

THE FUTURE LEGAL EDUCATION OF AMERICAN BUSINESSMEN

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In reading the charges which have been levelled at the teaching of business law, both by business educators and by business law teachers themselves, one is struck by the basic similarities between those charges, on the one hand, and the criticism and self-criticism of the teaching of law in our law schools, on the other. We are told, with respect to both business law teaching and professional legal education, that it is too narrow, too technical, too analytical—that it lacks sufficient breadth, sufficient perspective, sufficient synthesis, sufficient indication of the relationships between the legal and the non-legal.

When these charges are made by non-lawyers we tend to reject them as showing a profound ignorance of the nature of law. The discussion of law in the Gordon-Howell Report on "Higher Education for Business" has already had a thorough going over at this conference, but let me just recall once again, for the sake of the record and for your amusement, what it proposes as the proper course in law for business students. "Such a course," the authors state, "might include topics such as the following: the background, importance, and role of law in our society [Have the authors ever considered how one can teach the role of law in our society to students who do not have the faintest conception of what law is—who do not know the difference between a criminal and a civil action, to whom the adversary system is an irrational game, who think that no contract is enforceable unless it is in writing, who believe that liability for personal injury is based simply on causation, who do not know what is the function of the jury and what is the function of a trial judge and what is the function of an appellate court, who, above all, believe that law is simply a system of rules which are more or less self-executing? But the "role of law in our society" is only the first topic in the proposed course]; the legal system of the United States [in 20 hours, or 60? We spend three years on that in the law schools, often with indifferent success] and its workings [even in the law schools we do not pretend to teach much about its "workings"—that takes additional years of practical experience]; private property and contract as basic concepts of a free enterprise system [but the student already knows that private property and contract are basic concepts of a free enterprise system; he simply doesn't know what private property and contract are—and it doesn't help to tell him in two hours or in ten, he has to see property and contract in operation through the cases, he has to ponder some of their myriad concrete

ramifications, and that takes time]; and [finally] the evolution of legal attitudes toward business, including the changing relations between business and government [which, I take it, means taxation, anti-trust law, administrative law, legislation, and a few other things thrown in at the end.]" Like a great many laymen the authors would like a very small dose of law swallowed down with huge quantities of something more tasty.

Yet lest we become too smug in our rejection of such suggestions from the outside, we should consider what our own colleagues—teachers of law, both in the business schools and in the law schools—are saying along similar lines. I was struck by Dean Jack D. Heysinger's article in the latest issue of the American Business Law Association Bulletin, in which he charged that business law teachers state the objectives of their courses in extremely broad terms—not altogether different from the objectives proposed by the Gordon-Howell Report—but in fact fail to fulfill those goals; "we have stated our objectives," you will recall he said, "in terms of both 'macro-' and 'micro-law', but we have taught only 'micro-law.'" He, too, pleads for "a true overall picture of law as a system." And in this connection you may be interested in learning that a Committee on Legal Education at Harvard Law School, which has spent a large part of the past academic year considering some of the changes needed in our law school curriculum, makes a similar criticism of our law teaching. The Committee speaks of "the need for a broader and deeper perspective," and states that it would be desirable to provide some teaching in the first year explicitly designed to illuminate the functions of law and lawyers in society as they have evolved over the centuries.

Indeed, if critics of the law schools are right, one of the reasons for the weakness of business law courses may be that business law teachers are themselves victims of a bad legal education.

The difference between Dean Heysinger and the Gordon-Howell Report, and the difference between the self-criticism of professional legal education by law teachers and the charges of narrowness often levelled at the professional law schools by social scientists and professional educators, comes to this, in my opinion: the non-lawyers do not understand that you cannot have "macro-law" without "micro-law"—you cannot understand the nature and functions of law in society, or in business, without struggling mightily and for a long time with what the outsider incorrectly thinks of as mere techniques. It is no good trying to teach what law is all about to someone who doesn't know what law is—who cannot, for example, even read and understand a judicial opinion. It would be like trying to teach someone the significance of music without exposing him to the sound of a symphony, or teaching what French is all about, or German, without teaching him to read or speak it. Law is a language—it is one of the basic languages of our system of social, economic and political institutions. The student of law must learn to speak it and read it, at least haltingly, if he is also to learn to appreciate its beauty and its power.

But *can* you have both "micro-law" and "macro-law" in a single course? In law schools we can adjust the curriculum so that the greater emphasis in the first year is on legal method and legal technique, and the greater emphasis in the second and third years is on perspective and synthesis—but can these two approaches be combined effectively in a single course given to college undergraduates? I believe

it can be done, and I shall try to explain how. I shall take the liberty of offering my explanation in terms of my own experience as a teacher of law not to business students but to students of the arts and sciences at Harvard College, though I may add I have taught the same course three times at the School of Industrial Management of M.I.T.

In the first place, let me state the basic purposes of the course I offer to college undergraduates called "The Nature and Functions of Law." They are as broad and as lofty as the purposes proposed for a course in law by the Gordon-Howell Report—indeed, I believe they are broader and loftier! There are five of them:

First, to add a new dimension to the student's thinking by confronting him with the legal aspect of social relations (including, incidentally, business relations), by showing him that legal relations among people are a fundamental part of their social relations.

Second, to teach some of the basic elements of a legal system for their own sake: the nature of judicial procedure; the relation between the adjudicative process and the legislative and administrative processes; the principal differences between crime, tort, contract, and other types of legal actions; the doctrine of precedent; the relation between law and equity; remedies; and some other matters which I consider basic parts of a legal system, and which should be transmitted from generation to generation as part of our cultural heritage.

Third, to provide an awareness of fundamental legal problems which cut across all branches of law—fundamental dilemmas of a legal system—such as: the balance of rule and discretion, the institutional limitations of legal decisions, change and continuity in the development of legal doctrine, the relation of law and policy, law and custom, law and morality.

Fourth, to explore the broad social functions of law—the function of law, first, as a peacemaker—as an alternative to private vengeance and self-help; the function of law, second, as a stabilizing factor in social, economic and political life, its role in providing historical and doctrinal continuity and consistency; third, the function of law in organizing society, in channeling thought and action, in enabling people to count on having their expectations fulfilled; fourth, the educational function of law, its role in teaching people right ways of thought and action, its role in teaching people—and especially conflicting social groups—how to get along with each other.

Fifth, to explore the relationships between a legal system and the social, economic and political order of which it is a part, to trace the connection between our legal institutions and our national character in its historical development, and to evaluate that connection by comparison with other national systems.

Now I think you will agree that those are broad and lofty objectives! Can they be fulfilled?

I believe these objectives can be fulfilled—or at least can best be fulfilled—if the students are presented with cases and materials selected in the first instance in order to fulfill these objectives. In other words, the cases and materials should not be selected in order to teach the students "contracts" or "torts" or "criminal law" or any other "branch" or "branches" of law; they should be selected in order to teach the students that legal relations are a fundamental part of social life, that a legal system contains certain basic elements, that there are certain dilemmas, cer-

tain tensions, in any legal system, that law has certain social functions, that legal institutions are an "effective symbol" of the basic goals of a society.

Why cases? Why not just tell the students? Because cases give the student a vicarious experience of law. They are like listening to a symphony in a music appreciation course, or reading Goethe in a course in German. The student is challenged by the actual report of the case, as he could not be by a digest or summary of it, to identify himself with one side or the other, and to share the dilemma which confronts the judge. Only then can he give an answer to the question, Do the reasons offered by the court justify the decision? Only then can he begin to see that, on the one hand, the decision must be made in a relatively narrow context, that of the case at hand, with all its individual peculiarities, but at the same time the repercussions of the decision may be very broad and may affect the whole society. Only then does he have the raw materials out of which a philosophy of law, or a sociology of law, can be constructed. And this is what the non-lawyers do not grasp—that the raw data of the cases can stimulate generalization about the nature and functions of law, yet keep generalization within the bounds of what law is in a technical sense.

Therefore cases—but not any cases, and not only cases.

My cases and materials are, on the one hand, grouped around what I consider to be the four major functions of our legal system. To demonstrate each function I have selected a particular area of law.

I start with the peacemaking function of law, its pacificatory role; and I start, therefore, with judicial procedure, civil and criminal—not all of civil and criminal procedure, but certain aspects. At the very beginning the cases pose questions raised by the requirement of a live controversy for civil jurisdiction. These are tough cases, from a legal standpoint, and even tougher from a philosophical. I present some analytical questions and notes after the cases, and I also present a philosophical argument between Thurman Arnold and Lon Fuller: Arnold says that the rule which forbids the court to speak without a contested case before it is irrational, to be explained, as he puts it, only by social anthropology; Fuller says that it is one of the factors which increases the rationality and the moral force of the decision. My own view is that the formal processes of law—the time-consuming nature of adjudication, its deliberateness, its articulateness, its objectivity, the necessity of a fair hearing and of a reasoned decision—make it suitable for the resolution of certain types of conflicts in society but not others, and that where there is no "controversy" in the legal sense, formal adjudication is apt *not* to be an effective mode of settlement. Thus this first section gives the student materials directly related to what Dean Pound, in sociological language, called "the limits of effective legal action."

I shall not bore you with an outline of the rest of the cases and materials. The book is a first effort and I have many qualms about it. It was designed for liberal arts courses in law—I might add, for liberal arts courses in law which are largely non-existent! Although quite by accident it happens to contain a good deal of what is traditionally defined as business law, I did not design it for use in business law courses, and I am amazed and delighted to find some business law teachers using it.

What I have come here to state is what many of you already know: that the

future legal education of businessmen, and the future legal education of non-lawyers generally, must avoid both the Scylla of the older type of college law course, with its attempt to cover systematically many fields of law, and within each field, a large body of rules and principles, and the Charybdis of the "new look" which would throw the baby out with the bath or, rather, drown the baby by filling the tub almost entirely with broad generalizations about law as a system and a framework and a philosophy. The path is in the middle; and the middle is not a smattering of both; the middle is *some* cases, and *some* legal problems, which demonstrate crucial aspects of law, together with background notes and essays of a historical, comparative, and philosophical character. Speaking generally, what is needed is not a survey of law or of any single brand of law; what is needed is to sink shafts into some particular areas of the legal system where rich deposits are to be found. There is time to explore only a few areas in any individual course—enough areas to give some idea of the breadth of the field, but not so many that you have to stop digging before you get a strike.

Nevertheless there is one field of law with which I think that any attempt to teach "macro-" and "micro-law" together must start—and that is judicial procedure. I am absolutely convinced that you have to start with procedure. And I would include both civil and criminal procedure, for this provides a basis for contrast and evaluation. First, if the student does not know procedure, he cannot read a case properly—he does not know how it came up, he does not know the issues, he does not know the context in which the substantive rules are laid down; second, without some procedure to start with, the student will never understand that law is *not* rules, that rules are not in themselves decisive, that rules of law are rather guides to decision, and that the rules evolve as they are challenged in concrete legal situations. The student must understand something about jurisdiction; something about pleadings and the formulation of issues, something about trials and appeals; without some real insight into judicial procedure, he will miss the structural design of law, within which substantive laws develop. I do not believe that he can acquire this insight without direct and systematic confrontation with procedural problems as such.

Secondly, it is essential that the student be given a systematic introduction to the doctrine of precedent and the problem of doctrinal consistency, that is, to what is generally called legal reasoning. He must understand—and that means have a real feeling for the way in which a court approaches the decision of a case by comparing it with, and distinguishing it from, previous cases. He must know the distinction between holding and dictum, and must learn the hard lesson, illustrated so effectively in the line of decisions leading to *MacPherson v. Buick*, that the reasons which a court states as necessary to its decision may properly be treated as not binding in a later case.

On these two foundations—judicial procedure and legal reasoning—a great variety of substantive fields of law can be taught effectively. But I should like to stress again that whatever subjects are selected, a few particular problems should be explored in depth and no attempt should be made to offer a survey or a condensation of a whole field.

If there is one thing which I miss in the very excellent articles which I have read by business law teachers, it is the sense that law in the first instance is an in-

stitutional process, that it does not consist in the first instances of rules and concepts but of procedures and of approach. Law is action—it is the resolution of conflict through institutionalized procedures, in which substantive rules and concepts play an important part but are not the whole story. I would say that substantive rules and concepts are an intermediate stage between the procedure—whether it be a judicial, a legislative or an administrative procedure—and the decision.

Connected with the fallacy, as I see it, of teaching law as a system of rules, is a still deeper fallacy that law is an abstract and impersonal science which does not really meet the flesh-and-blood realities of life and the concrete, personal, passionate actions of men dealing with each other in business, in politics, or in social activities. Paul Freund, in an excellent article, stresses that the temper and outlook of the lawyer should be more widely shared, in order that society might save itself a little oftener from the tragedy of mistakes of judgment, and he urges the lawyers, therefore, to "give those 'lesser breeds without the law' a taste of our austere and civilizing discipline." Civilizing, yes; austere—well, it depends on what is meant by austerity. It is not only the tragedy of mistakes of judgment which we should be concerned with in teaching law to college undergraduates, whether in business courses or in the liberal arts curriculum. It is also the tragedy of the prevailing philosophy and mood of our time—a philosophy and mood which has its own form of austerity—the philosophy that what counts in the long run is power, technology, and material and psychological security.

The study of law can help to counteract this, not only by showing that reason and restraint play a crucial role in the maintenance of social order—that is, perhaps, its more austere side—but also, and equally important, by showing that in the drama and conflict of the courtroom and legislature, the struggle for rights, the fight for justice, is equally important. There is nothing abstract or impersonal about issuing an injunction to the School Board of Little Rock, Arkansas, restraining it from excluding Negroes from Central High School, or awarding a man who has been run down by an automobile money damages to pay his hospital bills, or, for that matter, drafting a contract for the sale of goods. If law is conceived in the first instance as a process, as a going concern, and in the second instance as a type of relationship among people, it can be used to teach a philosophy different from the one which is threatening to enervate our society, on the one hand, and barbarize it, on the other.