1980

Legislative Process and Drafting in U.S. Law Schools: A Close Look at the Lammers Report

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LEGISLATIVE PROCESS AND DRAFTING IN U.S. LAW SCHOOLS: A CLOSE LOOK AT THE LAMMERS REPORT *

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Some years ago the American Bar Association's Standing Committee on Legislative Drafting, in its efforts to raise the level of legislative drafting in the United States, concluded that providing draftsmen with adequate manuals was hardly enough, that they also needed an administrative and procedural environment conducive to applying their art [1] and, most important, that training in drafting could no longer be entrusted to on-the-job experience in an area where a comprehensive tradition of solid craftsmanship had never been developed. The law schools seemed to be the best ultimate hope of meeting the need.

Unfortunately, law school teachers were largely preoccupied with litigation and, even when they deigned to look at a statute, it was almost always over the shoulder of a court faced with resolving a problem of vagueness. The lawyer's world of legislation is, of course, much broader. With respect to training in the drafting of statutes, and of private instruments such as contracts, leases, and wills, it was apparent that the law schools were doing little and most of that was superficial and generally ineffective.

In the meantime, ABA's Special Committee for a Study of Legal Education came into being. This committee, among other things, persuaded the American Bar Foundation to undertake a study of what the law schools were doing in the field of legal drafting. The whole field of legal drafting was chosen, because it was by then accepted by professional draftsmen that, despite the idiosyncracies of particular kinds of legal instruments, the conceptual, structural, and compositional problems of drafting were essentially the same for all legal instruments. ABA accordingly changed the name of the Standing Committee on Legislative Drafting to the Standing Committee on Legal Drafting. In the meantime, the Legal Education committee became interested also in the broader fields of legal writing, legislation, and legal research.

* Although this article was accepted for publication in 1978, unforeseen circumstances delayed its publication. Fortunately, it is still timely.

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[1] Dickerson, ed., Professionalizing Legislative Drafting: The Federal Experience (American Bar Association, 1973).

To check out current legal education in these fields, the Foundation engaged Bernard Lammers, associate professor of government at St. Lawrence University, a man highly knowledgeable in legislation. His report [2] has been published, it is now in the hands of the law schools, and, although I have some reservations that will appear later, many of his findings are worth heeding. Although the fields he covered overlap, they are sufficiently disparate to warrant discussing them separately. Let us start with legal drafting.

Perhaps the most basic of Lammers' findings on drafting relates to the curricular inadequacies of even our best law schools. It is ironic that educational institutions that pride themselves on their innovativeness and modernity are so far behind in meeting the rapidly growing need for competent legal drafting. At first, it was academic blindness. Today, it is more the lack of a mature pedagogy, especially one for reaching large classes of students. The immediate problem is to recognize the nature and extent of the problem.

The Lammers report supports the long-standing misgivings of most professional legal draftsmen about legal education. Nevertheless, the law schools remain the only institutions that can ultimately fill a professional need that on-the-job training (with its lack of adequate trainers), continuing legal education programs (which are at best sporadic), and traditional seminars (which reach too few students) cannot fill. Once they perceive the need, realize the fact that the trained draftsman performs a solid intellectual function and not a pedestrian skill, and develop an adequate large-class pedagogy, they can begin to upgrade the bar generally. Consideration of specific methods must await another occasion.

The value of the Lammers' report is that it gives increased visibility to a serious professional problem that the law schools have largely neglected because of their traditional preoccupation with litigation, a recent fascination with sociology, and the lack of an adequate pedagogy in an area where the case method is irrelevant. The matter is socially critical because an otherwise solid program can founder if the craftsmanship necessary to formulate adequate implementing statutes, regulations, and other definitive legal instruments is lacking.

Here are some of Lammers' valuable findings:

(1) Modern government needs good draftsmen (2).
(2) Drafting is important also to the practitioner (46 note).
(3) Good draftsmen can help improve substantive policy (2).
(4) Draftsmen need a solid grounding in exposition and structure (39).[3] (Many students are deficient in general exposition when they enter law school (8).)

[2] Legislative Process and Drafting in U.S. Law Schools (American Bar Foundation, 1977).

[3] "Research design is the central factor in scholarly writing of this sort where precise communication is more important than imaginative flair" (39).

(5) Legislative draftsmen need to understand the legislative process and its social and political background (passim).
(6) Good reasons exist for teaching at least legislative drafting in the law schools (54–56).
(7) Adequate training in drafting is now lacking (3), because it is not being provided by (a) current courses in "legal writing and research," (b) the "pervasive" approach to drafting (that is, handling it where relevant in substantive courses), or (c) sporadic courses or seminars in "drafting" (10–11).
(8) Training in drafting is a proper function of the law schools (57). "Instructors should not hesitate to teach writing!" (39).[4]
(9) Most faculty members are "not seriously concerned about instruction in general legal drafting—as distinguished from legislative drafting" (11).
(10) Materials for teaching drafting to large classes have not yet been developed (16, 24).
(11) In drafting and other legal writing, it is possible to simulate the "real-life activities of lawyers" (40).
(12) Assigning the teaching of drafting to outsiders such as alumni (40) or persons served by outside internships (50) is risky, because it is hard to monitor them. Use of students with minimal faculty supervision is cheap but produces "cheap" results (43).

These observations are all to the good and they deserve to be heeded. It remains only to point out respects in which the report needs sharpening or supplementing. Its continual intermingling of legal drafting, legal writing, legislation, and legal research blurred some of its specific perspectives and Lammers' reluctance to inject his own evaluations left gaps that the inexpert would find it hard to fill. Several assumptions may also be questioned.

The report suggests that legal draftsmen doubt that legal drafting differs significantly from scholarly writing generally. Some of the draftsmen Lammers questioned seemed "puzzled or even offended" by his inquiry and he observes that legal drafting shares problems with scholarly writing generally (42 note). In my opinion, legal drafting differs from most scholarly writing in the former's greater intellectual and verbal rigor, its more compelling need for succinctness and formal consistency, the lesser appropriateness of redundancy, and the lesser incidence of the emotive element, which is common even in scholarly writing while minimal or non-existent in drafting. The fact that two disciplines share problems does not, of course, preclude the presence of others that make it desirable to keep the disciplines functionally separate.

The report seems to treat legal drafting as a specialty, when it is no more a specialty than case analysis. Legislative drafting, on the other hand, may in some respects be so classified, but these respects are easily

[4] "There is some question... whether on-the-job training is the only way to learn drafting effectively" (46).

exaggerated (the differences between legislative drafting and other kinds of legal drafting are much less important than their similarities).

Whatever the reason, the report implies a greater difference between legislative drafting and other drafting (4, 23) than any professional draftsman I know would admit to. The practical difference here is mainly in differing degrees of complexity, which is of lesser concern to legal pedagogues than aptness and typicality. I consider myself as teaching "legal drafting" even though most of my examples come from statutes or administrative regulations, where I am professionally more experienced.

In any event, professional draftsmen do not accept the assertion that the desirability of teaching law students how to draft private legal instruments is still "open to debate" (10), an arguably innocuous assertion in view of the obvious fact that some legal pedagogues are still debating the point. Unfortunately, in context the phrase "open to debate" suggests, not merely that people may in fact debate the point, but that solid arguments can still be adduced on either side. On the basis of what is now known, the issue is no longer whether but how. That laymen occasionally draft as skillfully as some lawyers (48, 61) is hardly persuasive, because the situation is more plausibly explained by the fact that inadequate law school training in drafting has left many lawyers equipped little better than laymen.

The report attributes the rapid turnover in personnel in offices of legislative counsel to low salaries, but it is more persuasively attributable to the legal profession's condescending view of the drafting "skill" (its semantic putdown) [5] and the lack of an administrative and organizational environment conducive to good drafting.[6] In discussing the relationships between law schools and offices of legislative counsel (49), the report might have pointed up more sharply the important difference between placing student interns in such offices (which has been generally unsuccessful) and having them work within the law schools and under professorial supervision on assignments made by such offices (which has, on occasion, been quite successful). This difference, of course, relates to the law schools' opportunity for close supervision, the general need for which the report strongly affirms (50 note).

Although Lammers is commendably reticent about advancing his own views, letting the facts speak for themselves imposes a heavy responsibility to carefully collect, sift, and balance. Lammers is an impressive scholar, deeply devoted to democratic principle. As a sophisticated political scientist, he sought conventional legal wisdom from a wide array of interviewees and, being thorough, he got it. But it was risky to poll the traditional repositories of legal wisdom in an area where the received tradition still condones practices whose historical and constitutional justifications have long since disappeared. Nowhere else is accepted legal and

[5] E. g., see T. DeCotiis & W. Steele, Jr., *The Skills of the Lawyering Process*, 40 Tex.B.J. 483, 489 (June 1977). No putdown is intended by Lammers.

[6] See note 1 above.

academic practice so archaic. Asking the law schools to tell what they were doing made good sense, but asking them to evaluate what they were doing inevitably produced, in this neglected area, a melange of superficialities. Lammers' decision to soft pedal his own evaluations thus left important gaps.

For example, the report does not point out that Columbia University's Legislative Drafting Research Fund, which Lammers finds an attractive model (18, 25) is atypical of, rather than a prototype for, professional legislative draftsmen generally. Ignorance of the fact would make it easy to conclude that legislative drafting normally calls for conventional methods of legal research, whereas the typical professional (who rarely has the opportunity to work in the Columbia University pattern) lacks the time, the resources, the opportunity, and even the need to do it. He does most of his policy research by finding persons who are already knowledgeable and questioning them closely.[7] It is thus hard to evaluate Lammers' references to the legislative draftsman's "research" (e. g., 23, 51), because it is not clear from the report what kind of research methods he had in mind. Belief in the need for conventional policy, fact, or law gathering could easily lead a reader to assume that conventional courses in "legal research and writing," which stress just that, are more than incidentally relevant to legislative drafting.[8] Although Lammers himself seems aware of current weaknesses in such courses, the more important point is that even an otherwise excellent course in those areas is likely to leave the student less than minimumly qualified in legal drafting.

Although the statement that the "time seems ripe for development of a shared methodology" (61) is plainly true of matters of pedagogy, it is not so true of uniformity of drafting style. Its plea for a "uniform bill-drafting manual" (as distinct from a "non-uniform" one?) (61, 63) serves only a secondary current need; today's trained professionals do not differ widely in these areas. More significantly lacking are (1) an adequate acceptance of the solid drafting standards that already exist, (2) an adequate cadre of trained professionals, and (3) a decently adequate organizational and procedural environment in which they can operate.[9] Meeting these lacks would also go far toward getting rid of legal gobbledygook.

Lammers' plea for exposing legislative draftsmen to sociologically enriched courses in constitutional law and administrative law (62) is not wholly convincing, if he is referring to such courses as they are otherwise conventionally oriented, inasmuch as they tend to neglect the aspects of those fields that are of peculiar interest to legislative draftsmen. These

[7] "We do not have time to take a lot of books or written materials and pore over it. We have got to get the expert that knows it and dig it out of him in a hurry." Middleton Beaman, Hearings on H.R.Con.Res. 18, Joint Committee on the Organization of Congress, 79th Cong., 1st Sess. 413, 425 (1945).

[8] The realities seem to undercut any such assumption. E. g., G. Gopen, *A Composition Course for Pre-Law Students*, 29 J.Leg.Ed. 222 (1978); E. Stone, *Communication Skills Offerings in American Law Schools*, 29 *id.* 238.

[9] See note 1 above.

include important aspects of the separation of powers [10] (especially that between legislative and judicial branches), subject and title requirements, special legislation, requirements for effective enactment, appropriate vehicles for legislation, and adequate attention to the constant interaction between substance and language in the course of administrative rule-making, none of which is emphasized in the report. Conventional courses in administrative law, like other parts of the typical law school curriculum, tend to be preoccupied with the formal and evidentiary aspects of agency action and judicial review, which are of small concern to the legislative draftsman. To serve the prospective draftsman, these courses would need to be substantially realigned.[11]

Also questionable is the statement that legislative drafting "should be taught after the student knows something about all the other fields" (65). Although drafting cannot be taught in a substantive vacuum, its rudiments can be effectively taught at any time after the first year and even after the first semester. The main reason for postponing it is that student attrition helps alleviate the heavy pedagogical burden that today's scarcity of law teachers who are adequately trained in drafting would otherwise impose.

In the broad field of legislation generally, it is hard in many instances to determine what the Lammers report is targeting. The affinity, such as it is, between legislation and legislative drafting might suggest that he is targeting the whole field of legislation; much of the data gathered relates generally to the legislative materials that interest lawyers. On the other hand, the title of the report ("Legislative Process") read in the light of various aspects that Lammers continually emphasizes within his own special fields of interest[12] suggests that he downplays non-"process" aspects of legislation such as statutory interpretation. Why, for example, did he include a valuable "Bibliography for Courses on the Legislative Process" (77) but none on legislative drafting or statutory interpretation? Even if, as I am persuaded, it was to emphasize an important need, we must be concerned also about the negative implication created by refraining from doing the same for other aspects of these areas of concern that are equally nontraditional, equally important, and equally neglected.

On the other hand, there is good reason to support Lammers' general espousal of legislation courses in American law schools.[13] Certainly, the

[10] Linde & Bunn, Legislative and Administrative Processes (1976) is a helpful step in this direction.

[11] What of the fact that some well known casebooks include cases on the "separation of powers" or "administrative rule-making"? Only tangentially do they deal with the matters most critical to the legislative draftsman. Nor does the occasional inclusion of a significant case preclude its being among the materials that the law teacher omits.

[12] E. g., "structure of American government . . . constitutional and political history" (2), "political dynamics of the legislative process" (3, 4), "*political causes* of the products of legislatures (4), "factors that interest present-day political analysts" (7), "legislative behavior useful to prospective bill drafters" (30), "political activity that is indicated by present-day reference to 'legislative behavior' " (31), etc.

[13] This need has been well documented by J. Dolan, *Law School Teaching of Legislation*, 22 J.Leg.Ed. 63 (1969).

"pervasive" method of dealing with statutes in a wide range of substantively oriented courses has failed to provide lawyers with any realistic grasp of how to deal with legislative materials.

Lammers favors at least two courses, including one dealing with conventional legislative subjects (such as legislative procedure and statutory interpretation) and the other dealing with his own professional interests (27 note, 64). Although the latter include valuable materials that should infiltrate the former,[14] I question the value, in law school, of a legislation course that in Lammers' terms would seem to approximate a course in political science or sociology.[15] In questioning further interdisciplinary ventures on the ground that they would tend to prolong the neglect of hard-core disciplines that lie closer to the center of today's lawyers' professional responsibility, I do not denigrate those other valuable disciplines.

What would be more the point would be to redress, throughout the curriculum, the serious imbalance that persists between case law and statute law. Instead of looking at statutes and administrative regulations mostly through the eyes of the courts, we need a heavy exposure to problem materials that can be handled only by explicating the applicable instruments.

But the main inadequacies in the Lammers report remain in the field of legal drafting, where its continual emphasis on the importance of developing a sophisticated grasp of the political and sociological environment in which legislation is developed,[16] coupled with its failure to pinpoint the most critical weaknesses in current courses in legal education, tends to divert academic attention enough to make it easy to conclude, with respect to legal drafting, that the most important academic problems lie elsewhere and that the law schools need do little more about drafting than they are now doing. If so, Lammers may have succeeded only in praising with faint damns the academic status quo.

We have here a professional problem that cannot be solved wholly outside the law schools and cannot be solved in any significant way inside the law schools until the nature of the drafting problem is better understood by academics and an adequate pedagogy is developed to deal with it. It cannot be solved with new drafting manuals (of which there is a plethora) or by courses in legal research, "legal writing," legislation, conventional courses in constitutional or administrative law, or by the "pervasive" method. It can be solved only by using such approaches to supplement required courses in legal drafting that adequately reflect the fact that legal drafting is a special kind of writing that concerns almost all lawyers.

[14] E. g., Nutting & Dickerson, Cases and Materials on Legislation (5th ed. 1978).

[15] Most legal functions are directed to serving clients, an activity that involves policy making by the lawyer only in the role of midwife. Certainly, the legislative draftsman is not essentially a policy maker, political scientist, or lobbyist and thus is not having the baby himself.

[16] See note 12 above.

In closing, let me emphasize that my observations on the report have been intended only as a constructive supplement and reflect no lack of appreciation for the otherwise valuable report that Lammers has produced and no lack of gratitude to the Foundation and the Legal Education Committee for making it possible.