Legislative Drafting and the Law Schools

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At the beginning of this century the distinguished Parliamentary Counsel in England, Sir Courtenay Ilbert, wrote an important book on legislative drafting. Although he acknowledged valuable American contributions to some phases of the art of legislation, candor led him to say that—

... in point of draftsmanship we have probably nothing to learn from the United States, where the preparation of legislative measures is usually the work of amateurs.

Unfortunately, Sir Courtenay’s comment cannot be written off as a gratuitous insult or a commentary now a half century out of date. It is an unpleasant duty to report that, with due honor to the few notable exceptions, his appraisal remains accurate even today. The tender shoots of legislative enlightenment in America barely show above the ground. Whether they will bloom depends, in large part, on what the law schools decide to do about the problem. These facts are significant because they relate not only to legislative drafting but to legal drafting generally.

One encouraging sign is that this subject is now being discussed. Although we are still in the stone age of legal drafting, the fact that we can talk about using steel instruments gives hope of eventual progress.

This hope is a slender one because there are serious intellectual obstacles to overcome. One of these is the Englishman’s justifiable abhorrence of too much logic and organization in the ordering of legal judgments, the fear of replacing the common law’s informed intuition with the Prussian discipline of some continental code. Another obstacle is the lawyer’s inadequate appreciation of the relationship of language to ideas, which has confined legal language often to forensics and sometimes to mere word-huckstering.

This slender hope of progress is also pitifully conservative. While the lawyers have established a wholesome liaison with the social sciences, with economics, and even with philosophy, their failure to keep contact with the growth of the non-emotive aspects of language means that they have failed to keep abreast of, let alone use, many of the great contribu-

*Address made to Round Table on Legislation, Association of American Law Schools, Dec. 28, 1954. The text has been edited slightly and documentation has been added.
†Chief, Codification Section, Office of General Counsel, Department of Defense. Author, LEGISLATIVE DRAFTING (1954).
1 LEGISLATIVE METHODS AND FORMS 222 (1901).
tions of science and mathematics in symbolic logic and several important phases of what is usually called "semantics." In this age of flying saucers, perhaps we can even take a peek at the fact that today there are available electronic machines that use Boolean algebra and binary numbers to verify or refute conclusions; expose redundancies, omissions; and inconsistencies; supply missing premises; and weigh probabilities.

However, it would be fatuous to dwell on these things when even the elementary principles and devices of rational communication are being ignored. How can we enlighten a profession whose leading draftsmen prepare internal revenue codes in which you and I cannot be "heads of households" because we are married, or with laws in which the term "supplies" includes buildings, the term "cows" includes horses, and the date "September 16, 1940" means "June 27, 1950"?

At the meeting of this group in Chicago just a year ago, I was surprised to hear lawyers representing the law schools, the judiciary, and the executive branch of the government come together to justify, and even to praise, ambiguity as a tool of government. How can we prepare sound legislation when our leading spokesmen do not recognize the difference between ambiguity and generality, or between a problem of communication and a problem of legislative delegation?

The profession that for the most part produces only handwork is beginning to wonder a little about more modern tools. I wish I could say that this was an accomplishment of the law schools. Unfortunately, the teaching profession, which has shown so much vision in other respects, has been almost blind to the potentialities here. Not only has it not led but it has seemed reluctant even to follow. I am talking, of course, about law schools in general and not about those exceptional institutions whose representatives here today may appear to prove me wrong.

One writer said recently that drafting is the most important thing a lawyer does. Whether or not we consider that statement an exaggeration, there is enough truth in it to warrant our giving the matter deep consideration. In this area the bar is falling far below its potentialities and the law schools must take a large share of the blame.

Professor Stanley Tennenbaum, a young mathematician at the University of Chicago, has been more discerning. The following appears in a memorandum which he prepared as special consultant to the Committee on Technical Aids to the Law of the American Bar Association:

"The usual logical classification of terms is into those that are precise and those that are ambiguous, with the consequence that a term like 'income' which is not precise in the sense that 'married man' is classified as ambiguous. But 'income' is not ambiguous in the sense that 'swallow' is. In fact, the term 'income' is neither precise nor ambiguous."

3 Thomas, Problems in Drafting Legal Instruments, 39 ILL. L.J. 51 (1950).

4 "The responsibility must come back to the teaching profession. We, in large measure, determine the approach, the cast of mind, the method, and the skills of the
If this were a theological discussion I might even try to draw up a list of seven deadly drafting sins, some of which are being committed not only as a matter of course but as if they represented some kind of virtue. Of the ones I have tentatively in mind, I can think of none that are not being committed regularly in the very agency in which I work. I am not going to spend time on these specific deficiencies here, since in this brief time it will be more constructive to talk about what a draftsman should do than to talk about what he should not do.

Before discussing particulars, I should point out that these matters fall generally into two classes: matters of substance and matters of communication. In recognizing this dichotomy, let no one think that the two can be divorced. Ideas and the language in which they are couched are functionally inseparable.

On the substantive aspects of drafting, we cannot stress too much the necessity for the draftsman to become fully conversant with the client’s problem. He must know what, specifically, he is trying to do. And he must know it in as much detail as possible.

Some clients are willing to leave a lot of substantive matters to the draftsman, but the draftsman must not take this for granted. The problem—and it is a hard one—is to help the client think through his problem. You have to ask a lot of questions. You have to point out possible pitfalls and inconsistencies. You have to point out the legal and administrative alternatives. You have to do this without irritating the client or pushing him around intellectually. Dealing with the client is an integral part of the job. Drafting, in other words, is not a purely intellectual exercise to be performed in solitude.

There is, of course, an intellectual side to this phase of drafting, and that side is the crucial one of analysis. If the lawyers were not already being educated to do a good job of analysis, I would be at some pains to develop the point. What needs stressing here is the necessity of instilling...
the notion that the draftsman should actively participate at the earliest possible stage in the process of turning a crude idea into a polished statute.

Point two: A draftsman should size up the existing legal situation before he begins to frame his bill. It is appalling how many otherwise intelligent lawyers put together statutes as if they were starting from scratch. How else can you account for the welter of implied repeals, overlapping provisions, and inconsistent terminologies? Can you imagine a builder constructing a room without regard to whether a building already exists at that location or without regard to the character or position of the building? Yet that kind of legislative construction is carried on almost every day.

Point three (and here we come to the lawyer's real Achilles' heel): A draftsman should be able to put together the relevant pieces—and there are usually many of them—into an organic whole. He should be able to put them together so that they leave no holes, so that they don't duplicate each other, so that they don't contradict each other, so that he ends up with the most useful and efficient marshalling of ideas. Such an arrangement provides the greatest findability and clarity. It's like planning a kitchen. First you pick out the right equipment. Then you arrange it so that you can find what you want and use it with the fewest possible steps and the least effort.

Sad to say, this is the place where most draftsmen stumble. Perhaps you think I am exaggerating. I will go even further: It is the exceptional draftsman who knows the cart from the horse in hooking up the legislative team. I got my first inkling of this back in 1942, when the Office of Price Administration, having assembled perhaps the finest large group of lawyers any agency ever gathered, proceeded to turn out some of the most inept regulations imaginable. These lawyers were not stupid. They included professors and law review men from our best law schools. Many of them were supposed to be experienced draftsmen. Some had drafted state or federal legislation. Despite all this, most of them in those early days turned out work that was professionally inadequate, even taking into account the frantic conditions under which they worked. Moreover, these men were doing better than the draftsmen in comparable agencies. Twelve years of experience since that time, both on Capitol Hill and in the executive branch, have strongly confirmed that discovery.

Here, then, is probably the hardest part of drafting, and the part for which the typical draftsman is least prepared. Having analyzed the substantive problem, he has to select, and in many cases shape, his basic concepts. Then he must carefully relate them so that they crystallize into a coherent whole that shows their relative positions in the hierarchy of ideas he is trying to express.
Can I make this concreté? Unfortunately, in a brief talk, I cannot. I cannot go into detail beyond saying that the problem of organization, with its subsidiary problems of division, classification, and sequence, is one of the most elusive, yet fundamental, intellectual problems that a man can attempt. It calls for sound training, mostly by supervised doing, and then much, much practice. Incidentally, the problem of organizing a statute is much more difficult than that of organizing a brief.

As substantive crystallization takes place, the draftsman moves inevitably into the field of statement and thus into the field of communication. These fields are closely interrelated but they are not the same. An idea may be frozen in specific form but in a language that is uncommunicable to others, as witnessed by so many provisions now in effect.

Last summer I had the good fortune to spend a few minutes with Béranard Berenson, the great art critic, at his Villa I Tatti, outside Florence. When our conversation touched briefly on the writing of laws and the disrepute in which most legislative draftsmen are held, he remarked that "laws suffer from the disease of language." A rather sophisticated remark, you might say. Few laymen could have resisted the temptation to thrust at the profession instead of at the underlying problem.

In the field of legislative communication, much progress has been made in the past ten years. We are deeply indebted to the Fleschls, the Cavers, and the Conards for improving legislative style. Unfortunately, this improvement has not adequately encompassed two of the most important aspects of communication: terminology and consistency.

The problem of communication is central and we still have far to go to solve it satisfactorily. One step toward solving it—and we must continue to emphasize the fact—is to get the substance of our message in order. A second, and equally important, one is to develop an adequate terminology. The second is closely related to the first since the selection and tailoring of concepts (which, properly labelled, are the elements to be linked by the syntax of language) determine the subjects, verbs, and objects of our sentences and determine what degree of concretion we can give those elements. We must not only select the relevant ideas but shape them, put edges on indefiniteness and generality, and make what is plain enough for casual transactions plain enough for the more rigorous tests of legal and administrative transactions.

For instance, in the military codification program we are often confronted with the term "United States" in a geographical, as distinct from a sovereign, sense. For most purposes, "United States" is plain English.
and nobody asks you what you mean. However, when you get to the territorial particulars, you have to distinguish between the States, the District of Columbia, the organized continental Territory of Alaska, the organized insular Territory of Hawaii, the Commonwealth of Puerto Rico, possessions such as the Virgin Islands and the guano islands, leased areas such as the Canal Zone, occupied areas such as Western Germany, and areas where the forces of the United States are merely physically present. In this respect, we found that the existing statutes are far from uniform in what they mean by "United States."

After a lot of study and some sharp debate we decided to define "United States" in its geographical sense as the 48 States and the District of Columbia and to spell out at each place in the text of the proposed law exactly what additional areas, if any, were also included. Incidentally, the draftsman is often amazed at what he finds when he translates a number of heterogeneous statutes relating to the same subject into a common language.

Another important step in the drafting process is to select for the basic ideas labels that will do the least violence to established connotations. This is where most legislative draftsmen jump the track. They forget Humpty Dumpty's great lesson which Lewis Carroll provided for us in Through the Looking Glass. You will remember that Humpty Dumpty, the word master, used "glory" to mean "a nice knock-down argument" and "impenetrability" to mean "we've had enough of that subject, and it would be just as well if you'd mention what you mean to do next, as I suppose you don't mean to stop here all the rest of your life."

Robinson has criticized Humpty Dumpty in psychological terms by pointing out that you can't "cancel the ingrained emotion of a word merely by an announcement." The problem falls into the general area of semiotic which Morris calls "pragmatics," an area as foreign to traditional legal draftsmen as factual data were to appellate briefs before Brandeis. Here, again, the mathematicians are far ahead of us.

The note I want to sound the loudest is the most important idea in communication, and thus one of the most important ideas in legal drafting, that of consistency. By consistency, I refer not so much to the structural consistency that forbids substantive gaps, overlaps, and contradictions, as to the consistency in language that alone makes communica-

7 Chapter VI.
8 RICHARD ROBINSON, DEFINITION 77 (1950).
tion possible, the use of the same words to say the same thing and of different words to say different things.

If you will forgive a reference to the field of art criticism, let me quote some sentences from Mr. Berenson’s recent tract on modern art, *Seeing and Knowing*. There are a couple of thoughts here that we would do well to ponder.10

*Representation is a compromise with chaos*. . . . The compromise prolonged becomes a convention. . . . The alphabet is a convention. So is all arithmetical notation. So is mathematics . . . . And the joy of creative art comes when one is lured to hope that he has found the cypher, the symbol, the generic shape or scrawl, the hieroglyph, the convention, in short, that will do it. . . .

So long then as we want to have . . . contact with others of our own species, we can have it only through conventions. If we shed any instinctively or throw them over deliberately, either they are replaced before too long or we fall back into private universes, self-immured, *incommunicado* . . . .

Literature, Anglo-American literature certainly, is now overshadowed by the glossolaly of Gertrude Stein and still more by the polyglot etymological puns and soap-bubbles of James Joyce. . . .

It is worse in the visual arts. Words drip with sub-meanings. Take a word out of the colour-vat in our own minds where it soaks; do what you can to wring it clean, to dry it, to harden it, to crystallize it, as the French have done with their language for three whole centuries until the other day: yet some trace of meaning, besides what is intended, sticks. . . .

A tradition, a convention, needs constant manipulation to vivify it, to enlarge it, to keep it fresh and supple, and capable of generating problems and producing their solution. To keep a convention alive and growing fruitfully requires creative genius, and when that fails it either becomes mannered and academic or runs “amok” . . . .

How could this phase of the legislative draftsman’s job be better described?

The most urgent need in the field of statutory communication, therefore, is to develop an acceptable set of legislative conventions. This, in turn, involves the “debabelization” of the present statutory law, to borrow Morris’ apt metaphor.11 The problem is not so much to invent wholly new conventions as to make a constructive selection and tailoring of existing usages and then to stick to these usages as closely as substance permits.

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10 *Bernard Berenson, Seeing and Knowing* 7, 9–13 (1953).
11 *Morris, op. cit. supra* note 9, at 3.
The most important questions remain: What can we do about these things? How can we raise the drafting standards of the bar?

One approach is to try to redeem those who have already been corrupted by the ineptitudes of the drafting tradition. This can be done through providing suitable drafting aids such as style manuals and better form books, sponsored in appropriate instances by bar associations and by such professional associations as the American Law Institute and this association. Effective work has already been done in the field of insurance contracts by Mr. Kurt F. Pantzer and some of his fellows in the Indianapolis Bar Association. The most effective attacks of this kind will naturally come from organizations, since the individual practitioner has little time or opportunity for initiating general reforms. I remember my own experiences in a Boston law office.

The best approach, however, is to strike directly at the source, since it is usually easier to prevent a disease than to cure it. The way to make a good draftsman is to train him correctly in the first instance. And this is where the law schools come in. What the specific courses and techniques might consist of I am not going to undertake to suggest beyond saying that they should center around closely supervised doing. In a few minutes you will hear about these things from persons more expert than I.

However, I can say this: We can clear the way for a satisfactory solution if we will first recognize that we have here an important problem that needs solving. Nothing significant is going to happen until we take at least that step.

The next step is to dispel some prevalent fallacies that are clogging our pedagogical pipes. Here are the main ones.

First, we must bury the notion that legal drafting is a mildly difficult form of English composition that is mastered, or not, before the student enters law school and that the intelligent amateur automatically takes his place with the best specialists. Let's be rid of this prevalent heresy that high grades and a diploma from a top present-day law school make, ipso facto, an accomplished legal draftsman. The drafting discipline can be greatly sharpened in the law schools (although it is not now being sharpened), and if it is not sharpened there it is not likely to lose much of its dullness later.

Second, we must stop confusing legislative drafting with "legislation." The pathology of the legislative process, which in the form of statutory construction makes up the great bulk of courses on legislation, is of only modest help in the development of preventive legislative measures. Some lawyers may be surprised to learn that a good draftsman pays little atten-
tion to the rules of statutory construction. Why? Because these rules, dealing as most of them do with bad drafting, have little relevance.

The confounding of legislative drafting with legislation also results in our thinking of legislative drafting as an esoteric legal specialty, when in fact it is the most socially and pedagogically significant form of a basic skill that every lawyer needs and uses every day. Its greater difficulty makes it an ideal vehicle for teaching the general drafting discipline, even to students who may never draft a statute as such.

Third, we must stop confusing legal drafting with legal-writing-in-general. Brief writing, law review writing, and the like are an inadequate substitute for the far more rigorous discipline of drafting. How much better off we would be if many of the existing law reviews would retire from the scene and some of the same energy were expended on practicing the most difficult art a lawyer is called upon to perform.

Finally, we must stop thinking of legal drafting as another "subject" that must prove its right to a place in a crowded curriculum in competition with specialized subjects such as municipal corporations, patent law, unsecured creditors' transactions, and workmen's compensation. Legal drafting is no more a "subject" than the analysis of cases is a "subject." It is a pervasive discipline that should someday find wholesome expression throughout the curriculum including such basic courses as contracts, creditors' rights, and real property. But until we can develop a generation of teachers capable of training students we will probably have to rely on separate drafting courses.

I hope I have given no one the impression that this is an attempt to pass the whole buck to the law schools. Pre-legal education must take much of the responsibility. I have marked enough law school papers to know how ill prepared to think and to express themselves many of our college graduates are. I know also that many government agencies have failed to permit that degree of specialization among lawyers which is necessary to preparing adequate statutes and administrative regulations.

12 "Where two or three, or more, are gathered together in contract, they set up a small momentary sovereignty of their own. There is nothing fanciful about this. A contract is a little code for a special occasion. A lease is a little statute for your tenancy of a house you have neither built nor bought. Partnership articles or the charter and by-laws of a corporation are quite an elaborate code of law for those who are concerned. A corporate mortgage is a piece of legislation for a large and shifting population of bondholders, affecting, it is true, only a part of their lives, but affecting that part as completely as experienced and foresighted lawyers working late into the urban night can make it." CHARLES P. CURTIS, IT'S YOUR LAW 42 (1954).

13 "... Drafting is not a skill apart from the law school substantive courses. Preferably, drafting should be encountered as part of the course in which the problem normally arises. A contract should be drafted in the course in contracts, a will in the course in estates and trusts." Mautz, Book Review, 7 J.LEGAL EDUC. 109, 111 (1954).
These things may be assumed. However, we have come together today to talk about the law schools, and I am glad of the fact because the law schools affect the legal fetus when it is most susceptible to change.

Let me now summarize my points by making these statements:

(1) Legal drafting is a discipline constantly used by all lawyers.

(2) The bar is falling far below its potentialities in practicing this discipline.

(3) The law schools have the key responsibility in developing the drafting discipline.

(4) As a pervasive discipline and not a substantive specialty, legal drafting should be approached on a broad pedagogical front.

(5) Pending the development of conditions making the broad approach practicable, the law schools should attack the problem through courses on legal draftsmanship supplemented where feasible with special drafting projects.

(6) As the most significant, most difficult, and most concentrated form of legal drafting, legislative drafting is the ideal form of legal drafting from a pedagogical point of view, even for students who may never be called on to draft a statute.

(7) The immediate problem is to persuade ourselves that we have an important and a difficult responsibility to discharge.

Gentlemen, we face here a man-sized challenge. We owe it to our profession, to the art of government, and to the public at large to meet it head on.