

LAW IN THE BUSINESS ADMINISTRATION CURRICULUM

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I have been given five but not more than six minutes in which to comment on Professor Carrell's thoughtful paper.

I shall address myself first to his diagnosis; next to some aspects of the recommended cure.

The diagnosis: our present course in business law does not meet the objectives of the collegiate schools of business. In that Professor Carrell agrees with Gordon, Howell and Pierson, the authors of the two reports being discussed here this morning.¹ He reaches this conclusion by suggesting that business students are typically exposed to a vast array of rules of law and little else. They apparently are not, in most colleges, sufficiently taught to appreciate law as a social phenomenon and to understand the role of law in a highly complex industrial society. Professor Carrell appears to draw support for this argument from a survey of the textbooks in business law. Unless you happen to receive royalties from the books he has in mind, you may agree with him, and you may also agree with Oscar Handlin of Harvard who made the following observation in an article entitled "Textbooks that Don't Teach":

Only a few textbooks have ventured to break through the pattern of dogmatism and dullness which is characteristic of the species. Generally publishers, authors, and teachers follow one another in a frustrating circle that strengthens the pattern. The publisher is constrained by the market to turn out books for existing courses; the author writes what will be published; and the teacher shapes his course by the available texts.²

Handlin concludes, as Professor Carrell did today,

It is not difficult to trace today's volumes back to their models of sixty years ago.³

Professor Handlin, however, is not dismayed, for, as he observed,

In the ideal teaching situation, with qualified teachers, well-prepared students, well-stocked libraries, and ample visual material, the textbook in its present form would simply disappear.⁴

¹Gordon and Howell, *Higher Education for Business* (New York: Columbia University Press, 1959); Pierson and Others, *The Education of American Businessmen* (New York, 1959).

²*The Atlantic*, December 1957, page 112.

³*Ibid.*

⁴*Ibid.*, page 113.

Professor Carrell does not call for the disappearance of the textbook but, and here we get to *the cure*, he recommends in effect that the law teacher do some library work and build on available texts. May I suggest that if we try to approach the ideal teaching situation advocated by Handlin much of the current criticism of the traditional business law course will have been met. But this requires at the very least

1. qualified teachers
2. well-stocked libraries

Handlin's third principal requirement—well-prepared students—would be helpful too.⁵

A few remarks as to these prerequisites.

1. *Qualified teachers*: The thought expressed here is not new to the American Business Law Association. At the Symposium on The Place of Law in Higher Education in 1958 Professor Cornelius W. Gillam observed:

If the institutional home of business law is to be the business school, business law faculty must be students of management first and lawyers second.⁶

Generally speaking few law teachers meet this qualification today. Consequently, it is no wonder in Professor Gillam's opinion that the business law course is viewed largely as a service course devoid of its own intrinsic value. We must also admit that the business law curriculum is often entrusted to the downtown legal practitioner who hurries to the campus between depositions, briefs, trials and conferences. Only a very exceptional practitioner provides the type of course demanded by Gordon, Howell and Pierson. Only a very exceptional practitioner *can* provide such a course. To revert to one more observation by Dr. Gillam, on the whole "the part-time teacher has offered a weak business law course . . ."⁷

If the purpose of collegiate Business Law is to relate the legal problems of business to their economic and social environment—and I believe this is the true purpose of the course—then it is necessary to teach and study business law so as to include the "law-creating practice of professionally trained business administrators"⁸ as has recently been suggested by a British colleague. To succeed in this endeavor requires that our deans and department heads reconsider their past practice of consigning this course to legal practitioners in town who can use the money, but rarely earn it. The pursuit of excellence must not remain a mere matter of words.

2. *Well-stocked libraries*: I need not remind this group of the many first-rate books which are available to us for library reading assignments. Professor Carrell mentioned the excellent volumes by Cohen and Cohen⁹ and by Friedmann.¹⁰ To these I would add at random Learned Hand, *The Spirit of Liberty*; Cardozo,

⁵As to Handlin's suggestion of visual material, the present writer has successfully used Dr. Mortimer J. Adler's filmed discussions in "The Great Ideas" series, especially the films entitled *The Nature of Law*, and *The Kinds of Law*.

⁶Gillam, *Business Law Faces The Future*, American Business Law Association Bulletin 32 (May 1958).

⁷*Id.*, page 34.

⁸Schmitthoff, *The Sale of Goods* (London: Stevens & Sons, Ltd., 1951), page x. Professor Clive M. Schmitthoff is a member of the faculty of the City of London College.

⁹Cohen and Cohen, *Readings in Jurisprudence* (New York: Prentice-Hall, 1951).

¹⁰Friedmann, *Law in a Changing Society* (London: Stevens & Sons Ltd., 1959).

The Nature of the Judicial Process; Hurst, *The Growth of American Law*; Ginsberg, *Law and Opinion in England in the 20th Century*; John P. Frank, *The Marble Palace* and last but not least the American Bar Association Section on International and Comparative Law on *The Rule of Law in the United States*. For those in a comparative mood I would add Harold Berman's *Justice in Russia*, which should be read with selections from Milovan Djilas' *The New Class*.

But is it not obvious that only a full-time teaching staff in this field will help build a business law library necessary to meet the needs of a meaningful business law course? Only in going beyond the textbook can we hope to convey the full significance and purport of 20th century law and legal institutions to our students. This is not done adequately at this time. Let me give you but one substantiating example. Many schools now devote close to a full term to the law of contracts, and understandably so. Yet how many of us, leaning on the texts, have adequately explained why contracts receives so much attention. The texts certainly do not show in what way the law of contracts is the product of free enterprise capitalism; nor what freedom of contract means; nor the limitations which have developed with respect to freedom of contract. The case of the standardized contract is a case in point. Just read the *Henningsen* case decided last May by the Supreme Court of New Jersey—the citation is 161 A. 2d 69—and judge for yourself whether you have been doing your best in teaching the law of contracts to the businessmen of the 1960s, the 1970s, the 1980s. Other examples come readily to mind in the wide field of business law. Unless we incorporate the elements of social control and the realities of the decision-making process in management into the business law course, we will continue to ignore the "kind of legal background that the typical businessman, particularly the more responsible business managers, will need in the closing decades of the twentieth century" as charged by Gordon and Howell.¹¹

Whether you follow the approach recommended by Professor Carrell or any of the many possible alternatives, such as a concentrated one-term course in the legal aspects of business as taught at the Notre Dame business school to the non-accounting majors, keep your objective in mind—that of teaching not *rules* of law, but the *role* of law and of legal institutions in a changing, dynamic industrial society.

And this being a political year, may I close by saying that not only on the convention floor but also in the classroom new ideas boldly challenge the old. One might even say that "the New Frontier is here," that "it would be easier to shrink back from that frontier, to look to the safe mediocrity of the past, to be lulled by good intentions and high rhetoric"—but were I to counsel this, you would justifiably accuse me of plagiarism. Thank you very much.

¹¹Gordon and Howell, *op. cit.*, *supra*, page 204.