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The December 1970 issue of the Vanderbilt Law Review carried a thought-provoking speech on Law Reform and Legal Education delivered by Professor Robert Keeton of Harvard before the Southeastern Conference of the Association of American Law Schools. Professor Keeton called for greater emphasis in law schools on matters of law reform and discussed briefly the challenge this emphasis may pose to the academic freedom of the university community. These are issues to which the American law teaching profession has devoted little attention. In the hope of provoking wider discussion and action on these questions, Professor Barnett has set down in this article ideas that go beyond Professor Keeton's, both in their embodiment of concrete proposals and in their potential for generating controversy. Although this article is addressed to the author's colleagues in legal education, other readers should find the subject interesting.

I. INTRODUCTION

Most of the current debate over academic neutrality has centered on whether the university as an institution—the faculty and students as a corporate body—should take formal positions on political issues, such as the war in Vietnam. This article will address the related, but perhaps more mundane, question whether law professors should take a more active role in providing legal services to government and to the public when this activity might provoke attacks on academic freedom. Traditionally, law professors who have sought to serve society in ways other than educating lawyers have engaged in the following five extramural activities:[1] (1) The production of scholarly writings that are

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1. Of course, a law school's intramural role in educating persons for the legal profession is certainly a service to the larger community, and it undoubtedly has been and will continue to be the primary raison d'etre of the great majority of law schools. Just as obviously, this teaching function has primary claim on the time and energy of any law faculty. Merely keeping up with current developments in one's own special fields occupies a great deal of time, and the interdependence of many fields of law makes it imperative for legal scholars to be widely read even outside their own narrow specialties.

published in the form of hornbooks and other treatises, monographs on specialized topics, articles in law reviews, and casebooks; (2) Legal aid to the poor;[2] (3) The continuing legal education of the bar; (4) Research and consultation services provided on request to other lawyers and to government agencies on especially difficult legal questions, usually for remuneration. Occasionally, however, law professors have offered their services gratis to organizations or private clients in important test cases, or as amici curiae; and (5) A variety of tasks too multifarious to catalogue associated with the improvement of legal education.[3] This article will examine how this traditional conception of a law school's extramural roles has resulted in two very important needs of American society going virtually unmet, and what can be done to remedy this neglect. The thesis of this article is that law professors, by limiting themselves to these activities, have failed to help government devise rational laws and have neglected to educate the public on the importance of the law in their daily lives. The article examines two ways that law professors could help American society meet these current needs. It concludes with an evaluation of whether these proposed activities would signal a departure from the principle of academic neutrality and therefore pose a danger to academic freedom.

II. THE WASTELAND OF AMERICAN LAW

One would think that with over 140 accredited law schools and 2,000 law teachers—on the whole probably of the highest calibre the world has ever seen—American law would be a model of clarity, rationality, and justice. For the most part, it is instead a muddled, inconsistent, irrational mess that only appears to work justice to those who keep its machinery oiled, because they are so close to the system that they cannot see the forest for the trees. This indictment of American law is made on the basis of the writer's own, admittedly limited, experience in the practice and teaching of "private" property law in three fairly typical states—Texas, Florida, and New Mexico. Occasional sallies into other areas of the law in these states have only confirmed this impression. The reader is left to judge whether his own experience warrants the same conclusion.

What are the causes of this lamentable state of the law? If the writer had to single out any one cause as the major one, he would choose the

2. This particular service function is experiencing a great revival with the current trend towards clinical legal education.

3. The yearly proceedings and committee activities of the AALS are examples of these tasks. Of course, some of the activities previously outlined, like the production of teaching materials, are also of this type.

fact that the law teaching profession has been pointing its extramural efforts in the wrong direction—towards a preoccupation with the law *as made by courts* rather than the law *as made by legislatures.* This is not to say that law teachers have been oblivious to the importance of statutory law in the total legal framework. We teach our students about statutes—the way in which they are brought into being by the legislative process, interpreted by the courts, and reconciled with common law. What we have generally failed to do, however, is to direct our efforts towards improvement of the law at the legislatures. This unbalanced approach to law reform is clearly reflected by analyzing the profile of the direct consumers of our legal scholarship. Who reads our hornbooks, monographs, and law review articles?[4] Practicing lawyers? Certainly. Judges? Yes, at least when their law clerks or counsel before them cite these works. Legislators? Almost never. Laymen? Not at all. Who takes our short courses or attends our special lectures held at the law school for "outside" audiences? The bar? Yes. The judiciary? Yes. The legislature? Never. The lay public? So rarely as to be negligible.

The consequence of directing our voices towards the bar and the bench rather than towards the legislatures has been that the impact of rational and scholarly thinking upon American law and the usage of the findings of the social and behavioral sciences have been only moderate at best. Moreover, improvement in the law has proceeded slowly and unevenly because judge-made laws must have a litigated case for a vehicle, and these arise only fortuitously and sometimes take several years to blossom into an appellate opinion embodying a new rule.[5] Judge-made change in the law, even when it does chance to come into being, is likely to be a poor substitute for statute law, because the courts are limited pretty much to the solutions urged by the particular litigants before them and generally do not create or recognize rights in the public *as such* or in persons who are not represented before them; nor can they impose duties upon nonlitigants or compel the creation of new social or political institutions. In addition, it is of the very nature of judge-made law that logic and symmetry are sacrificed at times to the demand of equity and justice. Moreover, the notion that lawyers can use social science data and knowledge to win changes in the law through the litigated case is one that is only just beginning to filter down through the bar, and one against which settled ways of thinking and

4. It is instructive to note in this connection that even "national" law reviews enjoy only a piddling circulation: the *Yale Law Journal* and the *Columbia Law Review,* for example, boast a circulation of about 4,000, and the *Harvard Law Review,* the grandaddy of them all, has only 12,000 subscribers.

5. Of course, the competent lawyer who is fortunate enough to have clients cognizant of the value of "preventive law" will expend much effort drafting instruments that skirt the pitfalls of doubtful questions in the law, thus avoiding the risk of resolving them in litigation.

doing offer stout resistance. Reasoning from logic and precedent is too deeply engrained in the average lawyer to make much room for the contribution of scientific data and the completely innovative idea. It is, for example, simply astounding that we bungled along for decades, trying to solve the problem of compensation for automobile injuries and damage through litigation involving the fault notions of tort law, before Keeton and O'Connell proposed their plan for no-fault insurance payments. Almost invariably, the only way a comprehensive, rational legal solution can be devised for any social problem of this breadth is through legislation; and only by means of legislation can all the social interests and values that bear on a problem be taken into account and either harmonized or fitted into a compromise. What is needed is not so much codification in the sense of restatement of the law, but codification in the sense of revision, reform, and improvement.

What are the reasons for this neglect of legislative law? Foremost is the fundamental conception of law that Christopher Columbus Langdell began building into American legal education a hundred years ago. He popularized the idea that law is a science in which principles are discovered through analysis and synthesis of the residue of the legal process—appellate opinions—just as the basic rules of chemistry are discovered through the analysis and synthesis of chemical substances. This idea has been completely displaced today by the recognition that law is neither science nor magic, but the rational structuring of society and of relationships between its individual members according to some compromise among competing values. That a particular compromise is enshrined in appellate opinions all the way back to the Year Books is no cause for deeming it more valid than any other. The old conception, however, has imbued legal scholars, and through them lawyers, with a reverence for traditional wisdom and thus created an approach to law revision that is at best timid, and at worst nonexistent.

A second cause is intertwined with the first—the idea that lawyers, and hence the law, have to do with courts rather than legislatures. Doubtless, it always has been and probably will continue to be true that lawyers' day-to-day activities are much more involved with and directed at the courts than the legislatures; and perhaps legal scholars conceive of the law as the province of the courts because of the natural inclination of any teacher to be preoccupied with imparting skills that will best equip his students for their careers. There is, however, another influence at work here—the old myth that the judiciary does not make law but only applies it.[6]

6. There is some basis for this popular belief. Judges still pay homage to stare decisis, and they still cannot make law in as sweeping and comprehensive a way as can a legislature. However, the legal profession is understandably reluctant to publicize the fact that courts, like the legislatures, do make law, because it seeks to shield the judiciary from politics in the raw.

Still another cause for the neglect of legislative law is the preoccupation of legal scholars with the general outlines rather than with the minute detail of the law. Legal scholars whose specialty is the field of administrative agencies, for example, have usually emphasized "administrative law" writ large, rather than the laws, rules, and procedures governing a particular administrative agency. On the other hand, anyone who has ever been baptized in the drafting of legislation knows that it demands attention to the most minute details. In this connection, it would be interesting and relevant to know how many law teachers lack any exposure to legislative draftsmanship. A final cause of the neglect is a fraternal twin of this one—the legal scholar's preoccupation with the *national* picture as opposed to the law of any single state. True, America does share a common law, but that law is particularized in fifty-odd jurisdictions; so why legal scholars should content themselves with the fact that at least one jurisdiction has found the right rule on some problem or that the majority trend is in the right direction is beyond comprehension. This preoccupation with national trends, and its resultant neglect of the positive law of any one state, is encouraged by the mobility of law teachers. With advancement and prestige often seeming dependent on moving to another school every few years, and with the so called "terminal" schools bunched together in a small handful of states, it is no wonder that legal scholars find it difficult to concentrate any sustained effort on the law of a single state, and, especially, on the law of those states most desperately in need. Furthermore, the mystique of the "national" law school so pervades legal education that everybody strives to attain that image, again to the detriment of local law.

The upshot of all this is that the statutes of most states are a confusing, jumbled mass of ad hoc enactments that are badly worded, lack clarity and consistency, and follow no rationally conceived policy. Furthermore, there are vast areas of common law, such as the law of landlord and tenant, that would benefit greatly from comprehensive statutory revision and codification but that are left to piecemeal modification by the courts. The question we need to ask ourselves is this: If the law teaching profession does not begin to mind the store, who will? The bar is usually far too preoccupied with making a living to do so, and in many states its organized arm is too shy of financial resources to muster a permanent effort at law revision and codification. Legislators typically lack legal expertise, are concerned chiefly with the politically explosive issues of the moment, and in most states are paid only on a part-time basis. Legislative staffs suffer from rapid turnover, low pay and prestige, and generalism. For the most part, they are well

qualified only in the formalities of bill drafting. Furthermore, the reference facilities available to them bear not even the faintest resemblance to a well stocked university library, much less the Library of Congress. In any event, staff time is spent primarily on projects that the legislators think will make political hay.

Compare, on the other hand, the resources that a law school can bring to this task: a diverse group of experts in almost all of the relevant fields of the law, whose day-to-day activities compel them to think critically about the law and to keep abreast of the best thinking being done by others; and an untapped reservoir of energy and talent in students, who, if directed towards this high calling, would probably do an extremely creditable job. If a law school could add to these resources the rest of the modern university—its experts in other disciplines, its libraries, and its data gathering and storing facilities—what an incomparable aid to the advancement of the law it could be! What, in Cardozo's words, a legislature needs, and what a law school together with its university setting is best equipped to provide, is advice on law reform that is "expert," "responsible," "disinterested," and "systematic." Fifty years after his clarion call for a "ministry of justice," we are still no nearer to having one than we were when his words were written. Moreover, the writer's four years of experience in a government bureaucracy leads him to doubt seriously whether a "ministry of justice" could do the job as well as a law school, because it would lack a fifth necessary characteristic that Cardozo overlooked—"independence."

One should not ignore the several bright spots in this dismal picture. The model and uniform laws promulgated by the National Conference of Commissioners on Uniform State Laws and the model laws formulated by the American Law Institute are outstanding examples of the combination of legal scholarship and legislative drafting. These efforts, however, are inadequate to meet the need of law reform for several reasons:

(1) Any nationally coordinated endeavor to produce model or uniform laws is likely to be so unwieldy and time consuming that it restricts its efforts to a few top-priority areas.

(2) Despite the semantic difference between model and uniform laws, both have a tendency to pay too much attention to what is *thought* to be acceptable to *most* American legislatures and to the *average* lawyer, and thus frequently settle upon the lowest common denominator.

(3) Since the premise underlying a model or uniform law is that it can be enacted by every state, many needy areas, such as property

law, are pushed into the background because they are thought to be too different from state to state to admit of a single law that could accommodate all the variations.[7]

(4) If a particular model or uniform law is not embraced with open arms by the country's legislatures, often the whole idea is scrapped and attention focused on other proposals deemed more likely to be enacted.[8]

(5) Even though they draw their representatives and members from the various states, the Conference and the Institute lack an effective base of support in each state to press for adoption of their recommendations. Consequently, most model and uniform laws get enacted only when backed by some powerful "lay" interest group for which they possess strong appeal.[9]

A second bright spot on the legislative scene is found in those few states where somebody has begun to mind the store. California, for example, early fixed upon the idea of a genuine codification of its laws, and as a result California's Codes come much closer to the ideal of a rational formulation of whole areas of law than the so-called "codes" of other states, which are little more than a neat ordering of ad hoc enactments. Even more importantly, California, as well as other states not so devoted to the notion of true codification, has followed the lead of New York in recognizing the need for a permanent watchdog dedicated to law improvement and has created a law revision commission. In still other states the bar has shouldered a continuing responsibility for law revision. The State Bar of Texas, for example, over the last twenty years, has undertaken the methodical revision and codification of a number of areas of Texas law. Its work products, like those of law revision commissions generally, have been the result of a

7. A notable current proposal that may succeed in disproving this thesis is the Uniform Probate Code.

8. One victim of this win-lose game, a most unfortunate one in the writer's opinion, was the model land registration, or Torrens, law. When the Conference's model act made little headway, it was completely abandoned, with little thought given to why it failed and how it might have been changed to increase its prospects for acceptance. It failed primarily because the model was premised on the inherently improbable concept that people will voluntarily move their land from the old title security system to a new one at great cost to themselves, and on the virtually discarded constitutional-law conception of the inviolability of vested property rights—a conception that resulted in very cumbersome procedures for registration and very timid provisions for curing title defects. The result has been that attempts to reform that morass of absurdity and inefficiency known as the American recording systems have centered on such half-way solutions as title insurance and marketable title acts.

9. In the case of the UCC, the impetus was provided by the banks and other commercial establishments handling interstate transactions. Public dissatisfaction with the present probate law may also foster change if it is of sufficient strength to influence the state bar. This may be the case with the Uniform Probate Code.

cooperative endeavor between the practicing bar and the faculties of the several law schools in the state—a combination that almost always ensures they will be met with respect by the legislature.

The final comparatively bright spot in the picture is federal law. Although the average lawyer may decry the complexity of federal statutes, he cannot deny that in comparison with most state statutes they are generally better drafted, more internally consistent, and follow a more rational, if not desirable, policy.[10] The reason for this superior condition of federal law lies in three facts: (1) Most areas of federal law are the province of some governmental department or agency that has its own legal staff—a staff usually not only of fairly high quality but also expert and experienced in the law that governs the agency or with which it deals. One of the jobs of such a staff is to keep the agency's legal house in order. (2) The federal government has instituted an elaborate system of checks and approvals that almost always assures every interested department and agency the opportunity to comment on proposed new legislation and thus prevents the development of inconsistencies. The system, of course, is not foolproof and often allows the governing legislation of different agencies to proceed along divergent lines of development for no good reason. In any event, it is clear that similar expertise and checks do not generally grace the scene of state government. (3) The United States Congress has much more extensive and expert committee staffs than any state legislature can hope to possess.

III. THE LAW'S FORGOTTEN MAN

There has been much talk recently of how the disadvantaged minorities, the poor, and the people of middle income have been neglected by the law. For the most part, law that affects these groups has been comparatively underdeveloped[11] or invisible, because their contacts with the law generally are limited to the discretionary justice of the police, inferior courts of the small claims or magistrate variety, petty officials administering welfare, and so forth. The wealthy know they can afford legal counsel and services, so they do not hesitate to

10. This is not to imply that federal law is free from defects and would derive no benefit from a law revision watchdog. Federal law, however, is almost exemplary when compared with state law generally.

11. Part of the neglect is again attributable to the traditional over-concern of legal scholars for appellate opinions. These sources of law generally involve only those clients wealthy enough and embody only those issues monetarily important enough to reach all the way up through the judicial hierarchy to the appellate courts. Thus, law as we were trained to think of it was the law of the rich.

seek them; but these others, whose resources at worst are even insufficient to meet their other needs and at best leave little room for an emergency, are afraid to darken the door of a lawyer's office even when they realize they have a legitimate grievance. A concerted effort appears at last to be underway to meet the need for legal services for these neglected groups—to provide lawyers at public expense or by means of private legal insurance (judicare) or group services, to enact new social legislation, and to establish new protective institutions, such as human rights commissions and consumer protection offices. This is all to the good. What has escaped our attention is a neglect that is far more fundamental. This neglect is ignorance—specifically, ignorance of and about the law.

Law conceived in its broadest sense is the very structuring of the society in which people live—the institutional and normative framework which governs their relations with their fellow citizens. Yet how many laymen have even the foggiest notion what this framework really is and how it works, apart from a few vague ideas picked up from a civics course in high school, a political science course in college, or the Perry Mason television series? What are the consequences of this ignorance for these classes of citizens? First of all, the individual does not know when his rights have been violated and redress can be had. To take only one example, how many laymen know that the fine print of a form which tells them they have waived all their rights and which they signed without reading may be held to be a contract of adhesion and thus worth no more than the paper it is printed on? A second consequence is that the individual does not know when to insist on seeing a lawyer, or even when and how he can protect his rights himself. For example, even assuming equal bargaining power of the parties, how many laymen realize that most of the provisions of a contract for buying a house or for leasing an apartment are required neither by law nor by custom, but are purely a matter of the bargain? Moreover, who is likely to tell them?[12] Surely not the realtor who is out to consummate the transaction and collect his fee, and whose organization probably drafted the form in the first place. A still more serious consequence of this ignorance is that the great mass of the people—those who control the ballot box and to

12. The remark has been made that the Supreme Court in *Miranda* had to force the police to tell a criminal suspect his civil rights because society had failed in its duty to educate the citizenry of those rights. All this means that both the rectification of injustice and the improvement of the law that could take place through lawyers and the courts is much more haphazard, sporadic, and sparse than it would otherwise be.

whom legislators incline their ears—have scant impact upon the formation and progress of the law through legislation. Those projects that hold the greatest promise of social betterment gather dust in the pages of some law review or on some professor's bookshelf, because they lack any political booster power behind them. Election campaigns, instead of concentrating on the merits and demerits of concrete proposals, degenerate into vague mouthings about law-and-order and moral leadership, which, like Love, America, and Brotherhood, nobody can really oppose. Finally, when definite proposals are bruited, like preventive detention, extended jail sentences, no-knock entries and searches, and national data banks on political dissenters, the great mass of the people are apathetic because they have little idea that their basic liberties are at stake.[13]

The point is that if anybody understands the significance of the grand design of Anglo-American law and its noblest traditions, it is the law teaching profession, and we have been neglecting to communicate its message to those who need that message most. This failure to direct our message to the great lay mass of Americans is understandable, but not excusable. The hoary myth that the law is a mysterious sanctuary to which only the high priests are allowed entry still holds sway in our unconscious, although we consciously admit that it is not nearly as mysterious as it appears. Yearly, with each beginning law class, we prove that "laymen" can absorb a good deal of useful knowledge about it without too much confusion.[14] It is only when some upstart layman sets about to fill the need we have so sorely neglected, as Dacey did with his *How to Avoid Probate,* that we begin to perceive the extent of our neglect. It is no answer to say that a little knowledge of the law is a dangerous thing. Surely it cannot be more dangerous than total ignorance. Besides, people are not so stupid as to disregard warnings to consult an expert, at least when they are told the circumstances under which they should consult one and why this consultation is necessary. They understand and appreciate advice of this sort. What laymen do

13. For example, when an atrocity like that at Kent State is committed, the people can be led into thinking that the issue is simply whether the guardsmen fired in self defense. The real controversy should center around the criminal negligence of an officialdom blind to the flagrant impropriety of sending men, armed, trained and psychologically conditioned to exterminate an enemy in battle, to quell a campus disturbance. The outrage is magnified by realizing that the men are often untried recruits.

14. Doubtless every learned profession has some tendency to guard its secret mysteries from the eyes of the uninitiated. Maybe Dr. Benjamin Spock's *Baby and Child Care* would never have seen the light of day had not the good doctor realized that if parents know nothing about how to safeguard their children's health, the children certainly will not!

not appreciate is being told to see an expert "whenever they have a legal problem," because they perceive this as just a blanket advertisement to come line the experts' pockets.

Finally, the objection cannot be made that laymen would not read what we have to say. With the advent of the paperback revolution, the quantity of reading matter consumed annually by the American public is simply staggering. If one adds to books all the magazines and newspapers that people subscribe to or buy at newsstands, he would be compelled to admit that America has now become very much a reading nation.

So the whole matter boils down to one single question: If law teachers fail to light the lamp of knowledge of the law for the lay public, who will dispel the darkness?

IV. Two Proposals for a Radical Reorientation of Legal Scholarship

A. Formulation of Legislation

The first proposal is this: When law teachers undertake a project of research looking towards publication, they should seek, whenever it is appropriate, to embody their conclusions in a specific, well-drafted bill, the enactment of which would bring the law of a particular jurisdiction into line with the views that they have asserted. Scholarly publications in the law always seem to end with criticism of existing law and broad proposals for its reform, but nothing more. Law teachers apparently think that their duty is done at this point. Presumably, they contemplate that some court, on the occasion of some yet unborn case, will retrieve the pearl of wisdom thus ensconced in the pages of a law review and mount it in the Law's tiara, or that some public-spirited legislator will grasp the importance of the problem and the worth of the professor's solution and put his legislative staff to work drafting the necessary bill. Most of the material in law reviews probably is not so fortunate and likely is not even read by the professor's colleagues in other law schools.

What is here being urged, therefore, is that law professors embody their ideas in legislation-to-be, and that law reviews replace their emphasis on the traditional scholarly article with one on new proposals for legislation. A vehicle for actually changing the law would thus be at hand, and not left to others to improvise. Moreover, by putting the proposals in specific form, the professor is much more likely to elicit from the bar constructive criticism, suggestions, and active interest in

helping to shape a final draft for submission to the legislature. Just as importantly, law teachers and researchers in other states would have available the best work of their colaborers elsewhere; Idaho, for example, could benefit from Wisconsin's thoughtful law reforms. There are no media presently functioning in which one state's efforts in all fields of law are regularly communicated to other states.

More than this is needed, however. In states that have no law revision commission or other body currently minding the store, at least the law school of the state university, and hopefully the law faculties of all the law schools in the state, should undertake the law revision function.[15] In developing proposals, a law faculty should not play solitaire. Constructive criticism and aid can be obtained from law students, and from faculty and graduate students in other disciplines. The typical third-year seminar, for example, could be restructured. Instead of being spent on the preparation and discussion of a plethora of topics in one broad field of law, culminating in a paper on each topic by one student in the model of a scholarly law review note or comment, the seminar could be arranged around one or a limited number of topics. The objective would be to concentrate research, thought, and draftsmanship on a single group product—the proposed legislation. This approach has been tried at the University of New Mexico Law School in a course entitled "Legislation." The topic chosen was the problem of implied consent to blood tests for DWI's, but the same approach could be taken in most seminars in special fields of interest. Interdisciplinary seminars would prove particularly beneficial in this format because the ideas of social and behavioral scientists derived from knowledge accumulated in their fields would have greater likelihood of being translated into law. In short, why don't we law professors stop talking about social engineering and start doing something about it? Law is to the social and behavioral sciences what engineering is to the physical sciences and medicine to the biological sciences; it is not the queen of the social sciences or even a science in itself, but the means for putting to use for the benefit of humanity the knowledge and insights uncovered by other disciplines.

Is such a broadly based mobilization geared towards law reform inconsistent with, or at any rate something of a diversion from, the central purpose of a law school—the training of young men and women

15. Although existing commissions have typically limited their efforts to nonpolitical areas of law, no sound reason exists for a law faculty so to limit itself. For a discussion of the problems that faculty involvement in the presentation of politically controversial legislation may pose see pp. 947-51 *infra*.

for careers in law? The answer, quite simply, is no. On the contrary, its educational benefits would be significant. The writer has always had serious doubts about how much good it does to hammer the average law student into the mold of a law review scholar, and that seems to be exactly what we are doing in the typical seminar. The sort of work-product we are compelling all students to produce is one that involves skills used only in writing appellate briefs—a very small part of the average lawyer's practice—or legal memoranda for the senior partners in a large law firm. How many of our students are likely to be involved in these tasks from day to day? On the other hand, drafting legislation inculcates skills that are widely needed and used almost daily in every law practice. Precision, clarity, and conciseness of language and organization of material should reach their apex in the drafting of both legislation and private legal instruments. In addition, a seminar directed at producing a bill can involve the students in learning the important skill of negotiation and acquiring a good sense for distinguishing between what is expendable in a proposal and what, on principle, cannot be compromised. Moreover, legal research is not necessarily neglected, because draft legislation should be supported by back-up papers that reflect research as extensive and vigorous as the most scholarly law review article or note. Last but not least, this emphasis on reform of the law through legislation hopefully would instill in each new crop of fledgling lawyers a sense of the ongoing responsibility of the bar for the quality of the law itself, and not just for achieving justice in the individual case.

Once a bill has been formulated, the drafters have the responsibility to place their recommendations before the legislature. A special mechanism within the law school for accomplishing this end would greatly facilitate matters. A few years ago the University of New Mexico Law School established this kind of an organizational arm—the Institute of Public Law and Services—with a full-time salaried Director.[16] The purpose was to obtain contracts with and grants from state and local governments and state agencies, and to coordinate and carry out the desired research. The Institute, however, ended up more or less like the proverbial old maid waiting for Prince Charming to show up. Few grants and contracts were forthcoming, and the Director evolved into an assistant to the Dean on general law school matters.

16. The director of this kind of institute must be carefully chosen. He should be sincerely involved in law reform while still maintaining good rapport with the state bar and the legislature. This job is no idle sinecure for the comfortably retired judge, practitioner, or civil servant, because it will entail detailed and often tedious work in the formulation of specific legislative proposals.

The cause of this denouement was the failure to recognize that such an institute, in order to generate demands upon itself, must first prove its usefulness; and this it can do only if it takes the initiative and carries out some projects of law research and reform on its own. The law faculty, therefore, should do just that and utilize the organizational arm to coordinate its efforts and to act as a liaison with the state bar and with the legislature. Although due consideration should be given to all suggestions, criticisms and comments coming from the state bar or from other sources outside the law school, the law faculty should not relinquish its independence by turning over its proposals to other groups, but should continue to seek the adoption of proposals that these groups oppose or want to modify. This independence must be retained to avoid good ideas being watered down or eviscerated by special interests.[17]

A prototype of sustained active interest and labor of the sort here being advocated is Columbia Law School's Legislative Drafting Research Fund,[18] which was founded in 1911 by the late Professor Joseph P. Chamberlain. The Fund over its lifetime has done extremely important work, ranging from New York's first unemployment insurance law and New York's health code to, in more recent years, a model state constitution and a model alcoholism treatment act.[19] Under the Fund's auspices, a plan on much the same order as the Keeton-O'Connell no-fault insurance plan was devised a full generation before the latter. In many ways, this institution is one of the most significant yet little heralded organizations in the history of American legal education, and demonstrates what can be done when law schools put their shoulders to the law reform plow. It has operated on a slightly different basis than this paper is suggesting: it provides only expert backup services and relies on outside organizations to do the legwork of pushing the reforms through. Although it has on occasion gone out and found a sponsor for some piece of legislation for which there was

17. While law faculties are usually immune to the charge that they have an axe to grind, lawyers, in general, are not. The bar, for example, has not adequately supported probate law reform because it enjoys profits from this cumbersome relic of *Bleak House*. The same is probably true of the Keeton-O'Connell insurance plan.

18. The Yale University School of Law has established a similar program. Yale Legislative Services is a voluntary service organization composed primarily of members of Yale Law School. The main objectives of YLS are to provide a wide range of legislative services, in the nature of nonpartisan analysis, study, and research, to legislative and other governmental bodies, and to provide students with an educational experienee concerning the legislative process. The YLS has been an invaluable aid to many state legislatures, especially the Connecticut General Assembly. Several notable projects by the Serviee include work on reapportionment, environmental law, and black capitalism.

19. It has also done yeoman service in the fields of housing law enforcement and pollution control legislation.

a pressing need, its principal role has been to equip *others* to be effective advocates of reform. This is doubtless the ideal *modus operandi,* but what may work for New York—a state that abounds in private do-good organizations of all kinds—may not be so feasible in states where there is a dearth of these activist groups. In the latter states, a law school may have to assume much of the burden of advocacy itself.

In implementing these proposals, any university and any law faculty must bear in mind that there is a difference between an honest and reasonable effort to get one's ideas and proposals fairly aired and a dogged determination to ram them down others' throats. The former we can defend as being consistent with our rather privileged position in society; the latter we cannot. Unfortunately, it is hard to gauge where the one ends and the other begins. All that can be done here is to flash a warning beacon, because it is impossible to set any hard and fast rules. For example, if a proposal is made and adequately explained to the legislature, but is rejected, the New York Law Revision Commission apparently follows the rule of thumb that that proposal, or at least its offending features, must be jettisoned. This approach seems unduly restrictive. If the scholar who made the proposal is convinced that the legislature's action represents a sacrifice of the general public's interest to that of a special interest group, unjustly discriminates against a minority group, or is seriously detrimental to the welfare of the body politic, he would be remiss in his duty if he did not call this to the attention of the final arbiter on all questions of what the law ought to be—the voting public. In these situations, however, criticism of legislative action should be limited to the scholar's area of expertise; those criticisms that derive purely from his own disagreement with the legislature's assessment of the relative importance of values about which reasonable men may differ ought to be excluded. He can as a citizen put forward the latter type of criticism, but should not look to his university to facilitate it.

B. Law for the Layman

The other reorientation of legal scholarship here proposed is writing about law for the layman so that he can fulfill his public duties and protect his own rights and interests as a human being. What is needed are serious efforts by legal scholars to bring the law down to a layman's level, not do-it-yourself kits like Dacey's *How to Avoid Probate.* Some of this sort of writing has been done by lawyers, and occasionally it has been rather good. The individual lawyer's product, however, must be nationwide in coverage in order to get published in a national book

market and consequently often fails to give adequate guidance about important local variations in the law. What is really highly useful is something on the order of a little book published a short while ago by a committee of the State Bar of Texas—*How to Live and Die with Texas Probate*. It is a superb example of useful writing about the law for laymen, which gives quite full and adequate information about the law and procedures governing wealth transmission at death. From it a reasonably intelligent layman could easily determine whether he needs a will and whether he also needs full-fledged estate planning.[20]

Books on legal subjects that most laymen are interested in are not the only sort of writing needed. To penetrate deeper into the fabric of society, scholarly writing about the law for laymen must use media other than books. Since the typical bookreader is the person with above-average education, legal writing for magazines and newspapers may be the only way to reach great mass of people. Law teachers should also participate in televised public discussion forums on legal matters of great current interest.[21] Surely, if law professors had been willing to shoulder more of their responsibility for explaining to the lay public what the Supreme Court was doing in extending Bill of Rights protections to state criminal proceedings, the politicians' demands for impeachment of some Supreme Court justices or for packing the Court with "strict constructionists" would have fallen on much less sympathetic ears. Another good example comes from the writer's own bailiwick—property law. He has long been convinced that the home buying public is being milked annually of millions of dollars to support the flock of abstractors and title insurance companies that have battened themselves on the American deed records system. This incubus could be shed by shifting to a title registration, or Torrens, system. The rub comes when one asks how the legislature is going to be convinced to make the shift. The only people who really understand how absurdly inefficient and expensive the present system is are none other than the parasites themselves! Unless one expects a man to be altruistic enough to champion a proposal that would render him superfluous, it is futile to address one's arguments for change to these persons. It would appear that the only way to build support for the switch would be to address oneself directly to the very

20. The book does have several drawbacks: it is multi-authored and consequently somewhat uneven in quality, and the writing tends to be duller than the subject demands. Law professors should be able to turn out a much more readable product.

21. Another project worth trying is short courses on law for laymen on educational television stations. These stations are often affiliated with universities, and consequently get much of their programming from local sources. Courses in philosophy and other liberal arts subjects are frequently televised, and short courses on law for laymen would make welcome additions.

people who are now paying for the present system—the home buying public. This can probably only be done through the mass media—newspapers and television.

V. Possible Departures from the Principle of Academic Neutrality

There is no doubt that the community involvement of legal scholars here called for could provoke a storm of controversy. The involvement, however, is imperative. If American liberties go down the drain, as they came perilously close to doing in the early 1950's and seem about to do again today, and if America continues to be saddled with an outmoded system of law, we law professors will have nobody to blame but ourselves. Is there, then, a rationale by which this involvement can be squared with the traditional principles of academic freedom? The writer believes there is. Of course, no rationale can guarantee our freedom and security from attack by irate special-interest groups or their minions in legislatures and in seats of executive power. All such a rationale can do is give us assurance that if we do fall victim to their wrath, we "perish" with a clear conscience and in the knowledge that we have not compromised the basic principles on which our independence, like that of all university scholars, rests.

A. Academic Neutrality for the Law Teacher

What does neutrality mean? It means that the institution—the university—must remain uncommitted to any particular idea, proposal, or viewpoint; it has never meant that the individual scholar should remain uncommitted. His obligation is only to follow wherever his values, his reason, and his research lead him. He owes an obligation to ferret out all the relevant knowledge and thinking on a subject before he takes a position. He owes an obligation to act with scholarly moderation and responsibility, bearing in mind his own fallibility and appreciating that there are almost always two reasonable sides to every question. He also owes an obligation not to let his judgment be swayed by strictly partisan considerations or by some special interest group of which he is a member. Having given all these obligations their due, however, he must follow the best lights he has and advocate whatever ideas, proposals, or viewpoints that he has come to in the course of his immersion in the subject field, no matter how controversial they may be. Thus, if the biologist is convinced that the Darwinian theory of evolution best explains the scientific data before him, he should not avoid propagating that theory because his board of regents or state legislature

finds it repugnant. Law professors likewise need not and must not avoid propagating their views. Indeed, they have never been reticent in speaking to their own fraternity, which includes lawyers and judges. Law professors, however, have confined their critical commentary on the law for the most part to their students and their confreres in the legal profession. The biologist may have no obligation to propagate his ideas outside his own discipline; the advancement of biology may depend on nothing more than the spread of new findings and ideas within the limited circle of the experts themselves. Can the same thing, however, be said of the law? Doesn't its advancement depend heavily on persons outside the legal profession—on legislators, administrators, and the general public? Moreover, how can we justify leaving the public in massive ignorance of the stuff that forms the very warp and woof of its communal life, at the city, state and national levels, and even the international level?[22]

B. Academic Neutrality for the Institution

Even if it is conceded that the principle of academic freedom as applied to the individual scholar is not breached by these proposals, there remains the problem of institutional neutrality. Universities, by supporting law reviews with an obviously legislative slant in contrast to their traditional judicial and scholarly ones, may appear already to have violated the Plimsoll line. Moreover, it is plain that universities will have to grant credit in tenure, promotion, and salary decisions to law professors' work of the sort just described, because the drafting of legislation is probably the most time consuming legal writing imaginable. Similarly, the writing of books, articles, and pamphlets of the law-for-laymen variety is bound to make heavy inroads on a faculty member's more "scholarly" production. Finally, will not the institution assume a patently activist stance if it sets up or uses an Institute of Public Law and Services or other organizational arm to coordinate and facilitate the translation into positive law of its scholar's proposals for reform and innovation? These issues are the heart of the problem, and the answers are by no means obvious.

Many members of the academic community today argue that universities not only may, but should, take formal positions on political issues because educational institutions have never been neutral or value-free. Consequently, failure to take a stand in itself amounts to support

22. Perhaps the principle of academic freedom has held its ground fairly well in America during this century because the political forces realize that the most noxious idea can be safely ignored if its propagation is limited to a closed circle.

of the Government's current political policies and of the Establishment in general. Others have urged, equally vociferously, that the academic freedom of the individual scholar was won in return for institutional neutrality and that to discard neutrality would only invite efforts by forces outside the university to appoint faculty members more sympathetic to *their* positions and to intimidate the unsympathetic ones. In rebuttal, the advocates of non-neutrality dismiss the idea of academic freedom as a myth, calling it nothing more than the right to continue to say and do things the way they have always been said and done. Although scholars who spout traditional ideas may appear not to utilize their academic freedom, full academic freedom is still a necessary atmosphere if there is to be any original thought. Moreover, the arguments that institutional neutrality is essential for the maintenance of academic freedom seem irrefutable.

The writer would argue that the proposals advanced in this article are consistent with the notion of institutional neutrality. This argument is bottomed on the fact that the institution itself does not dictate its scholars' proposals; indeed, even the law faculty as a body does not. Assuming that a professor's proposal meets the requisite qualitative standards, the institution must give it the same respect accorded all others that meet those same standards, regardless of the individual values it reflects.[23] The situation can be analogized to that of the university press. Most universities supply publication facilities to disseminate knowledge and ideas produced by the ferment of academic research, thought, and discussion, but university ownership of the press does not imply institutional endorsement of any published ideas.

The battle to keep facilitation distinct from endorsement was refought only two years ago at the University of New Mexico. The University had for many years published a learned journal—the *New Mexico Quarterly*—that cut across all university disciplines. A double number was scheduled to be devoted to an anthology of creative literature representative of current trends in America. After the issue had been assembled completely, carefully edited by not one, but two, professors of English, printed, and even distributed to foreign subscribers, the University administration learned to its chagrin that one

23. There can be no institutionally-nurtured orthodoxy, either of the radical left, the rigid right, or the fence-sitting middle. Particular attention must be called to the necessity that law faculties, like other scholarly groups, guard against philosophical inbreeding. There is a natural human tendency, in viewing potential candidates for faculty openings, to regard as superior the one who parrots our own views and positions. If this tendency is indulged, we conclude by surrounding ourselves with those who agree with us, and our illusions of infallibility are fed by this environment.

of the included poems juxtaposed the word "cunt" and an allusion to Christ! After a hurried consultation with the regents, the decision was made to impound under lock and key the yet undistributed issues destined for the domestic market. Only after a dogged effort by the Faculty Policy Committee and a letter from the prestigious South American literary journal *Sur* lauding the issue and requesting permission to reprint it in Spanish, were the regents and administration persuaded to release the domestic issues. The arguments that carried the day were: that the offending poem *was* representative of current American creative writing; that the University could not suppress it without appearing to impose thought, or at least speech, control on the academic community;[24] and that its appearance in a University publication did not and could not reasonably be taken to constitute University endorsement of whatever the poem was meant to say.

No doubt there is a difference between publishing a poem and propagating a proposal for legislative change in the law.[25] The writer is frankly unable to resolve this dilemma in his own mind. Perhaps a line can be drawn between true lobbying and merely calling the attention of the legislature or the public to the law reforms one is urging and the reasons why they ought to be effectuated. In any event, it is reasonably clear that the difference between what this paper is advocating that law faculties do and what they have done for decades in the realm of the common law is only one of degree, and not of kind. The question that we must keep asking ourselves is this: In view of the great need, can we justify continuing to make a distinction that we cannot logically defend between these types of activities? Should we not rather embrace legislative activity as well and throw down the gauntlet to those who would seek to confine us to our more traditional roles?

VI. CONCLUSION

In conclusion, the writer is convinced that if law faculties were to shoulder in a nonpartisan and genuinely helpful spirit the burden, as herein outlined, the worth of their aid would be quickly recognized by legislatures, and most of the conceivable adverse consequences would turn out to be no more than figments of an overly fearful imagination.

24. The poem was not authored by anyone at the University, so the argument that suppression would violate *our* academic freedom was not as easy to establish as it might otherwise have been.

25. Even the Internal Revenue Service recognizes a difference; the publication of a poem would not endanger an institution's tax-exempt status, but the propogation of a legislative proposal might do so.

Moreover, by subjecting our ideas to the batterings and bruisings of the outside world, our teaching and writing might benefit overall by being brought down from ivory tower to terra firma. The practicing lawyer is daily subjected to this humbling contact with the reality of vigorous opposition. How often are we law professors? Finally, but most importantly, the pace of advance of American law towards its ancient goal of "liberty and justice for all" would be immeasurably quickened.