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## RESEARCH FOR LEGISLATION.\*

CHARLES B. NUTTING †

## I.

## INTRODUCTION.

“RESEARCH FOR LEGISLATION” is a formidable subject since it includes a wide variety of possible topics. To cover them all adequately would be impossible within any reasonable limitation of space. However, in order to provoke criticism and comment, a somewhat superficial treatment of a number of these matters seems more desirable than a more profound consideration of only a few.

By way of introduction a few things not suggested by the subject might be mentioned. Anyone who discusses legislation in a favorable way is apt to be suspect because of the traditional abhorrence of legislation on the part of the common lawyer. I think this is due largely to the influence of nineteenth century juridical thought on many of the lawyers who are still practicing, and who have trained many of those who are entering the practice today. These persons, largely influenced by the historical school, took an extremely dim view of the efficacy of legislation in solving human problems. As an example, James C. Carter, the eminent Boston lawyer, in one of his lectures on Law: Its Origin, Growth, and Function,<sup>1</sup> has this to say:

“The popular estimate of the possibilities for good which may be realized through the enactment of law is, in my opinion, greatly exaggerated. Nothing is more attractive to the benevolent vanity of men than the notion that they can effect great improvements in society by the simple process of forbidding all wrong conduct, or conduct which they think is wrong, by law, and of enjoining all good conduct by the same means, as if men could not find out how to live unless a book were placed in the hands of every individual in which the things to be done and those not to be done were clearly set down.”

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1. Lecture IX, p. 221 (1907).

Carter goes on to say that the person who has done most to cultivate this point of view is Jeremy Bentham, and points out that his theories provoked “. . . the rather coarse but expressive sarcasm of Carlyle, who as you know, did not revel in pictures of human happiness or greatly love the common herd, that it was a scheme ‘for the distribution of an attainable amount of Pig-wash among a given multitude of Pigs.’” He goes on to say, “I do not adopt this characterization of the work of a great and philanthropic man.”

However, in outlining what he regards as the province of legislation, Carter makes a good deal more sense than the extract just quoted would lead one to believe. He suggests, first

“[T]hat it is an instrumentality first employed at a somewhat advanced stage of social progress and after society has come to assume an organized form;” second “[T]hat the purposes for which it was at first and still is employed were political rather than juristic, to remove political evils, perfect the organization of the state, and thus to aid the unwritten law of custom and make it more effective, rather than to attempt to furnish a substitute for it; that its action, therefore, was confined to the province of Public Law;” third “[T]hat the only considerable exception to this was the instance of codification, an exception more apparent than real, the cases in which it was resorted to being mainly where several states or provinces having different customs have become united under one government and the different customs were confused and needed unification.”

With much of this I would agree, although of course one can now take exception to his point of view that legislation cannot affect the relationships between individuals. However, there is a good deal of common sense in what he says. Theoretically, of course, almost every problem involving human conduct can be regarded as within the province of legislation. But for practical purposes, the following categories may be useful in marking the boundaries of the field.

## II.

### LEGISLATIVE PURPOSES.

First, legislation is useful to provide a framework for governmental action in new fields which were not considered by the common law to be within the province of governmental action. Examples are readily apparent. The whole program of social security is an instance. Laws relating to the control of atomic energy and laws dealing with the conservation of natural resources on a broad plane are other instances in which the common law had nothing to say, but where now

we feel that there must be some sort of legal control. Obviously, legislation is the solution of this situation.

Another example of legitimate legislative activity is where it is necessary to cope with situations which the common law could not handle. The most obvious example of this type has to do with workmen's compensation. We are familiar with the fact that the old law of master and servant which was adopted in England prior to the industrial revolution did not effectively answer the problems which were raised when mass production became common and where thousands of workers were employed by the same corporation, frequently without ever coming in contact or knowing each other. In this setting, the common law rule of assumption of risk and the fellow servant doctrine obviously made no sense. The result was that workmen's compensation legislation, which removed the basic principle of no liability without fault, and which abolished the doctrines to which I have referred came into being. And now practically all industrial accidents are covered by this type of legislation.

Along the same line, the enactment of legislation dealing with unfair labor practices, both by employers and employes, was made necessary because the common law had not developed an effective way to handle matters of this kind.

Possibly we may be witnessing yet another instance, although in the United States at least we do not have as yet very much legislation dealing with the problem. Personal injury litigation has become so prevalent and the consequences of verdicts have become so irrational that it may be we shall have to follow the lead of some of the Continental countries and some of the Canadian Provinces in providing for the statutory treatment of personal injury cases in a manner analogous to that which was employed in connection with workmen's compensation. These are only a few of the situations which have existed in the past and which may arise in the future, which may result in the necessity for statutory treatment rather than reliance on the common law.

Finally, legislation is important and useful in connection with attempts to codify and to revise a body of existing statutory law. The term "codification" is used broadly because it should mean more than simply a compilation of existing statutes. It may well include a revision of statutes in the light of modern needs and in the light of evils which have developed during the time older statutes have been in operation. Such examples as public health legislation, housing ordinances, the codification of the criminal law, the recent codification of military law by the armed services, and the drafting of the model post-mortem

examinations act are relevant in this connection.<sup>2</sup> In all of these situations there has been a body of existing legislation which frequently has been haphazard, ill conceived, and inconsistent. It is the task of the legislator and the legislative draftsman to bring some order out of this chaos and to present a unified body of law which will be sufficient to deal with modern problems as they arise.

Another topic for discussion is how to tell what impact on human life is made by a particular statute, or what impact may be expected. This is a question which I have no means of answering. It seems to me that at present the impact which may be made or which may be expected on human life as a result of statutory enactments is largely conjectural because we do not have at hand the data upon which to base an intelligent opinion. In some instances, of course, experience in other places may be relevant, as in a situation where one state may rely upon the experience of another in developing workmen's compensation laws. It is also true that an intelligent consideration of experience with analogous situations may be helpful. One wonders, for example, what the proponents of the Eighteenth Amendment would have done if they had considered the history of sumptuary legislation both in the colonies and in the early states, and had realized what the fate of legislation of morals or the attempt to change habits which have been developed by a large element of the population has been. Finally, a consideration of existing evils may create a presumption that statutory treatment may be helpful in curing the evils which exist. We know to some extent the problems of the injured, the aged, and the destitute. It may be that a realization of these problems will be helpful in assessing the impact which legislation designed to cure the evils may have, but in the absence of a thorough and considered study of human behavior in the various areas within which statutes operate it would seem that very little can be said in terms of the question posed by this aspect of the program.

### III.

#### STATUTE OF MINUTE DETAIL.

We now turn to a consideration of the effectiveness of statutes in particular instances and it is suggested that we draw a distinction between the statute of minute detail and the statute of general principle. Here again it is possible to generalize although the generalization may be invalid in specific instances. It seems quite clear that where certainty is important and administrative discretion should be

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2. See notes 5, 6, 7 and 8 *infra*.

kept at a minimum the statute of minute detail has a place. Probably the clearest example of this is in the criminal law. Not only is the constitutional requirement of definiteness and certainty present here but also the basic postulate which is shared by most of us that no one should be penalized criminally for doing an act as to which he was not warned in the first place. Jeremy Bentham referred to the common law as "dog law."<sup>3</sup> He said that when you train a dog you wait until he does something you don't like and then beat him for it so that he won't do it again. And the common law, particularly as it was applied in criminal situations, he said, was like beating the dog after he had done the act which he did not know was wrong. Certainly we do not want the lives and liberties of people to be affected by vague statutes or by statutes which grant broad administrative discretion to law enforcement officers.

Taxing statutes are likewise instances in which statutes of minute detail are usually better than statutes of general principle. Mr. Justice Holmes once said that men must turn square corners when dealing with the government<sup>4</sup> and a necessary corollary of this proposition should be that the corners be made square by statutes rather than be rounded by the use of administrative discretion in this field.

Another instance involves certain aspects of negotiable instrument law. Here it may be more important that there be a definite rule than that the rule be right. The need for instruments which can in fact be negotiated makes definite rules strictly adhered to necessary. If we were to have general principles and administrative discretion in this area the business of the country would be seriously handicapped.

#### IV.

##### STATUTES OF GENERAL PRINCIPLE.

Statutes of general principle involve situations exactly opposite to those just mentioned. Where a general standard of conduct is needed and where administrative discretion is desirable, then of course general principles are better than minute detail. Possibly the area of unfair trade practices might be an example. Here the concept of fairness is important but, because of changing circumstances and conditions, it would be virtually impossible to draft a statute which would completely and minutely describe all types of unfair trade practices which might exist. The same thing may be true in connection with combinations in restraint of trade. The Sherman Act is couched in very

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3. 5 BENTHAM, WORKS, 233 (Bowring ed. 1843).

4. *Rock Island, Ark. and La. R.R. v. United States*, 254 U.S. 141, 143 (1920).

broad terms and has been given content by judicial interpretation. Probably it would be impossible and undesirable to attempt to define with precision all situations which might constitute combinations in restraint of trade.

There are, in addition to these instances, borderline cases in which it is difficult to decide what we want and where conclusions should be based upon experience and research. For example, is it better to have a statute which sets a speed-limit at 50 miles an hour or one which simply indicates that the speed maintained should be reasonable under existing conditions? There are many arguments on both sides and I do not pretend to have the answer. But again it involves a question as to whether a strict rule is better from the standpoint of public safety than the requirement of a reasonable standard which leaves considerable administrative discretion in the hands of the law enforcement officers. Another instance involves the making of wills. Is it more important to follow the intention of the maker of the will, even though formalities are not complied with, than it is to require definite formalities such as an attestation clause and signatures by two or three witnesses? Considerations of social policy are present here and we do not, in my opinion, have sufficient information on which to base a judgment.

## V.

### LEGISLATIVE RESEARCH.

Perhaps the most important phase of the subject under consideration is that of research in connection with legislative drafting. Such drafting offers an opportunity for exactly the type of legal research law students should be encouraged to do. For purposes of common law litigation, ordinarily research consists in pawing over precedents in the library and trying to distinguish one case from another. Although this definitely has its value, it also limits the lawyer in the material he knows how to use. One of the great needs of legal education is to get research out of the stacks and into the market place. We should be concerned not only with opinions embalmed in reports but also with live facts. Almost any drafting problem makes it necessary to find facts in relatively simple or relatively complicated situations. Techniques of ascertaining these facts and putting them into appropriate statutory language are ones which are most needed, and as to which our law schools are perhaps most deficient.

Another advantage in legislative research is that it offers an opportunity for what we learnedly call the interdisciplinary approach. This means that lawyers have to work with people who are experts in

fields other than law. They may be physicians, scientists, economists, psychologists, even psychiatrists and social workers, depending upon the particular project in which the research is being carried on. Students and young lawyers engaged in drafting thus have an opportunity to learn something about these other professions which will not only enhance their knowledge but give them an increasing degree of respect for people who are working in non-legal areas.

However, the advantages are not all on one side. People working in other disciplines can profit a great deal from the participation of lawyers in their projects. As I have suggested elsewhere,<sup>5</sup> "Lawyers are experts in at least three things, apart from the substantive law. The first is assimilating and explaining the technical knowledge of other professions; the second is the adjustment of human relations; the third is the use of language to convey as well as to obscure meaning." The combination of these three qualities makes the lawyer unique in the advantages which he can offer to a drafting team. If a lawyer knows his business and if he has the proper attitude which will enable him to command the respect of other experts in the field he can function very well as the quarterback of the team. He can bring together conflicting points of view, can relate the importance of the various things discussed, determine what should be done, and then couch the whole result in appropriate language. This is something that technical experts in other fields often do not realize, no more than they realize the extreme tediousness and difficulty of finding language which will actually express the meaning which they intend to convey.

At this point it might be well to speak briefly of two projects which have been conducted at the University of Pittsburgh Law School and which illustrate the benefits which can be derived from legislative research and drafting. The first was a project originally under the direction of Professor Harold Reuschlein, now the Dean of the Villanova Law School, to create a modern Public Health Code. We were not able to use law students in this project although I think in the future we could do so if other projects of this sort come along. But we did use several recent graduates and we turned them loose into the whole field of Public Health Laws of which, of course, they had had very little knowledge. After discovering what the existing laws were, they secured the assistance of Public Health experts and others, talked with them at great length about what was desirable in the field of Public Health legislation and, in collaboration with these experts, worked out several statutes, some of which have been enacted by the Legislature of

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5. Nutting, *Lawyers and the Legislative Process*, 54 W. VA. L. REV. 287, 295 (1952).



the Commonwealth of Pennsylvania. The other project, directed by Professor William F. Schulz, Jr., consisted of an investigation of the laws and administrative practices relating to the conservation of renewable natural resources in Pennsylvania and culminated in the preparation of a draft of a model conservation law. Here, too, the young assistants ranged all over the state, talking not only with government experts on conservation but, also, with citizens who were interested in various aspects of the problem. The result was not only a good bill but also the preparation of a volume which deals very extensively with conservation practices and laws.<sup>6</sup>

One could, of course, mention an almost endless number of projects of this kind which might be undertaken, some of which are actually being carried on now. At Pittsburgh, we have done some work on a Model Housing Code for Municipalities.<sup>7</sup> I mentioned Dean Leflar's experience in drafting the Post-Mortem Examinations Act in another context.<sup>8</sup> As far as codification is concerned—and here I continue to use the word in the broad sense which I stated at first—we have had examples of the codification of military law<sup>9</sup> and the progressive codification of the criminal law<sup>10</sup> which is now in progress. Just the other day there was news of a proposed survey of the criminal law of Wisconsin which undoubtedly will result in the drafting of much legislation and which will be predicated on a very intensive investigation of what actually takes place in connection with criminal administration in that state.

There are just two points which should be mentioned here by way of caution. The first is that projects of this kind are extremely expensive. The Pittsburgh Public Law project, for example, has cost us in the neighborhood of \$160,000. The Conservation project was considerably less expensive but it ran to at least \$25,000. Substantial financial support is necessary if an institution is to do effective work in this field.

The next point is the matter of time. Not only is this type of work expensive but it is also terribly time-consuming. Many, many hours of research must be accomplished before the drafting begins. Even after the drafting has begun, there will be countless revisions, necessitating conferences, reconsiderations of points previously thought settled, and so on. But the results are well worth the cost—not only

6. SCHULZ, *CONSERVATION LAWS AND ADMINISTRATION* (1953).

7. Stahl, *A Housing Code Is Drafted for Pittsburgh*, 40 A.B.A.J. 63 (1954).

8. Leflar, *Drafting the Model Post-Mortem Examinations Act*, 41 A.B.A.J. 267 (1955).

9. Dickerson, *The Codification of Military Law*, 38 A.B.A.J. 1037 (1952).

10. Hall, *Codification of the Criminal Law*, 38 A.B.A.J. 953 (1952).

in terms of what the end product is, but also in terms of the educational opportunities which this type of activity affords. Law schools are producing statutory draftsmen now more by accident than design and if we are able to get students interested in this type of thing on a continuing basis, and to a considerable extent, we will be accomplishing a great deal in the improvement of the law.

## VI.

### LEGISLATIVE ADVOCACY.

A final topic has to do with getting to the voter and to the legislature. And here this introductory point must be made. Universities should not lobby. Not only may they get themselves in hot water but they also may involve the charitable foundations which finance their work in difficulty with the Internal Revenue Bureau. For some reason or other, these foundations are a little touchy about losing their tax exemption and if it were to develop that their funds were being used in lobbying or toward the advocacy of legislation, this might well occur. We avoided this in Pittsburgh, first, by securing a request from the appropriate governmental officials before we undertook the projects and, secondly, by turning over the results, without comment, to the officials who had requested them. This very effectively insulates both the university and its financial sponsor from any difficulties involving supposed advocacy of legislation.

On the other hand, there is no reason why an attorney in private practice should not present his case before the legislature on behalf of his client. The difficult problem here is to convince the lawyer, the law student, and perhaps even the public, that what we have come to call legislative advocacy is respectable. I pass for the moment the question as to whether lawyers should engage in activities ordinarily known as lobbying. This, it seems to me, depends largely on the individual circumstance and if a lawyer does decide to engage in lobbying of this kind he will, of course, be required to register as a professional lobbyist where this is required by law. But legislative advocacy means a good deal more than mere lobbying. It is a professional activity which can be engaged in without any lowering of professional standards. Professor Julius Cohen has dealt in a very interesting manner with this problem and has pointed out the remarkable similarity between judicial and legislative advocacy, particularly when issues such as due process may be involved in legislation having to do with economic regulation.<sup>11</sup> The techniques of the constitutional lawyer are equally applicable whether

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11. Cohen, *Some Observations on Advocacy: Judicial and Legislative*, 41 A.B.A.J. 656 (1955).

he is appearing before a legislative committee or before a judicial tribunal in this situation.

It surely appears that a good deal is involved in legislative advocacy as far as securing the passage of legislation is concerned. Professor Menard of the University of Colorado has recently dealt with this problem<sup>12</sup> and has pointed out many things which a lawyer can appropriately do in presenting a case to a legislative committee and in securing ultimate favorable action by the legislature itself. Not only careful drafting but careful preparation of underlying memoranda is necessary in this connection.

The art of legislative advocacy also extends to situations such as Professor Kernochan has pointed out and which have to do with the identification of critical points in the legislative process.<sup>13</sup> When these points are discovered and appropriate pressure brought to bear, the passage of legislation is considerably easier than would otherwise be the case.

These rather rambling comments may do little but illustrate a conviction that research for legislation offers one of the most fascinating and fruitful opportunities for the law teacher, the law student, and the lawyer. It is an area which has hitherto been neglected but which deserves all the support we can give it. There are so many things which need to be done and which involve research of this type that one could spend hours simply outlining the topics. For example, what might result from an interdisciplinary research project which would deal with the question, "What does the welfare state do to the spirit of man?" The question may be loaded but what a fascinating study this would be and what effect might it have on the passage or amendment of social security legislation!

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12. Menard, *Proving a Case to the Legislature*, 41 A.B.A.J. 860 (1955).

13. Kernochan, *Congressional Processes: Critical Points and Individual "Pressure"*, 37 A.B.A.J. 848 (1951).