
Business Law in the Business School

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Business Law in the Business School



Business law in the business school should move on to "higher ground" in the view of an Assistant Professor (A.B., Brooklyn College; S.J.D., New York Law School) at Bowling Green State University. Additional business and liberal arts preparation and a new dimension of compensation and rank would be involved.

By **ARNOLD H. SUTIN**

THE SO CALLED "traditional" approach to the teaching of business law has come to be a subject of considerable intraprofessional controversy on the undergraduate collegiate level, as well as a source of recent research foundation dissatisfaction. Intermittent charges of inadequacies in realizing some of its objectives were largely ignored on the rationale that the alleged inadequacies lay in faulty teaching performance and methodology. Today the environmentalists¹ attack this approach on two well-defined conceptual grounds:

- ▶ It is said firstly, that the primary objective, the teaching of rules of law, the essence of this approach, lacks contemporary relevancy in terms of present business conditions and practices requiring a new type of business law course along conceptually different lines.
- ▶ Secondly, there is as a result of the use of materials appropriate for the accomplishment of this prime objective, an inability and suggestive failure to accomplish the less frequently asserted secondary objectives, to meet those ends concerned with understanding the basis of legal thought and the nature of legal reasoning.

Business law has been historically a service type course, both as a miniature and a skeletal professional law school course. Some variation in course content and assigned credit hours exists among the syllabi of collegiate law programs. Teaching materials appear to have remained throughout the years largely unchanged. Simply stated, the course seeks the mastery of many exacting and relatively fixed rules of substantive law thought to be involved in the most common business transactions. Perplexing problems arise as the rules of law number into the hundreds or even thousands in any one field. The instructor

finds himself selecting a token representation of law in each of the fields. Students are exposed to this large array on the theory that there will be a retention of many of them with the particular fact situation in which they apply. The student is forewarned of the possible dangers and problems latent within a given business situation and is commonly advised to proceed to legal counsel when these arise. Further, there is insistency that caution be exercised in regard to the niceties of legal distinctions in rule application to factual business patterns in a hope that students may avoid an over- or under-statement of the rules.

The role of adjective law, namely evidence and procedure, in the traditional business law course appears to be largely peripheral in nature and is considered by many business law faculties as non-intrinsic to the general business law curriculum. The professional literature appears to evidence little interest in examining either the justifiability or feasibility of increasing the role of adjective law in the curriculum. However, as adjective law deals with the ingredients of analysis and reasoning so vigorously advanced by the business law environmentalists as a primary aim in a business law course, a reconsideration of this area has begun to develop. Professor Raskind² has suggested that adjective law be placed in the business law curriculum through the vehicle of administrative law. The application of logic and rules of evidence would be strongly emphasized and the decision-making process of the court would be made manifest. The matter is in fact not entirely as simple as Professor Raskind would make it. Firstly, much of what constitutes adjective law, pleading and practice, are highly technical tools almost totally employed by the legal practitioner. Whatever lessons in logic may be extracted from the mass rules constituting this area would hardly be worth the total effort in study and application. On the other hand, the value of evidence in a business law teaching situation appears somewhat more meaningful, but it is probably true whatever value may be obtained from legal rules of evidence, which are analytical in nature, may be more simply obtained in other disciplines whose specific purpose is to sharpen the students' critical faculties.³ Further, at present, syllabi prepared and made available in the adjective area are often lacking in completeness and depth with a result that there

is little encouragement on the part of teachers to look favorably at its introduction, particularly novices, who understandingly rely heavily on prepared departmental syllabi. Finally, it is felt that much of the historical and institutional factors associated with the development of adjective law may not be effectively handled in a course which attempts to expound on substantive law, but it may rather be best taught in a course in Legal History where a complete presentation in depth may be given.

The traditional approach may be seen in the content of the two required law courses offered at a typically large school of business at X University:

Business Law 120 (3)

This course covers the following areas of business law: law and society; law and its enforcement; contracts, personal property, bailments, and sales; commercial papers; and the uniform commercial code as it pertains to these fields.

Business Law 121 (3) Pre-requisite: Business Law 120

This course, which involves an application of the knowledge acquired in Business Law 120, consists of the following topics: security devices, agency and employment; business organizations; real property, leases and mortgages, insurance, trusts, decedents estates, and bankruptcy; and government and business.

The instructor is clearly advantaged in time and effort by utilizing traditional law textbooks which provide a prepared syllabus. The text normally outlines the appropriate topics and sub-topics and sets forth a selection of law materials under each. A functional unit has been formed by the author for the instructor. Some judgment is required to decide how much instruction time to apportion among the units and to break these down into particular lessons.

Clearly from an environmental approach to the teaching of business law, it may well be advanced that the traditional content and material discourage flexibility of analysis and creativity on the part of the instructor. One gleans from the prefaces found in many traditional texts secondary goals which may be said to be included in the ideal scope of the approach. These prefaces are replete with claims as to their attempt to provide informative materials on the underlying reasons or philosophical basis for the large body of legal principles contained within the text proper. These assertions are considered by the environmentalists as incompatible with the narrow presentation of technical rules, which typify the traditional business law course. May not the following question be seriously advanced, "Would a voluminous body of rules, with or without case material, coupled with straight classroom lecture, provide the necessary

basis for comprehending the rationale of legal concepts?" Much learned commentary in the literature has answered this question in the negative. Another equally important question may be asked, "Would a mass of legal rules provided by the traditional approach assist the student in developing skill in legal reasoning?" This objective, the environmentalists assert, while less commonly advanced as a secondary goal, has generally not been taken seriously by the profession. Certainly, they continue, traditional course content and case materials are not pointedly designed to accomplish student awareness of the decision-making process.

What effect has the traditional approach had on the learning process? Apart from the reticence for learning that may exist in any college classroom where the usual percentage of marginals are present, many teachers tacitly admit that they are confronted with the need to sustain student interest. It may well be asserted by the environmentalists that the wide use of varied teaching techniques associated with traditional law courses lends inferentially some credence to their view that traditional business law material is not sufficient to motivate, stimulate, and sustain student interest. Teaching techniques in which students are encouraged to raise personal legal problems for class discussion or for comment by the law professor on current cases pending before the courts, dramatic cases disclosed in the newspapers, visits to local courts, establishment of committees and assortments of other organizational arrangements all to a greater or lesser degree have merit, but may easily be interpreted as designed primarily to enliven an otherwise unreceptive class.

ALTHOUGH no course in a collegiate business curriculum may be said to be settled with finality, it has been surprising to many teachers in the business law field of teaching that the value of the traditional type course, approved as a requirement for admission into the American Association of Collegiate Schools of Business over a decade ago, is now a subject of much uncertainty. From whence comes this uncertainty? Perhaps more significantly the gravamen of discontent centers upon the conceptual narrowism of legal rules.

Today business firms are recognizing a new philosophy of administrative action which diminishes the need for highly technically trained executives. The market demand for analytically oriented generalists has risen. This situation has forced a hard look at the collegiate business curriculum and

business law in particular. This hard look has been principally made by research foundations which have lent their formal criticism to what has heretofore been informal private criticism through the years. Reports by Pierson and Gordon and Howell⁴ in recent years have asserted in broad terms the need for general experimentation on the question of a new course in business law in which imagination and conceptual breadth will be emphasized. These reports have suggested that technical details in the field of law be used only to the extent necessary to show the way law enters into concrete business situations and how it adapts to society. Law would be shown as an evolving social instrumentality to achieve ends deemed just in which legal reasoning as a tool in decision making would be made manifest. This new view includes examination of the historical similarities and dissimilarities between private and public law. The student is involved in a sundry assortment in the social science of materials requiring of necessity the taxing of his critical faculties. While the Gordon and Howell reports have failed to provide any details for implementation of these ideas, they have suggested a course entitled "The Legal Framework of Business" whose objects they claim should be designed to give the student an appreciation of the genesis of law, its role in shaping business and political conduct, its characteristics as a system of thought, guide to action, and technique of control. Presumably "The Legal Framework of Business" is to provide a beacon light for future curriculum development.

The proponents of the traditional approach have reacted; they counter by denying the existence of the very legal narrowism of which they are charged. Pearson,⁵ a leading supporter, denies the presence of inherent weaknesses that would be inconsistent with achieving a broad dynamic view of legal principles. He asserts that law cases when well considered and expounded upon by competent trained teachers are a journey into the environmental aspects of legal science. Much of the criticism, he reasons, refers not to content, but to methodology.

Other arguments, however, face the traditionalists and are formidable. Professor Allan⁶ has outlined the fact that management is able to develop the means whereby day-to-day legal problems may be typed, classified, and placed within a standard operating procedure. This procedure is being employed by some firms; for example, by the setting of limits of activity which management

should undertake before legal consultation. Only a modicum of appropriate legal information is required, and this may easily be provided in advance by the firm's in-service courses conducted by its legal department as part of on-the-job training. Should this standard procedure within the firm eventually increase in complexity, greater detail and closer liaison with the legal department would be required.

The traditionalists answer Allan by asserting that, regardless of increased employment of non-specialized executive personnel, the executive must know some substantive commercial law in order to know when there is a legal issue or problem for referral. They assert that presently constituted, ultra-expanded legal departments within the firm cannot alone bear this responsibility.

In all fairness to the environmentalists, it may be pointed out that as more and more students are trained to be employed by large firms, less value will result from a systematic exposure to particular rules. Well-staffed legal departments will be available to thoroughly screen and check managerial operations for technical pitfalls.

SOME research and a considerable amount of thought have gone into the problem of implementing change from the traditional business law course. Conceptual outlines for alternative courses have been advanced, seeking to answer questions as to content and appropriate teaching materials. These may be said to fall into six broad categories. (A seventh which may be called "legal engineering" will be given expansive treatment in a separate section.) They represent many considered ideas still in a state of flux and, while some have been adopted, others will be subject to changes in varying degrees in the years ahead.

► Dean Votaw⁷ some years ago suggested what may be called a modified traditional approach. He would meet the direct needs of the business student by using the specific law fields of contracts and business organizations as techniques to show some of the many ways they enter into the determination of business decisions in the areas of marketing, organization, and business policy making. He goes to great length to stress the importance of law (1) as a device for training in decision making by providing records of its reasoning process, (2) as an instrument for evaluating decisions and correcting errors, (3) as a means of presenting law as an instrument of social control and public regulation.

As to how legal subject matter is to be presented, he has indicated a multi-faceted approach. The case method can be valuable in exposing the student directly to major parts of the legal process where he sees decision making developing from the raw data phase to the decision based upon it. In addition to the case law technique, he recom-

mends the use of business cases where the student may recognize legal issues in a business situation. He would include the presentation of traditional material once the student has developed insights and skills through the study of case materials.

► Professor Carrell⁸ has indicated an approach which, for want of a better name, may be called descriptive-environmental. The objective is to provide the business student with a knowledge and appreciation of the origin of legal institutions and the role of law in reflecting and shaping social thought and action. This approach, from its outline, appears largely to emphasize historical and descriptive data in selective law areas.

Carrell outlines two three-hour credit law courses designated basic and advanced, respectively. The basic course would be a core course, environmentally structured, consisting of the following topics: the nature and aim of law; contract, a sociological and historical view; property, its classification, historical development and general principles; government regulation of business (an exposition through public law of the role of government in regulating business); torts, an examination of basic principles; family law, duties and obligations.⁹ Carrell, while acknowledging the lack of any one text satisfactory to his entire proposal, suggested "Readings in Jurisprudence and Philosophy," an anthology by Morris and Felix Cohen,¹⁰ to cover the nature of law and the areas of contract, property and torts; for government regulation of business, two volumes, Pegrun's "Public Regulation,"¹¹ Anderson's "Government and Business,"¹² and finally, applicable sections of Max Radin's "The Law and You"¹³ and Friedmann's "Law in a Changing Society"¹⁴ for the family law areas.

► Professor Berman,¹⁵ in his four-process approach outlined by Allan below, evidences more dynamic subject content. In his text, "The Nature and Function of Law,"¹⁶ he provides the student with an understanding of both the nature and legal processes by which social stability is resolved.

Allan, a proponent of Berman's dynamic approach, has recommended that the business law curriculum consist of two required courses, one environmentally structured and the other a follow-up traditional substantive type course in contract, with other elective specialized courses also along traditional lines. The first course would provide a general knowledge of the nature and function of business law in society, which to Allan is of primary importance to students preparing for managerial careers. Upon this foundation, contract law would be built. Allan recommends that the course be three or four hours, covering at least four basic areas: (1) law as a process of resolving disputes; (2) a process of maintaining historical continuity and doctrinal consistency; (3) a process of facilitating and protecting voluntary agreements; (4) a process of resolving acute sociological conflicts. The use of a wide assortment of texts selected by appropriate material would be required. Berman's text, "The Nature and Function of Law" approximates the over-all objectives of this course and is recommended by Allan.

► Lewellyn's¹⁷ "institution of law-government"¹⁸ approach seems particularly promising. He perceives law-government as an institution which performs the following functions: (1) disposition of trouble cases, (2) preventive channeling of conduct and expectations, (3) rechanneling

of conduct and expectations, (4) the allocation of authority and the arrangement of procedures which legitimize action as being authoritative, (5) the net organization (or drive) of the group or society.

► Weissman¹⁹ has urged that a basic foundation in business law be established on the development of legal reasoning. He has suggested Levi's²⁰ "An Introduction to Legal Reasoning"²¹ as a basis for a core course.

► The last approach considered here, outlined by Sutin,²² is described as legal integration. He would employ traditional law content so as to provide the student with material for direct and practical application. Within the same chapter or section in which traditional content is found, key concepts would be extracted and related to varied problems, issues, and propositions in business, economics and politics.

In concluding, it may be noted that there is some support for an essentially non-legal approach as a substitute for the traditional business law course; namely, a series of related essays and/or textual materials on the relationship of business to its legal, social, and political environment. Professors Votaw, Allan, et al. have been active with this approach and have participated in a Ford Foundation supported interdisciplinary workshop program at the Berkeley campus, University of California.²³ Illustrative of the type of material productive of this approach is a volume recently published entitled "The Business Establishment;"²⁴ however, such an approach is not germane to an exploration of the legal alternatives in the teaching of business law.

Let us now briefly view the seventh approach—legal engineering.

► While the movement away from the traditional business law course has gained much momentum as evidenced by the content and scope modification either proposed or in effect, these changes admittedly are premised on the concept of law as a coercive public instrumentality of the state. From the environmentalists' point of view, law is understood in this conventional sense, and for them it is to be the vehicle by which the many economic and social forces extant in the community will be understood, and their many faceted characteristics analyzed.

Legal scholars whose conceptual tradition stems from the sociological school of jurisprudence have in recent years turned their interest to the possible utilization of legal concepts in dealing with the many varied managerial and behavioral problems of the firm through what may be called a "private law system."²⁵ The author suggests the term "private legal engineering" to designate the development and application of the "private law system."

Professor Allan, associated with the collegiate business law profession, has suggested that business law teachers may now begin to employ their interests and talents in the examination and employment of legal concepts and techniques to appropriate organizational and behavioral problems extant in business. While he sees the scope and depth of material in this area to be generally

insufficient for formalized implementation in the undergraduate academic curriculum, a new role for business law teachers has been revealed.

In further explanation, he has suggested that the study of law as an internal and external apparatus would open up for examination hundreds of law related questions bearing on organizational control which have been ignored by the legal traditionalists and for which answers are needed.

For example, who performs the executive, legislative and judicial functions in a given firm?—and how? How does precedent operate in an innovating firm?—a non-innovating firm? If differently, can the differences be generalized? How does due process of law manifest itself in business firms? Or does it? Sometimes? Under what circumstances? And if not, why not? How do employees and managers perceive their rights and duties and how does the structure of the firm's legal system affect this? How are the firm's laws created? Implemented? Modified?

From this beginning it is possible that law may be employed as a valuable source for sound operational principles in the private firm. It is here that business law teachers may in the years to come have the most significant role in the total business curriculum. There is little doubt that legal behavioralism shares with the environmentalists a common recognition of the importance of knowledge by business law teachers of the social science disciplines. The author believes, however, that it is rather in collaboration with the social scientists than the law teachers' conversion that fruitful research and teaching in this novel law area will evolve in the years ahead.

ONE OF THE major areas for curriculum decision-making is the determination of the undergraduate business law core in terms of the new "environmentally oriented" course. This will provide little difficulty if there are two or more law courses constituting the core requirement within the curriculum. We may in this case reasonably assume that the "environmentally oriented" type of course will be combined with the traditional course, giving a well-balanced, mutually complementary, core basis. Where only the traditional type of course constitutes the core, a considerable amount of debate is likely to develop concerning its continued existence. The careful weighing of relevancies among the two types of courses with regard to particular major programs within the business administration curriculum becomes a prime determinant.

Another related problem centers on the relative place of the new type of course in the total sequence of the undergraduate business law courses offered. Will the traditional course be prerequisite to the more "environmentally oriented" course? On the one hand, it may be reasoned that the student needs some technical law

content as a basis for dealing with the more abstract legal content; on the other hand, it is thought some basic introduction to the principles of legal thought and the development of legal institutions should be preliminary to entering into traditional material. Still one may view both types of courses as so complementary and interrelated that they should be studied jointly.

Competing claims of superior teaching competency between the business law departments and those in the liberal arts area are likely to follow, with political science and economics seeking to incorporate the "environmentally oriented" type of law courses within their departments. The resolution of this problem may initiate a review of the rather unfortunate policy of many schools of permitting law courses to be taught by these departments.

It is appropriate at this juncture to indicate that fortunately the place of an environmentally oriented course in the graduate program is, as a practical matter, assured. There is ample authority for the inclusion of a course in business law from the reports of Pierson, Gordon and Howell. The Pierson report set forth in a suggested M.B.A. curriculum under law and public policy a course in legal institutions and business policy. Modification of title for course content is likely to follow. We may note the following statements from Pierson, Gordon and Howell:

Increasingly emphasis is being placed on work in law and public policy as an essential part of the general environment in which employers operate, serving to highlight the varied and changing relations between society and business management.

We think all graduate schools would be well advised to require the equivalent of a year's course on the evolving of legal, political, social, economic, and intellectual environment of business.²⁸

Finally, a problem which deserves consideration is one that touches upon compensation and rank. The effective teaching of the new type of business law courses would call for additional business and liberal arts training, either formally or informally. The possession of multiple graduate level preparations should justify a new dimension of compensation and rank for teachers in this area.

NOTES

¹ The environmentalists in the legal context here considered may be defined as those scholars who would examine problems, issues or propositions arising out of legal science in terms of the totality of relationship that these problems, issues, or propositions bear to the social sciences; its purpose is to obtain maximum inquiry, comprehension, and information. This is in effect social science integration. See Sutin, Arnold H., "Remarks Concerning in 'Integrated Approach' to the Teaching of Business Law," *Catholic Business Education Review*, XIII, No. 4, p. 32.

- ² Leo J. Raskind, Professor of Law, Vanderbilt University, Nashville, Tennessee. See *Law in a Business Environment*, Thompson and Brady, 1963, Chapter II, part 2, "The Judicial Process," pp. 25-86 and Chapter II, part 3, "Introduction to Law, Jurisprudence," pp. 89-124.
- ³ Unfortunately, the value of evidence lies in the fact that it is applied to the real world, while the rules of logic taught in a course in philosophy all too often are presented abstractly.
- ⁴ Pierson, *The Education of American Businessmen*, pp. 212-3, (1959). Gordon and Howell, *Higher Education for Business*, (New York: Columbia University Press, 1959). Also for a brief discussion as to the present debate in business law, see Curriculum Proposal—Business Law, submitted by Professor Allan, Curriculum Committee, Department of Business Administration, Oregon State University, Corvallis, Oregon, December 1959.
- ⁵ Carl G. Pearson, Dean, School of Business Administration, Rider College, New Jersey.
- ⁶ Harry T. Allan, Visiting Associate Professor at the University of Massachusetts, Amherst, Massachusetts.
- ⁷ Formerly Assistant Dean, School of Business Administration, University of California (Berkeley).
- ⁸ Carrell, John R., "The Type of Business Law Course in the Modern School of Business Administration," Talk delivered at the annual meeting of the American Business Law Association, University of Vermont, Burlington, Vermont, August 1960.
- ⁹ No one text has presently been prepared to cover the entire scope of Carrell's core course. A text written by Professors Corley and Black of the University of Illinois, "The Legal Environment of Business," has sought to embrace several areas; namely, law, its nature and function; and governmental regulation of business. Corley and Black, *The Legal Environment of Business*, (McGraw Hill Book Co., 1963).
- ¹⁰ Cohen, Morris R. and Felix S., *Readings in Jurisprudence and Legal Philosophy*, (New York: Prentice-Hall, Inc., 1951).
- ¹¹ Pegrun, Dudley F., *Public Regulation of Business*, (Homewood, Illinois: Richard D. Irwin, Inc., 1959).
- ¹² Anderson, Ronald A., *Government and Business*, (Chicago, South-Western Publishing Co., 1960).
- ¹³ Radin, Max, *The Law and You*, (Mentor Paperback, the New American Library).
- ¹⁴ Friedmann, Wolfgang, *Law in a Changing Society* (Columbia University Press, 1959).
- ¹⁵ Professor of Law, Harvard University Law School, Cambridge, Massachusetts.
- ¹⁶ Berman, *The Nature and Function of Law*, (The Foundation Press, Inc., 1958).
- ¹⁷ Formerly Professor of Law, University of Chicago Law School.
- ¹⁸ Another very interesting, and fruitful, approach is that of H. Richard Hartzler who relies heavily on Roscoe Pound's "social engineering" construct. H. Richard Hartzler, *The Legal System, The Courts and The Law*, (tentative title), manuscript in process, University of Massachusetts). Hartzler's "Book Review of Cases in Antitrust Policy," in ABLA Journal at 354 (1964) which reviews Paul W. Cook, Jr., *Cases in Antitrust Policy* (New York: Holt, Rinehart, Winston, 1964) gives the reader an excellent introduction to his social engineering approach. Karl Llewellyn, "Law and The Social Sciences, Especially Sociology" in 62 Harvard Law Review at 1286 (1949).
- ¹⁹ Weissman, Jacob, Chairman, Department of Business Administration, Hofstra University, Long Island, New York.
- ²⁰ Levi, Edward, Formerly Dean, School of Business, University of Chicago.
- ²¹ Levi, Edward, *An Introduction to Legal Reasoning*, (Chicago: University of Chicago Press, Revised Edition, 1962).
- ²² Sutin, Arnold H., Assistant Professor, Bowling Green State University, Bowling Green, Ohio.
- ²³ Held January 1964 under Institute of Industrial Relations, University of California.
- ²⁴ *The Business Establishment*, edited by Earl F. Cheit (John Wiley & Sons, 1964).
- ²⁵ "Private law systems" receives its greatest development and support from the sociological school of jurisprudence. One of the prime areas of interest within this school is the study of law as a social mechanism, observing their active working in the legal system, and testing hypotheses of individual, group and organization behavioral theories with the data obtained. The term "private law system" describes that part of social engineering which involves judicial action in the private sphere. "Social engineering" represents the most comprehensive definition of law. It defines law as "... a social institution to satisfy social wants—the claims and demands and expectations involved in the existence of civilized society..." *An Introduction to the Philosophy of Law* by Roscoe Pound, New Haven and London: Yale University Press, 1954. Thus, the law of the political state is only one aspect which may be understood as that which is juridical in nature; the second is the "private law system" herein discussed.
- ²⁶ Robert A. Gordon and James E. Howell, *Higher Education for Business*, Columbia University, 1959, pp. 275 and 277. Also Jentz, Gaylord A., "Business Law in the Master's Program in Business," *American Business Law Journal*, Vol. 21, No. 2, p. 192.

Fame

"Fame translates a man's nature and accomplishments into values and judgments made by others. These values and judgments however may be indifferent to what he in fact is, or to the merit of what he has done. Fame offers testimony, but this may be neither accurate nor sufficient. It offers only an unreliable guide to merit and desert, because it is external to the self. It may not come to those who deserve to be well known; it may be directed to aspects of them which have been misconstrued. Instead then of fame being the end we seek, it but provides us with a not altogether reliable indication that we are deserving of admiration, presumably because we are as men ought to be."

PAUL WEISS
The Making of Men
Carbondale, Illinois: Southern Illinois
University Press
1967. Page 125.