

THE BUSINESS LAW TEACHER AND THE GOVERNMENT

AND BUSINESS COURSE

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It may seem rather pointless, at first glance, to engage in a discussion on the subject "The Business Law Teacher and the Government and Business Course." What is there to be discussed? Are not both the course in Business Law and the course in Government and Business well established in the curricula of liberal arts colleges and schools of business administration, each course with a well-defined and sufficiently circumscribed course content? Is there not more than ample material to handle in either course, without one encroaching upon the other? Certainly there is more than enough in business law for a full-year introductory course. And I would pay my respects to anyone who gets through the Government and Business course in one semester without neglecting essential topics.

What then is the question? Should we abandon the independence and integrity of the two courses and consummate a merger in view of the fact that both deal with business conduct in its legal framework? Am I suggesting that because of their innate relatedness a greater unity of the two courses be established; that, for example, we offer the Government and Business course as an extension of the Business Law course, the two together then forming, say, a two-year sequence? Do I propose then, by implication, that the Business Law teacher should be prepared to assume responsibility for both courses? As you will see, nothing of the sort is in my mind.

True enough, both courses deal with business conduct in its legal framework; true enough, there are points of close contact. No presentation of contract law in a business law text would be complete without considering contracts in restraint of trade. And no Government and Business text is acceptable unless it contains an elaborate treatment of antitrust legislation and enforcement. However, it is exactly at this point of closest contact that, in spite of seeming similarity of subject matter, potential differences in purpose and didactic objective of the two courses, as they are taught now, appear.

There is, I believe, no lack of agreement among members of this group that one of the basic purposes of the introductory course in Business Law is to impress upon the student the fact that business unfolds itself within a system of law which essentially provides for each specific business conduct a particular set of law rules that are definite, and more or less unbending. "Teaching Business Students to Respect the Law" is a most worthwhile objective of the teaching effort. In other words, the Business Law course tends to be basically legalistic in its underlying philosophy, legalistic in the sense that we try to convince the student that business conduct which is contrary to a given legal rule produces, with a high degree of certainty, a stipulated sanction; that courts, in this legal framework, are bound by that rule and have only relatively little freedom of interpretation and action.

All of us, I suppose, have witnessed, not without a certain amount of amusement, how befuddled the student becomes when he is confronted with a legal situation that affords the courts greater leeway of interpretation and action.

Such a situation presents itself, for example, exactly at that point of closest contact between the Business Law and the Government and Business course, namely, when we deal with the question of legality of contracts that are in restraint of trade. Even if the discussion is limited, as it usually is, to agreements ancillary to the sale or lease of a business or property and contracts of employment, it is not without some bewilderment that the student views the courts' discretion in distinguishing between reasonable and unreasonable restrictions in such ancillary contracts, narrowly limited as the courts' freedom of interpretation actually is. Should the discussion transcend the bounds of ancillary agreements and include the whole gamut of monopolistic behavior, the student, by necessity, would become vividly aware of the fact that beyond the sphere in which the law provides well-defined and inflexible rules, that is, beyond the sphere of comparative legal certainty, there extend wide stretches of law where business conduct is not so much governed by compartmentalized sets of rules as where it is guided by broad standards of law that are subject, by both regulatory agencies and courts, to flexible interpretation and application on a case-to-case basis. These wide stretches of law are basically the territory covered by the Government and Business course, which requires therefore a philosophical and methodological approach which differs from that typical for the Business Law course.

This brings me to the main point I desire to make. Should it be left to the Government and Business course to acquaint the student with the broader function that the courts in our system of law may be called upon to perform? Should it be left to that course to impress upon the student the fact that where changing conditions and varying facts require a flexible interpretation of basic law the courts, in fact, embark upon legislation and the creation of law, gradually and continuously promoting its growth? Is it unwise, unsafe, or needless to foster such knowledge within the framework of the Business Law course? Or should the teacher of Business Law assume responsibility in the matter? This is the question to which I propose to address myself.

To begin with, the discussion, in contract law, of agreements in restraint of trade is not always strictly limited to ancillary contracts. All basic aspects of antitrust are taken up in some of the standard texts that guide the discussion. In such an event, there is a real temptation of oversimplifying the exposition of the antitrust statutes by neglecting to explain their very nature: as constituting general standards of law entailing a high degree of flexibility in their interpretation and application rather than as representing particular rules of law applicable in a more or less unbending manner. The danger of succumbing to such temptation is not academic but very real. Didactic considerations may have a part in the manner of presentation: the endeavor, in an introductory course, to impart to the student a view of the law which gives him a high degree of assurance as to the predictability of its operation. However, didactic considerations in any academic course should prevail only to the extent that they determine the scope and level of presentation, but should be no inducement to color the material. By way of reference to one of the standard texts in the field: what informative and educative value derives from an exposition of the antitrust statutes that neglects to include, in a survey of actual cases, any decision in the field of industrial concentration but pays exclusive attention to collusive and tying agreements in regard to which a legalistic interpretation of the law tends to prevail? The rule of reason is thereby swept under the carpet. To be sure, that rule has suffered erosion at the hands of some courts. But wipe it out from a basic text on Business Law that attempts to acquaint the student with the law of antitrust and you hide from the student its true nature and the creative

role of the courts in its enforcement. But apart from the fact that a purely legalistic approach in a basic law text dealing with antitrust misses a major point and tends to misinform the student, apart too from the fact that such an exclusive approach ill prepares and actually prejudices the student who may enroll in the Government and Business course, quite apart from all this, a broadening of the view of the student in the Business Law course regarding the nature of law and the function of law enforcement agencies in its interpretation and application would perform for him an extremely constructive service.

We must realistically assume that in many instances the introductory Business Law course is the terminal course for the business student. If successfully instructed, he can be assured that when he enters business life he has gained a rudimentary working knowledge of the legal regulation of those aspects of business conduct for which specific rules of law are provided. But he is at a complete loss to make any rhyme or sense of the legal regulation of those important aspects of business conduct, such as competitive behavior, for which the law provides broad standards rather than particular rules. He is looking for certainty, for an assurance that a given competitive conduct will not bring him into conflict with the law, and fails to understand why such certainty as he knows it from his contact with business law does not and cannot emanate from the law concerning competitive conduct.

Without doubt, such search for certainty is widespread in the business world, and not without some justification, in view of the vacillating manner in which the courts have been enforcing the antitrust statutes: in one instance interpreting them in the light of the per se doctrine of violation, in another in the light of the Rule of Reason. As I need not explain, under the doctrine of per se violation certain types of competitive conduct or the existence of a certain market structure are in and of themselves declared unlawful, while under the Rule of Reason all types of competitive conduct or the existence of a certain market structure are objects of a factual appraisal which considers all pertinent factors that determine the conduct or are responsible for the structure before any verdict one way or the other is reached.

To a large extent, however, this search for certainty on the part of the business community is the result of a misunderstanding of the function of broad standards of law, a misunderstanding of which the philosophical and methodological approach of the Business Law course may be the contributing cause. What obviously is needed is a reorientation of that approach to open the eyes of the business student to the fact that it is not feasible to provide for all kinds of business conduct the strait-jacket of specific law rules, that the dynamic character of our private enterprise system also demands broad standards of law, constitutional law if you please, which, if properly interpreted and applied, takes cognizance of the effects that technological progress and innovation have upon market structures and the nature of competition. To open his eyes to the fact that for a proper interpretation and application of such constitutional law the per se doctrine is generally of limited use, that the proper approach lies in the Rule of Reason, which in spite of repeated defeat seems to have a high degree of recuperative power, like the Phoenix always emerging again from its own ashes to guide the thinking of our courts in antitrust cases, is a primary objective. Whoever relies on the interpretation of the law under the Rule of Reason may not always be able to fully predict the verdict, but he is at least assured of a fair hearing in a procedure that gives due consideration to all basic and contributing factors that have been and are responsible for the development

of a competitive situation which is the cause for complaint. That does not mean, however, that this procedure, as frequently feared, amounts to an exemption from sin. On the contrary. In it, the old French adage, Tout comprendre c'est tout pardonner, has no application. In a comprehensive and masterly review of our national policy in the field of antitrust, published in the Michigan Law Review for June 1952, Professor Oppenheim, one year before his appointment to the co-chairmanship of the Attorney General's National Committee to Study the Anti-trust Laws, deals with the basic procedural issues involved in antitrust in the following not uncertain terms:

American antitrust policy will never come to grips with the inescapable task inherent in the administration and enforcement of the federal antitrust laws so long as either government or business hides its head in the sand to shut out the constantly changing and varied conditions in American industries and markets as they actually exist in structure, behavior, and accomplishments. The relative uncertainty of judicial decisions under the Rule of Reason is a price worth paying for the general standards in antitrust legislation by which flexibility and broad coverage can be achieved. The alternative quest for certainty by blind devotion to per se violation rules produces a rigid formulary system of mechanical rules of law which does violence to the facts of the American economic order. This is too high a price to pay for the government's merely chalking up an impressive record of enforcement successes no matter how hollow those victories may prove to be when they fail to square with the ineradicable facts of industrial life in the United States.

The report of the Attorney General's National Committee published one and a half years ago reflects Oppenheim's basic position throughout, all protestations to the contrary notwithstanding. Of special interest in the unfolding picture of antitrust discussion is the attempt at systematizing the role that economic analysis is to play in antitrust procedure. The Report includes a whole chapter on "Economic Indicia of Competition and Monopoly." And the energy which the courts have devoted, in some of the more recent litigation, to a full exploration of the economics of an antitrust case is well documented in Carl Kaysen's recent monograph of the United Shoe case.

The whole development in contemporary legal thinking on antitrust should not fail to have its impact on the teaching of the Business Law course. It seems to me of vital importance that the philosophical and methodological approach in that course be broadened to produce a full understanding on the part of the business student to the effect that the law of business cannot be couched exclusively in terms of unbending rules of conduct; that to serve well, the law must also take into account the dynamic character of our enterprise system; and that it catches that dynamic character and spirit best by establishing those broad standards of conduct, which, if reasonably interpreted and applied, will not fail to impart the appropriate justice. Such broadening of the philosophical and methodological approach of the Business Law course need not detract from the course content of the Government and Business course, nor need it put an undue burden on the Business Law course. As it stands we should be vitally concerned with the question how to introduce the student to law, courts and procedure. It is in that context that we should apprise the student of the essential differences in the nature and procedures of law as they relate to the various kinds of business

conduct for which the law makes provision. And in so doing, we should make him aware of the fact that, in the words of the late Morris Raphael Cohen,

The progress of the law involves the attainment of greater definiteness as well as greater flexibility. The problem of reconciling these two demands is difficult and we can seldom attain perfect satisfaction. But we have to learn to live in our imperfect world. We should not, in the language of Tourtoulon, throw to the dogs all that is not fit for the altar of the gods.*

The teacher of Business Law may by training and disposition not be inclined to cope with the type of problem inherent in the material offered in the Government and Business course, as, in turn, the scholar who specializes in the latter subject may have little propensity for handling business law. Whatever the dispositions and inclinations, whether we preempt one field or the other, or expand our offerings into both, the important thing, as I see it, is our perception that having a legalistic mind does not necessarily mean having the best legal mind.

*Morris Raphael Cohen, Reason and Law: Studies in Juristic Philosophy. The Free Press, Glencoe, Illinois, 1950.