." The excerpt is followed

9. *Id.* at 231-232.

10. *Id.* at 242.

11. *Id.* at 435. Parts of Professor Horack's article on *The Common Law of Legislation*, 23 IOWA L. REV. 41 (1937), are reproduced. In that article it is stated that "*Stare decisis* provides courts and litigants a fair standard for the prediction of future judicial action; *stare de statute* enables legislators, public administrators and those privately interested in legislative development to predict with similar degrees of error the development of statutory rule." Horack, *The Common Law of Legislation*, 23 IOWA L. REV. 41, 49 (1937).

12. *Id.* at 4.

13. *Id.* at 481.

by questions that will doubtlessly lead to a lively class discussion of the applicable principles of law.<sup>14</sup> Does the "fishing expedition" concept apply to the situation?

The book contains a supplement (a pocket part) consisting of the Federal Food and Drug Act of June 30, 1906, the Federal Food, Drug and Cosmetic Act of June 25, 1938, the Federal Trade Commission (Wheeler-Lea) Act, the Federal Regulation of Lobbying Act, and The Federal Administrative Procedure Act.

Presumably all would agree that a study of the materials on legislation is desirable to round out and broaden the student's knowledge. Actually the question would not be whether such a study would be "desirable" (if it could be jammed into the curriculum), but whether such a study is not made absolutely "necessary" by virtue of its importance in the daily life of the lawyer. It would seem that a dynamic curriculum, calculated to meet the needs of the present day lawyer, should find a real place for a course imparting so basic and so necessary a skill. Although your reviewer is aware of the fact that less than one-half of the law schools offer courses on legislation, he nevertheless feels that such a course is vitally important and should be taught in all of the law schools. Its omission from the curriculum reveals a partial inadequacy in the present law school training. The availability of good books in the field of legislation doubtless is a fact that will be considered by the law school officers and law school curriculum committees responsible for curriculum changes and improvements. If Professor Horack is correct, and your reviewer is thoroughly convinced that he is, when he states that ". . . the statute law today is indeed as extensive as judge-made law,"<sup>15</sup> the task of convincing these educators is made considerably easier. It is clear that the problem is now purely one of curriculum, and not one pertaining to the availability of suitable teaching materials.

Professor Cohen is to be commended for having made available to the law teaching profession an excellent book designed to teach a very important course—an introductory course in the field of legislation.

Edward D. Re\*

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14. *Id.* at 536-539.

15. Preface by Frank E. Horack, Jr., 1 SUTHERLAND, STATUTORY CONSTRUCTION (3rd ed., Horack, 1943).

\* Assistant Professor of Law, St. John's University School of Law.

