

LEGISLATION IN THE LAW SCHOOL

by Frank P. Grad*

Introduction; Legislation as a Source of Law and as a Part of the Law School Curriculum

A brief, introductory comment is hardly the place for a historical analysis of the origins of statutory law. I need not rely on the Code of Hammurabbi to establish the accepted status of legislation; Magna Carta—the Great Charter of 1215—will qualify as legislative action by the British Crown.¹ In the system of Civil Law, the Justinian Code² suffices as evidence of early legislation. When I refer to early legislation, I mean a systematic statement of a set of articulated rules promulgated by a law giver in a textually rigid form, distinguishable from the *ad hoc*, casuistic statement of a rule in the decision of a case. We encounter a new situation with the beginning of modern legislative bodies, such as the British Parliament and its House of Commons, or the American Congress, when statute making attains its force as an expression of the popular will. To be sure, there were a number of ancient legislatures, such as the Roman Senate, but we need not delve into early history to make the point that the enactment of legislation is an established and accepted practice,³ and that legislation as a source of law is ancient and really quite respectable.

There ought to be no reason to say any of this, because to those engaged in the teaching and drafting of legislation, the importance of legislation as the *major* source of modern law is self-evident and beyond doubt. Unfortunately, this point must be made ever more insistently, because many American law schools continue to neglect the subject of legislation in their curricula at a time when legislation affords the only opportunity for responsible development of the law. In 1949, my teacher and preceptor, Harry W. Jones, characterized

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¹ It is so used in H. READ, J. MACDONALD, J. FORDHAM & W. PIERCE, MATERIALS ON LEGISLATION 1 (4th ed. 1982).

² For discussion of civil law systems, see O. HETZEL, LEGISLATIVE LAW AND PROCESS 367-78 (1980).

³ See, e.g., H. READ, J. MACDONALD, J. FORDHAM & W. PIERCE, MATERIALS ON LEGISLATION 1-7 (4th ed. 1982). Reference is made to the Statute of Labourers, 1349, 23 Edw. 3.

the history of failure to train students in legislation as "a record of neglected opportunity."⁴ In 1984, 35 years later, I characterize this failure as a professional disgrace.

There was no training in any aspect of legislation for many years following Christopher Columbus Langdell's major contribution to legal education.⁵ The whole Langdellian apparatus of case law study, with its insistence on case-by-case development and synthesis of the common law, its reliance on the Socratic Method, and its abhorrence of principles of law that could not be drawn from reported cases, began as a monumental advance in legal education, but also served as a massive obstacle to the teaching of legislation well into the 20th century.⁶ Langdell's contribution to legal education choked the development of legislation as a subject for serious academic concern. This chokehold was not weakened until 1919-20 when the first course in legislation was taught by Thomas I. Parkinson at Columbia Law School.⁷ In 1928-29, a new Spring semester course in legislation became a required course for all first year law students at Columbia.⁸

During the past sixty years or so there have been many develop-

⁴ Jones, *A Case Study in Neglected Opportunity: Law Schools and the Legislative Development of the Law*, 2 J. LEGAL EDUC. 137, 139 (1949).

⁵ It seems that prior to Langdell, there was some teaching of statutory law as part of the training at the Inns of Court. See Pound, *The University and the Legal Profession*, 7 OHIO ST. L.J. 3, 19 (1940).

⁶ Langdell reflected his contemporaries' distrust and dislike of statutes as unwarranted intrusions into the perfect and seamless web of the common law. Langdell and his followers, who actively sought to prevent legislation from being taught in American law schools, were aided in their efforts by the particularly low public standing and reputation of legislative bodies, particularly state legislatures.

⁷ Memorandum from Joseph P. Chamberlain, Director of the Legislative Drafting Research Fund, to Professor Lindsay Rodgers of the Faculty of Public Law and Government (Feb. 22, 1937) (copy on file at the Columbia Legislative Drafting Research Fund). In 1917, a new professorship of legislation was created at the Law School, and Parkinson was appointed to fill it. Thomas I. Parkinson, following a practical demonstration for Congress undertaken by the Legislative Drafting Research Fund in 1916, became the first legislative counsel to the Senate in 1918. Middleton Beaman, who had been in charge of the 1916 demonstration for Congress, became the first legislative counsel on the House side. Lee, *The Office of the Legislative Counsel*, 29 COLUM. L. REV. 381, 386 (1929). While Columbia Law School takes great pride in its contribution to the study of legislation, it should be noted that such men as Ernst Freund, Dean Landis, Roscoe Pound, and others, were advancing the cause and development of legislation at other institutions.

⁸ ANNOUNCEMENT OF THE SCHOOL OF LAW OF COLUMBIA UNIVERSITY FOR 1928-29. In 1936, the course became a three-hour course, and was moved into first semester of the first year. Entering law students thus received their initial training in legislation concurrently with their initial case law instruction. The course was replaced in 1944 by

ments in the teaching of legislation in law schools. An examination of the *1983-84 Directory of Law Teachers* indicates that there are now 202 law teachers in the nation who describe themselves as teachers of legislation.⁹ Of these 202, however, only 106 are listed as currently involved in teaching the subject.¹⁰ The Directory lists 174 approved law schools,¹¹ 146 of which are approved by the Association of American Law Schools (AALS),¹² and 28 of which are approved by the American Bar Association.¹³ Assuming that no school has more than one instructor of legislation, an assumption which I consider fairly safe, sixty percent of approved American law schools teach some course in legislation, but forty percent do not!

These numbers suggest other conclusions as well. Only 27 of the 106 currently active teachers of legislation have taught the subject for over ten years.¹⁴ This provides some evidence that interest in the field as part of the law school curriculum is fairly recent. Perhaps the count also provides some basis for optimism—the largest group of the currently active legislation teachers, 55 of them—have taught the subject for only one to five years.¹⁵ This statistic may be indicative of growth justifying hope for the future.

A significant development, too, is the recent establishment of a Section on Legislation by the AALS.¹⁶ Although the AALS had a Roundtable on Legislation many years ago,¹⁷ the formal recognition

the first-year course in Legal Method which is still part of the first-year curriculum, and which gives equal attention to legislation and case law.

⁹ ASSOCIATION OF AMERICAN LAW SCHOOLS, *DIRECTORY OF LAW TEACHERS* 1983-84, 862-63 (1982).

¹⁰ *Id.* These numbers have not changed significantly since 1971, when the Directory listed more than 200 instructors in legislation. See *THE LEGISLATIVE DRAFTING RESEARCH FUND OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK, 1911-1971, A BRIEF HISTORY OF THE FIRST SIXTY YEARS*, at 5 n.11 (1972) [hereinafter cited as *LDRF Brief History*].

¹¹ See ASSOCIATION OF AMERICAN LAW SCHOOLS, *DIRECTORY OF LAW TEACHERS* 1983-84, at 904-14.

¹² *Id.* at 915-16.

¹³ *Id.*

¹⁴ *Id.* at 863.

¹⁵ *Id.* at 862.

¹⁶ The Section on Legislation was proposed by Professor Lawrence Bershad of the Seton Hall University School of Law. See *Proposal of Section on Legislation*, AALS NEWSLETTER, March 1983, at 8.

¹⁷ The Legislation Roundtables were begun in 1932. See Witherspoon, *The Essential Focus of Statutory Interpretation*, 36 *IND. L. REV.* 423, 424 n.1 (1961). Other significant events in the recognition of legislation as a subject in law school include the meeting of teachers and legislative draftsmen at the National Conference on Federal Legislative

of legislation as a fitting subject for curriculum attention—though delayed—must be appreciated. Better late than never!

A Miscellany of Offerings and Programs

I have referred to legislation as a subject for inclusion in the law school curriculum without any indication of what such a course should cover. A review of law school offerings made by the American Bar Foundation in 1977¹⁸ found that it is difficult to compare the offerings of different schools because there is so little uniformity in what is included in courses in "legislation." A look at the available coursebooks¹⁹ on the subject indicates that most commonly what is taught in legislation courses is the subject of statutory interpretation, both by reference to the outmoded—but frequently used—canons of

Drafting in the Executive Branch, held under the sponsorship of the Standing Committee on Legislative Drafting of the American Bar Association, at Caldwell Hall, Catholic University of America School of Law, on May 21-22, 1971. The proceedings were reported in *PROFESSIONALIZING LEGISLATIVE DRAFTING-THE FEDERAL EXPERIENCE* (R. Dickerson ed. 1973). Another significant conference that stressed the many ways of teaching legislation in law schools was also stimulated, arranged and presided over by Reed Dickerson. The Conference, entitled International Seminar and Workshop on the Teaching of Legal Drafting, was again under the sponsorship of the ABA Standing Committee on Legal Drafting, and met on October 3-4, 1975 at the Indiana University School of Law, Bloomington, Indiana.

¹⁸ B. LAMMERS, *LEGISLATIVE PROCESS AND DRAFTING IN U.S. LAW SCHOOLS* (1977). For a recent soundly analytical and detailed review of legislation in law schools, see Williams, *Statutory Law in Legal Education: Still Second Class After All These Years*, 35 *MERCER L. REV.* 803 (1984).

¹⁹ See H. READ, J. MACDONALD, J. FORDHAM & W. PIERCE, *MATERIALS ON LEGISLATION* (4th ed. 1982); J. COHEN, *MATERIALS AND PROBLEMS ON LEGISLATION* (2d ed. 1967); F. NEWMAN & S. SURRAY, *LEGISLATION, CASES AND MATERIALS* (1955); C. NUTTING & R. DICKERSON, *CASES AND MATERIALS ON LEGISLATION* (5th ed. 1978). Although these books were first published in the later forties or early fifties, they are still in use. A recent addition is O. HETZEL, *LEGISLATIVE LAW AND PROCESS* (1980). There is another coursebook with significant relevance to the teaching of legislation in a first year course. It is H. JONES, J. KERNOCHAN & A. MURPHY, *LEGAL METHOD: CASES AND TEXT MATERIALS* (1980). This is a successor to the work by Dowling, Paterson, and Powell, which began in the forties to teach legislation as well as case law to beginning law students.

Another recent work combines an emphasis on legislative process with an examination of the impact of the legislative process on the application of the statute after its enactment. The work emphasizes policy formulation while examining the process of statutory enactment. H. LINDE, G. BUNN, F. PAFF & W. CHURCH, *LEGISLATIVE AND ADMINISTRATIVE PROCESSES* (2d ed. 1981). In 1977, Lammers reported that Read, MacDonald, Fordham and Pierce's book had been adopted for 39 courses, Nutting and Dickerson's for 35, and Dickerson's book, *Fundamentals of Legal Drafting*, at 7 schools.

construction,²⁰ and the more contemporary method of reliance on extrinsic sources of legislative history.²¹ Some texts even include such advanced approaches as the use of the statute as a source of law beyond its terms, *i.e.* the use of a statute for the purpose of developing its policy and applying it to situations not expressly covered by the statute itself.²²

Coursebooks also address the legislative process, but these books generally separate the discussion of process from the consideration of legislative interpretation.²³ It would be useful to consider process as an aid to understanding and using the documents produced in the course of the legislative history, and as an aid to statutory interpretation.

Consideration of the effective documentation of the coming into effect of statutory law, including a variety of formal requirements, and such matters as the enrolled bill or journal entry rules, have also been covered.²⁴ In addition, the coverage has included reference to such matters as the regulation of lobbying,²⁵ and legislative investigations, including consideration of executive privilege.²⁶ There seem to be no references to the legislative veto and sunset rules, though each of the works comments on some other matter of legislative-executive

²⁰ See O. HETZEL, *supra* note 19, at 307-14; C. NUTTING & R. DICKERSON, *supra* note 19, at 447-48, 528-42; H. READ, J. MACDONALD, J. FORDHAM & W. PIERCE, *supra* note 19, at 778-84, 799-808, 843-47.

²¹ See J. COHEN, *supra* note 19, at 35-174; O. HETZEL, *supra* note 19, at 161-270; F. NEWMAN & S. SURREY, *supra* note 19, at 646-52; C. NUTTING & R. DICKERSON, *supra* note 19, at 543-605; H. READ, J. MACDONALD, J. FORDHAM & W. PIERCE, *supra* note 19, at 886-946.

²² See J. COHEN, *supra* note 19, at 187-252; O. HETZEL, *supra* note 19, at 140-60; C. NUTTING & R. DICKERSON, *supra* note 19, at 655-64; H. JONES, J. KERNOCHAN & A. MURPHY, *supra* note 19, at 694-736.

²³ See J. COHEN, *supra* note 19, at 350-406; O. HETZEL, *supra* note 19, at 431-562; F. NEWMAN & S. SURREY, *supra* note 19, at 89-198; C. NUTTING & R. DICKERSON, *supra* note 19, at 200-368; H. READ, J. MACDONALD, J. FORDHAM & W. PIERCE, *supra* note 19, at 451-544.

²⁴ See O. HETZEL, *supra* note 19, at 563-604; C. NUTTING & R. DICKERSON, *supra* note 19, at 200-349.

²⁵ See J. COHEN, *supra* note 19, at 296-350; O. HETZEL, *supra* note 19, at 693-752; F. NEWMAN & S. SURREY, *supra* note 19, at 16-88; C. NUTTING & R. DICKERSON, *supra* note 19, at 109-48; H. READ, J. MACDONALD, J. FORDHAM & W. PIERCE, *supra* note 19, at 407-32.

²⁶ See J. COHEN, *supra* note 19, at 407-518; O. HETZEL, *supra* note 19, at 605-92; F. NEWMAN & S. SURREY, *supra* note 19, at 252-565; C. NUTTING & R. DICKERSON, *supra* note 19, at 73-108; H. READ, J. MACDONALD, J. FORDHAM & W. PIERCE, *supra* note 19, at 289-406.

relations.²⁷

Finally, the coursebooks on legislation comment on the task of legislative drafting, and some of them include legislative drafting exercises. These exercises are usually brief, and involve the redrafting of a statute with primary emphasis upon technical aspects of bill drafting. They make no reference to, or leave any opportunity for, legislative research and policy analysis. The brevity of the exercises, and the very limited number of pages devoted to them, indicate that little class time is likely to be spent on the subject.²⁸

A casual survey of fairly recent law school bulletins which are available in the Columbia law library indicates that the status of legislation in the law school curriculum is not great, but it may be improving. Course descriptions are always sketchy, and there may be some distance between the description and what actually happens in the classroom. Taking the catalogue course descriptions at face value, most, but not all, of the schools whose catalogues were available offer at least one course in legislation which covers legislative process, legislative interpretation, and which makes some reference to legislative drafting. The schools which fit this pattern include Albany Law School (2 credit seminar),²⁹ University of Arkansas Law School (2 credit course),³⁰ Brigham Young Law School (2 credit course),³¹ Case Western (3 credit course),³² Cornell (3 credit course),³³ University of Georgia (3 credit course),³⁴ Hastings (3 credit course),³⁵ University of Maryland (3 credit course),³⁶ Nova Law

²⁷ See O. HETZEL, *supra* note 19, at 753-904 (*Part Four — The Legislative and the Executive*); F. NEWMAN & S. SURREY, *supra* note 19, at 199-251 (*Legislative-Administrative Relations*); H. READ, J. MACDONALD, J. FORDHAM & W. PIERCE, *supra* note 19, at 490-511 (*Executive-Legislative Relations in Lawmaking*).

²⁸ See J. COHEN, *supra* note 19, at 253-84; O. HETZEL, *supra* note 19, at 905-50; F. NEWMAN & S. SURREY, *supra* note 19, at 564-641; C. NUTTING & R. DICKERSON, *supra* note 19, at 666-738; H. READ, J. MACDONALD, J. FORDHAM & W. PIERCE, *supra* note 19, at 127-255.

²⁹ ALBANY LAW SCHOOL OF UNION UNIVERSITY, 1983-84 BULLETIN 43.

³⁰ UNIVERSITY OF ARKANSAS AT LITTLE ROCK, SCHOOL OF LAW BULLETIN 1981-82 41.

³¹ BRIGHAM YOUNG UNIVERSITY BULLETIN, J. REUBEN CLARK LAW SCHOOL, 1983-84 30 (1983).

³² CASE WESTERN RESERVE UNIVERSITY, SCHOOL OF LAW BULLETIN 1983-84 23 (1982).

³³ LAW SCHOOL, CORNELL UNIVERSITY, ANNOUNCEMENTS 1979-80 31 (1979).

³⁴ SCHOOL OF LAW, THE UNIVERSITY OF GEORGIA, BULLETIN 1980-82 37.

³⁵ HASTINGS COLLEGE OF THE LAW, UNIVERSITY OF CALIFORNIA, 1981-82 BULLETIN 36.

Center (3 credit course),³⁷ and U.S.C. (3 credit course).³⁸

Other patterns are also encountered. The University of Alabama has an offering in "Special Problems in Legislation" (2 credits),³⁹ and a course in legislative process (3 credits).⁴⁰ Berkeley offers a seminar in Legislative and Administrative Process,⁴¹ a novel pattern which is also reflected in a Stanford offering that focuses primarily on consumer law.⁴² Some offerings focus on legislative process alone. These include courses at the University of Alabama,⁴³ Boston College,⁴⁴ and the University of Chicago.⁴⁵ Some combine an emphasis on process with other concerns. Boston University offers a three credit course in Legal Process that includes coverage of legislative process and statutory interpretation.⁴⁶ A similar pattern is followed at Northeastern.⁴⁷ George Washington, in its 1978-79 Bulletin, listed a two credit offering covering process and interpretation, and a separate two credit offering in legislative drafting.⁴⁸ The University of Idaho also combines process and interpretation in a three credit course.⁴⁹ U.C.L.A., in a two credit offering, combines legislative process with some drafting.⁵⁰

³⁶ UNIVERSITY OF MARYLAND SCHOOL OF LAW AT BALTIMORE, 1983-84 66.

³⁷ NOVA UNIVERSITY CENTER FOR THE STUDY OF LAW, BULLETIN FOR THE ACADEMIC YEAR 1983-84 17.

³⁸ THE LAW CENTER, UNIVERSITY OF SOUTHERN CALIFORNIA, 1983-84 BULLETIN 41.

³⁹ THE UNIVERSITY OF ALABAMA, LAW SCHOOL CATALOG 1983-84 40.

⁴⁰ *Id.* at 43.

⁴¹ SCHOOL OF LAW (BOALT HALL), UNIVERSITY OF CALIFORNIA AT BERKELEY 1980-81 39 (1980) (2 credits).

⁴² STANFORD UNIVERSITY BULLETIN, STANFORD LAW SCHOOL, PROGRAMS OF STUDY 1983-84 30 (1983) (three credits). The combination of instruction in Administrative and Legislative Process is encountered, too, in one of the more recent coursebooks, H. LINDE, G. BUNN, F. PAFF & W. CHURCH, ADMINISTRATIVE AND LEGISLATIVE PROCESSES (2d ed. 1981).

⁴³ THE UNIVERSITY OF ALABAMA, LAW SCHOOL CATALOG 1983-84 40.

⁴⁴ BOSTON COLLEGE, LAW SCHOOL BULLETIN 10 (1983).

⁴⁵ THE LAW SCHOOL, THE UNIVERSITY OF CHICAGO, ANNOUNCEMENT 1983-84 13 (1983) (four credits).

⁴⁶ SCHOOL OF LAW, BOSTON UNIVERSITY, 1983-84 BULLETIN 55 (1983).

⁴⁷ NORTHEASTERN UNIVERSITY SCHOOL OF LAW, COOPERATIVE LEGAL EDUCATION 39 (undated).

⁴⁸ THE GEORGE WASHINGTON UNIVERSITY, NATIONAL LAW CENTER BULLETIN 1982-83 57, 78 (1982).

⁴⁹ UNIVERSITY OF IDAHO, THE COLLEGE OF LAW 1983-84 ANNOUNCEMENT 28 (1983).

⁵⁰ UNIVERSITY OF CALIFORNIA AT LOS ANGELES, SCHOOL OF LAW 1979-80 30 (1979).

A few schools have offerings which focus entirely on legislative drafting. Brooklyn Law School offers a two credit bill drafting seminar,⁵¹ and U.S.C. offers a "Legislative Workshop" which provides training in legislative drafting.⁵² George Washington, too, offers a two credit seminar in legislative drafting.⁵³

A number of courses seem to emphasize particular substantive aspects of legislation. The University of Georgia Law School offers a three credit course in "Social Legislation,"⁵⁴ as does Nova Law Center.⁵⁵

In addition to formal offerings of a traditional kind, a growing number of schools provide programs and activities of a clinical nature. Some of these seem to have been inspired by the general development of clinical offerings in the seventies, but some were underway before clinical legal education had been given that label. These programs include Albany Law School's Government Law Center, which provides opportunities for internships and research,⁵⁶ and Boston University's Legislative Services Program, which involves legislative drafting for state legislators and civic groups.⁵⁷ Creighton Law School has a Legislative Research and Drafting Service which uses law students and a faculty advisor; it also seeks to serve as a national clearinghouse for drafting projects.⁵⁸ Harvard, in its Bulletin, lists an offering in International Legal Drafting of documents such as treaties, resolutions, and economic agreements,⁵⁹ but it does not list its student-run legislative drafting service, which also publishes the *Harvard Journal of Legislation*. For a description of this significant activity, one must consult the Harvard Handbook for Activities listing.⁶⁰ Hofstra, in addition to its three credit seminar in Legislative Process,⁶¹ and a two credit seminar in Advanced Legal Research,⁶² which includes legislative research skills, has available the Louis Lef-

⁵¹ BROOKLYN LAW SCHOOL, 1979-80 BULLETIN 61.

⁵² THE LAW CENTER, UNIVERSITY OF SOUTHERN CALIFORNIA, 1983-84 BULLETIN 42.

⁵³ THE GEORGE WASHINGTON UNIVERSITY, *supra* note 48, at 78.

⁵⁴ SCHOOL OF LAW, THE UNIVERSITY OF GEORGIA, BULLETIN 1980-82 38.

⁵⁵ NOVA UNIVERSITY LAW CENTER, *supra* note 38, at 18.

⁵⁶ ALBANY LAW SCHOOL OF UNION UNIVERSITY, *supra* note 30, at 54.

⁵⁷ SCHOOL OF LAW, BOSTON UNIVERSITY, *supra* note 46, at 72.

⁵⁸ CREIGHTON UNIVERSITY SCHOOL OF LAW, BULLETIN 1982-83 28 (1982).

⁵⁹ OFFICIAL REGISTER OF HARVARD UNIVERSITY 26 (1982).

⁶⁰ *See id.* at 35.

⁶¹ HOFSTRA UNIVERSITY SCHOOL OF LAW, HOFSTRA LAW 36 (1983).

⁶² *Id.* at 28.

kowitz Center for Government, Law and Legislation, which provides research and the aid of experts to government agencies and legislators.⁶³

Yale, like Harvard, lists no formal offerings in legislation, but it has a student-run operation, Yale Legislative Services, which engages in "legislature watching," *i.e.* keeping track of the activities of the Connecticut Legislature. It does some bill drafting, and provides some internships with state legislators.⁶⁴

Other significant programs include a clinical offering in legislation and legislative drafting at Seton Hall.⁶⁵ The Seton Hall Legislative Bureau also produces this very Journal.⁶⁶

Other significant clinical programs in legislation which are well-known in the field, though I have no catalogue references for them, include the Georgetown program, the Legislative Research Center at Michigan Law School,⁶⁷ and legislative reference bureaus at Vanderbilt⁶⁸ and Notre Dame.⁶⁹ Another program, which extends the clinical approach to a simulation of the entire legislative process, is the Georgetown program which Professor Schrag, one of its originators, describes in the pages that follow.

The two law schools of Indiana University also reflect major and significant interests in legislation. The Indianapolis Law School includes legislative drafting in its more general three credit offering in legal drafting.⁷⁰ It also has a two credit offering in legislative process and interpretation which covers process, interpretation, and some drafting.⁷¹ In addition, there is provision for some legislative internships of ten to fifteen hours a week with the Indiana Legislative Services Agency.⁷² The Indiana University Law School at Bloomington is the place where Reed Dickerson teaches. One of the best-known

⁶³ *Id.* at 21.

⁶⁴ YALE LAW SCHOOL, 1982-83 BULLETIN 100-101 (1982).

⁶⁵ SETON HALL UNIVERSITY, THE SCHOOL OF LAW BULLETIN 1982-84 46 (1982).

⁶⁶ *Id.*

⁶⁷ See Estep, *The Michigan Legislative Research Center*, 41 A.B.A.J. 749 (1955); see also Domanskis, *The Journal: After a Decade*, 11 U. MICH. J.L. REF. 1 (1977) (discussing the contribution of the *University of Michigan Journal of Law Reform*).

⁶⁸ See Traynor, *A Foreword to the Vanderbilt Law Review's New Section on Legislation*, 16 VAND. L. REV. 1261 (1963).

⁶⁹ The *Notre Dame Journal of Legislation* began publication in 1974.

⁷⁰ SCHOOL OF LAW — INDIANAPOLIS, INDIANA UNIVERSITY BULLETIN 1982-84 39 (1982).

⁷¹ *Id.* at 38.

⁷² *Id.* at 46.

teachers of legislative drafting, Professor Dickerson has provided an account of his teaching activities in some of his publications.⁷³ Having earlier emphasized legislative drafting in his teaching, he later subsumed legislative drafting into a course in legal drafting generally, which he teaches to large classes, demonstrating revisions with the aid of an overhead projector. He avoids both a research component and individualized attention to student drafts, except in a final examination exercise which requires the students to revise, without substantive change, "a complicated one-page legal document that contains typical drafting inadequacies."⁷⁴ Though Dickerson has clearly rejected the view "that drafting is only manipulating words,"⁷⁵ he believes that major involvement in substantive research detracts from, rather than enhances, effective attention to the drafting task.⁷⁶ His course also seeks to cover materials of a theoretical nature relating to drafting, including linguistic aspects, and analytical aspects of conceptualization and communication. He has since published these materials in a text.⁷⁷

My own school, Columbia Law School, has other offerings relating to legal writing and drafting,⁷⁸ but it has a separate course in legislation, and a seminar in legislative drafting entitled "Seminar in Legislative Development of the Law."⁷⁹ The course in legislation is a small section course limited to 30 students. It covers legislative process by tracing a recent piece of legislation from introduction to enactment, analyzing legislative procedures and the production of significant legislative documents along the way. In addition, the federal process is compared to the state process. Legislative interpretation is covered by an analysis of the techniques of interpretation as reflected in recent decisions, and by discussion of recent writings on the subject. A significant part of the course is devoted to legislative drafting. A substantial and researchable problem is assigned, and

⁷³ See, e.g., Dickerson, *Teaching Legal Writing in the Law Schools (with a Special Nod to Legal Drafting)*, 18 IDAHO L. REV. 85, 88-89 (1979).

⁷⁴ *Id.* at 90.

⁷⁵ *Id.* at 89.

⁷⁶ *Id.* at 86-89 *passim*.

⁷⁷ R. DICKERSON, MATERIALS ON LEGAL DRAFTING (1981). Professor Dickerson begins his *Foreword* to the work as follows: "This book is intended to do for preventive law what the modern casebook has been doing so well for case law." *Id.* at xix.

⁷⁸ COLUMBIA UNIVERSITY SCHOOL OF LAW 1982-84 (seminar in Drafting of Legal Instruments (2 credits)); *id.* at 57 (seminar in Legal Writing); *id.* at 45 (writing credit required for degree).

⁷⁹ *Id.*

several weeks are spent discussing policy issues and the legal and constitutional questions raised by the assignment. The discussion is based on legal and substantive research. The instructor acts as final policymaker, and the process is a near-simulation of similar sessions held by legislative committees or public groups developing a legislative proposal. One student is selected to prepare a draft with a supporting memorandum, while each other member of the group prepares a so-called first draft without any supporting writings. A two-hour class session is devoted to a no-holds barred review and critique of the selected student draft, and on the basis of the entire process, each student prepares an individual final draft with a supporting memorandum for final submission. With 25 to 30 students in the class, detailed review of final drafts and memoranda, which generally run 40 to 60 pages each in length, is a substantial task, but an unavoidable one if each student is to get the response and individual "feedback" to which a beginning drafter is entitled.⁸⁰ The drafting projects generally draw on recent work of the Legislative Drafting Research Fund for their subject matter. For instance, after the Fund had completed its work for the so-called Superfund § 301(e) Study Group on hazardous waste victim compensation,⁸¹ students were assigned the preparation of remedial legislation—on one occasion, a compensation statute, and on another, remedial legislation to modify common law rules—to effectuate the Study Group recommendations. More recently, when the Fund provided research support for the New York City Charter Revision Commission, some individual drafting assignments for students in the Seminar in Legislative Development of the Law were based on earlier Fund work.⁸²

The drafting seminar involves the participants in two major drafting exercises, the first of which is assigned by the instructor and follows the pattern already described. The second exercise is self-selected, with the approval of the instructor. It also requires a report to, and discussion by, the ten to fifteen members of the seminar

⁸⁰ *LDRF Brief History*, *supra* note 10, at 6.

⁸¹ See Special Report to Congress, *Injuries and Damages from Hazardous Wastes—Analysis and Improvement of Legal Remedies, in compliance with Section 301(e) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (P.L. 96-510) by the "Superfund Section 301(e) Study Group."*

⁸² *Report of the New York City Charter Revision Commission, With Proposed Amendments to the Charter for the City of New York* (1983). The amendments were adopted by the voters at the general election in November 1983. The author was Director of Research of the Commission, and the Fund provided the necessary background research.

before the preparation of a final draft and supporting memorandum. Requests to the Fund from legislators or public interest groups for drafting assistance for relatively minor projects are sometimes handled by students as part of their work for the drafting seminar.

The Columbia Law School offerings described above are separate from the work of the Legislative Drafting Research Fund, but they are clearly related, because the Director of the Fund is also the main instructor in the legislation offerings, and invariably draws on his other work. The Fund, a small research institute closely related to Columbia Law School, was founded in 1911 by Professor Joseph P. Chamberlain in what was one of the most significant developments in the teaching of legislation, legislative drafting, and legislative research in American law schools. Its purpose was to provide instruction as well as public service.⁸³ The history of the early years of the Fund has been told elsewhere.⁸⁴ It is noteworthy, however, that Middleton Beaman and Thomas I. Parkinson, whose early, early experience was with the Fund, served in the United States Congress as House and Senate Legislative Counsel respectively, after those offices had been established following an actual demonstration of the value of such services in a demonstration project in 1916.⁸⁵ Middleton Beaman has become a legendary figure, an embodiment of the idea of the true draftsman.⁸⁶ As noted earlier, Thomas I. Parkinson became probably the first professor of legislation in any American law school when he began to teach in 1919-20, filling a professorship in legislation that had been established in 1917.⁸⁷ Aside from its past contributions, the Fund continues to offer some ten students an opportunity for on-the-job training. The student staff is evenly divided between second and third year students. This balance is maintained by the selection of some four or five students from the second year class, with some weight given to first year grades, but placing primary importance on writing ability demonstrated by the submission of writing samples. Once selected, students are likely to remain with

⁸³ *LDRF Brief History*, *supra* note 10, at 2.

⁸⁴ *Id.* at 1-14.

⁸⁵ *See supra* note 7.

⁸⁶ Jones, *Middleton Beaman: Doctor of Laws*, 35 *A.B.A.J.* 778 (1949). For another account of his contributions to a major legislative undertaking, see Landis, *The Legislative History of the Securities Act of 1933*, 28 *GEO. WASH. L. REV.* 29 (1959). *See also* Middleton Beaman's testimony in *Hearings before the Joint Committee on the Organization of Congress*, 97th Cong., 1st Sess., at 413-430 (1945).

⁸⁷ *See* Memorandum from Joseph Chamberlain to Lindsay Rogers, *supra* note 7.

the Fund for the remainder of their time in law school. They assist in legal and policy research, working on projects undertaken by the Fund under contract with the government or public interest groups. The students' work is closely supervised by the director or his associate, and students are assigned research—or oftentimes—drafting tasks commensurate with their demonstrated capacity and experience. An effort is made to give each student research assistant the opportunity to take responsibility for the completion of a project of his or her own. The student research assistants work closely with the director and his associate, and they are also required to participate in one of the two course offerings so that practical and academic work in legislation is combined.⁸⁸ As a training institute in legislation and legislative drafting, the Fund has received high marks in Bernard Lammers' 1977 report to the American Bar Foundation on *Legislative Process and Drafting in U.S. Law Schools*.⁸⁹

Some Conclusions and Impressions

In concluding this casual survey of the teaching of legislation and legislative drafting, a number of comments are appropriate. The Lammers study for the American Bar Foundation⁹⁰ is still valid in most of its findings. As summarized by Reed Dickerson, these include the following:

- (1) Modern government needs good draftsman.
- (2) Drafting is important also to the practitioner.
- (3) Good draftsmen can help improve substantive policy.
- (4) Draftsmen need a solid grounding in exposition and structure. (Many students are deficient in general exposition when they enter law school).
- (5) Legislative draftsmen need to understand the legislative process and its social and political background.
- (6) Good reasons exist for teaching at least legislative drafting in the law schools.
- (7) Adequate training in drafting is now lacking, because it is not being provided by (a) current courses in "legal writing and research," (b) the "pervasive" approach to drafting (that

⁸⁸ See also *LDRF Brief History*, *supra* note 10, at 7-9.

⁸⁹ See B. LAMMERS, *supra* note 12, at 2, 18, 25. But see Dickerson, *Legislative Process and Drafting at U.S. Law Schools: A Close Look at the Lammers Report*, 31 J. LEGAL EDUC. 30, 34 (1981) (criticizing *Lammers Report*).

⁹⁰ See B. LAMMERS, *supra* note 18.

- is, handling it where relevant in substantive courses), or (c) sporadic courses or seminars in "drafting."
- (8) Training in drafting is a proper function of the law schools. "Instructors should not hesitate to teach writing!"
 - (9) Most faculty members are "not seriously concerned about instruction in general legal drafting—as distinguished from legislative drafting."
 - (10) Materials for teaching drafting to large classes have not yet been developed.
 - (11) In drafting and other legal writing, it is possible to simulate the "real-life activities of lawyers."
 - (12) Assigning the teaching of drafting to outsiders such as alumni or persons served by outside internships is risky, because it is hard to monitor them. Use of students with minimal faculty supervision is cheap but produces "cheap" results.⁹¹

Unlike my friend Reed Dickerson, whose great contribution to the field I appreciate,⁹² I believe that research—whether in the library or by other means—is a significant and inseparable part of the drafting task.⁹³ Since the Lammers Report, a number of schools have begun significant clinical efforts in legislation and legislative drafting. Legislative work in law schools—whether by simulation or in the actual completion of a policy study and drafting assignment—is inherently clinical, and I be-

⁹¹ Dickerson, *supra* note 89, at 31-32.

⁹² See Grad, *To Reed Dickerson: A Tribute to the Master*, 55 IND. L.J. 426 (1980).

⁹³ For an expression of that view, which has long been reflected in the work of the Legislative Drafting Research Fund, see Parkinson, *The Legislative Drafting Bureaus*, 7 COLUMBIA ALUMNI NEWS 283 (Nov. 26, 1915):

The drafting of legislation involves much more than matters of form, such as style, arrangement and choice of words. It involves appreciation of the conditions which it is desired to regulate, the means by which the purpose of the regulation can be best accomplished, the administrative organization, powers, duties and procedures which are best suited to the effective enforcement of the proposed regulation, and the adjustment of the proposed legislative and administrative scheme to existing constitutions, statutes and administrative organizations. In addition to the legal research which this work naturally suggests, there is also involved the hardly less important research in administration to discover processes and devices likely to result in economical and efficient enforcement of proposed statutory provisions, and the investigation of economic and social conditions to discover the essential characteristics and scope of the evil requiring legislative remedy, and the precise nature and extent of the remedy needed.

Id. See also Grad, *Legislative Drafting as Legal Problem Solving—Form Follows Function*, in PRACTICING LAW INSTITUTE, DRAFTING DOCUMENTS IN PLAIN LANGUAGE 481 (D. McDonald ed. 1979).

lieve that the Legislative Drafting Research Fund, begun in 1911, was Columbia Law School's first clinical endeavor, even though the clinical label had not yet been invented. The new emphasis on clinical efforts in the teaching of legislation has not as yet been fully reported on.

Moreover, my very casual survey convinces me that we need to know more of what goes on under the curricular umbrella of "Legislation." We know that some schools—like Harvard, Yale, New York University, and others—do not include a legislation course in their curriculum. But we do not fully know what exactly goes on in the many schools that have courses with similar names but rather widely varying content. The AALS Section on Legislation may help to provide us with that information,⁹⁴ but it seems that it may be time for a new and substantial survey which would update and advance the knowledge gained in 1977 by the American Bar Foundation.

Another impression I gained from my look, however unsystematic, at what is happening in the teaching of legislation, is that while many significant and important insights are imparted to students, and while many students are beginning to learn how to draft legislation, I feel the need for a unifying principle to give legislation as a law school subject an intellectual and analytical core. All of what is taught in legislation courses deals with legislation, but I would look for a real examination of what the field, as a whole, is about. Legislation is the only purposeful form of lawmaking we know. It is the primary task of the legislative branch of our democratic government. By comparison, the common law is a mere incidental result of the rendering of decisions in individual cases by judges not responsible to a constituency for policy formulation. Thus, if instruction in legislation is to be meaningful, it must deal with the essential task of lawmaking by the legislative branch in our form of government. It is the task of the legislative branch to meet the kinds of public need which can only be resolved by legislation. We have looked to legislation to resolve the emerging contemporary problems that the common law is inherently unable to resolve. The need for general legislation, for legislation of a programmatic and prospective nature, has become more clearly apparent since the turn of the century, beginning with legislation to protect the safety of railroad employees,⁹⁵ continuing

⁹⁴ The AALS Section on Legislation has mailed questionnaires to its members to try to discover what they teach.

⁹⁵ *E.g.* Act of Congress of March 2, 1893 (27 Stat. 531), "An Act to Promote the Safety of Employees and Travellers Upon Railroad. . ." interpreted in *Johnson v. Southern Pacific Co.*, 196 U.S. 1, 14-15 (1904).

with legislation to protect laborers in the workplace generally,⁹⁶ and going on to programs of social insurance, health insurance, provision for old age and retirement,⁹⁷ and protection of the population generally against substantial threats to health and safety from ever more complex industrial and technological developments,⁹⁸ as well as legislation to advance and manage the problems of our economic and commercial life.⁹⁹ None of these programs could have been accomplished without effective legislation.

The teaching of legislation, to be meaningful, must inculcate an understanding not only of the process, but of the purpose of the legislative enterprise. Rules of interpretation and the use of extrinsic sources take on an entirely different aspect when the legislative process is viewed in the context of its ultimate purpose—to examine the need for legislation, to weigh the available policies, and to come to a reasoned result to be incorporated in a technically sound statute. An effective course in legislation must deal not only with the disparate parts of the entire process, but it must consider the legislative process, the formulation of legislative policy, its incorporation in a final draft of legislation, and the interpretation of legislation as a continuum. This continuum, in my view, includes both the legislative research necessary to aid policy formulation, and the task of legislative drafting to cast the chosen policy into firm and effective statutory form.

We have all been exposed to the well-known statement by John Austin in the late 19th century:

that what is called the *technical* part of legislation is incomparably more difficult than what may be styled as the *ethical*. In other words, it is far easier to conceive justly what would be useful law, than to construct the same law that it may accomplish the design of the law giver.¹⁰⁰

It is time to modify that elegantly stated, but inaccurate view. The pro-

⁹⁶ *E.g.* wage and hour legislation, such as the Federal Fair Labor Standards Act, state workers compensation laws, and the Federal Occupational Safety and Health Act.

⁹⁷ Such as the Social Security System, including Medicare and Medicaid.

⁹⁸ Such as the Federal Food, Drug and Cosmetic Act, the Consumer Product Safety Acts, and the broad environmental protection legislation including the Clean Air Act, Clean Water Act, Resource Conservation and Recovery Act, Toxic Substances Control Act, and the Superfund legislation.

⁹⁹ Starting with the Securities Act of 1933, commented on as an early and significant use of legislation in Landis, *The Legislative History of the Securities Act of 1933*, *supra* note 86.

¹⁰⁰ 2 AUSTIN, JURISPRUDENCE 1136 (4th ed. 1873), quoted in Lee, *The Office of Legislative Counsel*, 29 COLUM. L. REV. 379, 403 (1929).

cess is a single, continuous process, and the technical draft of a bill will not succeed unless there is a clear line of policy for the draft to follow—and unless the author of the draft has a full and detailed understanding of the problems the legislation addresses and of the policymaker's approach to their resolution.

It would be easier to teach an integrated approach to legislation if students had earlier training in how to read a statute. Law schools should train students to understand and to enjoy the structure and architecture of a well-drawn law. To comprehend and to enjoy the aesthetics of a well-drawn statute, its structure and inner connections and relationships, is an aspect of legal training which we do not often afford our students. Like most sophisticated intellectual enjoyments, it is an acquired taste. Many students are frightened at the intellectual effort needed to comprehend the structure of a statute in its entirety. They feel safer with the common law, because it relies on cases they get to enjoy reading. Reading a case is reading a story. A good case is a good yarn. It has a legal denouement at the end, and as in most good stories, the virtuous get rewarded. Is it surprising that students reared on the comforts of the common law find the intellectual challenge of a complex statute forbidding and cold? Legal education should take this into account, and should allow students to become familiar with legislation, perhaps even before they get totally absorbed by case law analysis.