CHAPTER XXIV

EDUCATION FOR THE LAW

This address on law teaching in America was read at a dinner in Boston of the American Association of Collegiate Schools of Business in April, 1936.

Law schools are over a generation slow in their educational program. I mean that in several ways. In the first place, there has been only perceptible progress since Langdell some sixty-five years ago deserted the law treatise and introduced the so-called law case in the classroom, and since Ames some forty-five years ago brought that system to the height of its perfection. As a matter of fact, the major effort of most law schools since has been to catch up with Langdell and Ames by perfecting that method and the pedagogical skill which it requires. In that effort almost all the energies have been consumed. In that endeavor most of the imagination has been sublimated. This has meant that the content, drive, and direction in legal education has been toward teaching teachers' law rather than lawyers' law. That is to say, the law-teaching profession has been following the system of Langdell and Ames who taught strictly library law—the sole pabulum of such intellectual activity being the content of court opinions. In the second place, we have been principally engaged (whether consciously or not and whether adequately or not) in preparing country practitioners for the days of the 'seventies and 'nineties. In the third place, we have professedly been concerned strictly with professional law training; yet viewed from that single point of view we have fallen far short of that objective. It is with these phases of legal education that I wish to deal. [FN 1]

The school of legal education which flourished on the introduction of the so-called case system developed the dialectical method to a high point of perfection. With stern precision were the syllogisms, drawn from the opinions of the judges and applicable to the various issues, worked out. Through use of the Socratic method legal problems were tested by these syllogisms. Those that fitted represented good law; those that did not represented bad law. The analysis was tight and incisive. The intellectual discipline was severe. The system of law which was taught had symmetry and consistency. It likewise had apparent certainty. Though much of it might seem metaphysical, it had little of the imponderable in it. In such a system there would be found no place for the pressure of current social problems on judicial decisions. In such a system there would be found no place for the effect of economic theories of judges on the decisions which they made. The *opinion* rather than the *decision* was the paramount and important matter. This system, however, developed a body of doctrine which, though highly conceptual, was a work of art, and which, though pretty well insulated from the facts of the social and economic problem at hand, had internal logical consistency.

But the case system of study on which this school of legal education was based is in fact a misnomer. The things which were studied were not cases but opinions. A study of the cases would mean at least a study of the records containing the facts and pleadings. But these records were not studied, although they are obviously useful and necessary for a real interpretation of the opinions since, in the language of a brilliant lawyer, "A judicial opinion is not only *ex post facto* with reference to the decision. It is a censored exposition, written by a judge, of what induced him to arrive at a decision which he had already reached." [FN 2]

With this approach it likewise becomes apparent that the content of the records of the cases is likewise inadequate. Business practices, social philosophies, and similar imponderable factors, including "hunches," which produce many judicial decisions, become as obviously relevant to a true explanation of the specific result which a court reaches as do all of the pertinent documents which go to make up the case record. As stated by this same critical observer of the judicial process,

To study these eviscerated judicial expositions as the principal basis of forecast of future judicial action is to delude oneself. The lawyer will go wrong who believes that (in advising a client, drafting an instrument, trying a case, or arguing before a court) he can rely on the so-called reasons found in or spelled out of opinions to guide him in guessing what courts will hereafter decide. To do so is far more unwise than it would be for a botanist to assume that plants are merely what appears above the ground or for an anatomist to content himself with scrutinizing the outside of the body. [FN 3]

Thus it is that any study of law which is restricted to the so-called case method; that is, to a study of judicial opinions, grossly oversimplifies and distorts the nature of law. After all, law is neither more nor less than a prediction of what a governmental agency or other agency of control will do under a given situation. A study of the legal literature exemplified by judicial opinions supplies part, but only part, of the material necessary to make such a prediction. The other psychological, political, economic, busjness, social factors necessary to complete that prediction are innumerable. The weakness of the old system was that all of these more general and imponderable factors were eliminated from consideration. It was for that reason that the nonconformists in legal education [FN 4] began to raise disconcerting notes. They began not to attack the logical consistency of the syllogisms but to discard these syllogisms and talk about "the facts," "social policy," "effects on business," "desirable and undesirable social consequences," "incidences" of particular rules, "good policy," "bad policy," etc. This was called either "ferment in legal education" or "loose thinking," dependent on the point of view. In any event, it blasted out the more conventional methods

when it was employed, for it entailed a fundamental shift in point of view and a fundamental shift in techniques.

The result was that law teachers of this faith no longer restricted their exploration and study to the opinions but entered the preserves previously restricted to psychologists, sociologists, economists, bankers, politicians, etc. They began critically to study decisions in their entire setting. They not only opened up for study the case records, but they engaged in extensive exploration into the economic theories of particular judges, they entered into a consideration of the social and economic maladjustment which particular rules of law engender or permit, and into the question of the kind and quality of business practices and customs with which particular decisions were dealing. The result was that the whole horizon of the law was broadened and new vistas brought into view. The movement which was thus started has gained great momentum during the last decade. The difficulty with this new point of view was that it entailed not only a shift in point of view but also a shift in techniques. A shift in point of view was quite easily made; a shift in techniques was not. The result has been that perhaps some of us who made the transition have been at times wallowing either in the trough of idle chatter or of whimsical speculation. The charge is frequently made that under this new method hard analysis has tended to disappear, intellectual discipline has diminished, and the heavy and reliable doctrine of law, as expressed in opinions, has assumed a secondary place. If true, it means that the resultant product has lost some of the vigorous quality of the old and has fallen far short of the objectives of the new.

The new approach is largely in the blueprint stage because of the volatile character of the phenomena being studied. The quality of business practices is so dynamic that once a specific legal-business issue was adequately explored, the investigator would be apt to find that he had been studying history rather than current life. The process of catching up would thus be costly, breathless, and futile. A closely related fault is the fact that we are probably seeing only the bare beginnings of an endeavor to study the social and economic phenomena of our times.

To state the matter comparatively, the nonconformist in the law probably is not far behind—and at times he is ahead of—his brethren in the allied fields of psychology, sociology, economics, government, and business in his efforts to treat the phenomena, with which he deals, on a scientific basis. But the fact remains that, with minor exceptions, the whole area of human conduct with which the law deals is not yet capable of treatment on any scientific basis. The failure then of the nonconformists in legal education to produce a substitute system as vigorous, orderly, and complete as the one they seek to displace must be shared by all other students of human behavior. It is likewise probably true that no

significant achievement in the direction of a really scientific method can be made for many generations to come, if ever.

But short of such achievement lie vast areas for exploratory work. Few of these have yet been traversed. Take, for example, the field of corporation finance. I suppose that most teachers in this field still treat only the conceptualistic and doctrinaire principles of corporation law. The interest and energy are given to the philosophical and metaphysical aspects of what corporations are or are not, what they are like or unlike, what they can or cannot do—all based on word pictures taken from judicial opinions. The impact of the corporate device on our social and economic life is almost wholly neglected. The corporation as an object of control and as a method of control is passed by. Even the nonconformists have only started on the task of broadening the horizon in the corporate field. True, they are sensitive to the importance of the problems. Yet when it comes down to the ultimate fact of studying the corporation in its modern environment, most of the major tasks lie ahead. Now it seems apparent that a study of the corporation in its modern environment is the essence of the law of corporation finance. The question of the responsibility of the investment banker calls for appreciation of the functions he actually or ostensibly performs, the techniques he employs, the niceties of his requirements, the malpractices in which he engages, his impact both on issuer and security holder. Such matters cannot be fully seen through the window of the law, even assuming abundant legal literature, which there is not. Exploration of such matters leads one directly to the market place and, more recently, to the files of the Securities and Exchange Commission. The question of dividends likewise calls for much more than is contained in the legal concepts of capital and surplus. It leads one directly into accounting and financial management. To forsake these areas and to hew strictly to the line of the legal concepts is to neglect the legal problem of control over dividends. Nor can the important issue as to the responsibility of the corporate trustee under modern trust indentures be met by adhering solely to the literature of the law of trusts and of contracts. The institution of the corporate trustee needs to be studied—its functions, the manner in which it performs or fails to perform them, its relationship to underwriter and issuer, its compensation, its conflicts of interest, the devices available to it for protection of investors, the responsibility which the law should place on it for what it does or does not do. Such examples in the field of corporation finance could be multiplied on end through watered stock promoters' liability, parent and subsidiary corporations, nonvoting stock, cumulative preferred stock, etc.

A consideration of such aspects of each of these problems is as much a legal as business one. The legal issue of liability or responsibility brings to the fore all of these so-called business considerations. It is with the business institution that the law deals. It is the business institution which needs to be understood in order that

the legal control be so fashioned as to be adjusted to the requirements of the total situation.

The upshot of what I have been saying is not merely that adequate treatment of the law of corporation finance calls for vise of so-called business materials. The point is that any considered treatment of this subject would entail a subtle fusion of the so-called legal and business aspects since in final analysis they are one. As a practical matter, viewed either from the legal or business point of view, it would be difficult, except in terms of emphasis, to differentiate between a law course and a business course on corporation finance.

What is true of corporation finance is likewise true of most other areas of the law. In the commercial law field the examples are more striking. Yet the same holds true in varying degrees throughout most other subjects. To rebuild our law courses along the lines mentioned would necessitate drawing heavily from all of the allied fields of the social sciences.

To reconstitute our law-school curricula along these lines obviously would not be to reduce the study of law to any scientific basis. It would still be on a literary or argumentative level. But it would have wider horizons than its present dialectics permit; it would have in it the true ferment of realism. The result would be that students would be more closely attuned to the practices and institutions with which the law deals. The insight and appreciation of the modern requirements of society which such education would produce should go far toward awakening in the Bar a greater social consciousness. Practitioners of the law acquire at least a technical appreciation of the workings of these business institutions. This is acquired from necessity so as to be able to handle the work of their clients. But it must be remembered that almost the sole tutoring which our lawyers obtain in such matters comes from their clients and their elders who are more concerned in getting what they want than in critically appraising and weighing the validity of the fundamental hypotheses that underlie their transactions and practices. It is because there is such a narrow trade view in the typical lawyer's approach to these problems that we are so sadly lacking in real legal statesmanship in these areas of law.

I mentioned above that in legal education we were over a generation slow. That we are will perhaps be now more apparent to you when I tell you that no real fusion of law and business—let alone other social sciences—of which I speak has been accomplished. The nonconformists, whom I mentioned, have been moving in that direction. But in no single field of law has there been any substantial integration of the kind described.

The path lies clearly in that direction. But progress in that direction calls for more than the law teacher has been taught or expected to contribute. It requires not

research in the library but research in the market place and in other appropriate laboratories where human conduct may be observed. It requires treatment and study not so much of century-old legal precepts (though they may be relevant) as of the current cinema of life. That means that the law teacher's task is to a large part research —not research in the sense of compiling a corpus juris but research in the sense of keeping up with the fast-moving stream of human activity. To do this he requires new techniques, new approaches. In fact he often will need a new education. For that reason perhaps the nonconformists made no more progress than they did. For that reason it may be that a special educational task of training such teachers will have to be undertaken. The only thing certain is that the job remains to be done.

It must and will be done for the reason that the modern requirements of the law demand it. And that brings me to the second reason I had for calling legal education over a generation slow. The content and nature of our law curricula were pretty well set over a generation ago. As I stated, their content and objectives have remained fairly constant, although the quantum of courses has increased. The objective at the time these curricula were crystallized was pretty largely the education of country practitioners. I use the word "country" not so much with a geographical connotation as in the sense of general practice. What were conceived to be the requirements of general practice of that era fashioned the contents of the courses. The emphasis was on a thorough training in the common-law system. It is not difficult to see that the training, limited as it was in view of its restriction to the judicial opinion, was primarily for the courtrooms. The emphasis was on the meaning and application of the legal words of art, the nature of various legal proceedings, the basic factors in legal strategy, the philosophies of the system of common law and equity. The scene has changed materially since then in two important respects. In the first place there has developed a demand for lawyers who are doctor and nurse to the great financial arid commercial institutions. For such service the cream of the profession has been drafted. These men are engaged as much in business as in law practice. Yet the training which they have had in preparation for this work is in large part inappropriate. They have in effect been trained for one profession while they practice in another. I do not contend that law schools should divert any of their energies to turning out bigger and better corporation lawyers. I do, however, maintain that if we are to make measurable progress in effecting more adequate social control over finance we must undertake seriously the training of enlightened corporation lawyers. We can do that if we address ourselves to the task. We cannot do it with the vehicle of legal education which we have known. If done, it must come through means of an educational system based on a study of the phenomena of finance, neither through the translucent window of judicial opinions nor from the limited vantage point of the technician, but from the broad social point of view. In the second place we have fast adopted new and permanent governmental agencies of control. Depending on the point of view,

these new agencies are called either administrative or bureaucratic. The vital fact is not that the number of these governmental agencies has increased. The material factor is that government has moved permanently into control over new social and business areas. This new problem of control does not require, nor can it countenance, the techniques of common-law litigation and adjudication. Frequently it entails disposition of litigated matter. More often it calls for formulation of policies, drafting of rules and regulations, preparation of forms, standardization of practices, etc. Lawyers have been and will continue to be conspicuous in such activities—those representing clients on the one hand, those representing government on the other. The lawyer is of necessity and perhaps by tradition the general handy man in such activities. This means that the mass of material with which he is constantly dealing consists of statistics, banking practices, finance, accounting principles and practices, problems of securities distribution, problems of securities exchanges, problems of marketing, of prices, of labor, of production, etc. With these raw materials he must work—he must interpret, analyze, and appraise. Out of these raw materials he must shape policies and make vital decisions. But more often than not the lawyer brings to bear on these problems nothing but native intelligence, for his common-law training has little or no application. There is, to be sure, no substitute for native intelligence, common sense, and character. Yet if any educational program is justified, education in preparation for these important and significant experiments in social control should come first, for on their success or failure turns the fate of our social and economic welfare. This, of course, entails more than training for law in the conventional sense—it entails training for law in the sense of training for government. And in view of the traditional proclivity of lawyers for such posts it means that fundamental changes in our legal education must be made.

These fundamental changes which must be made relate both to content and to techniques. The enlargement and expansion of the conventional course along the lines of integration of relevant business, social and economic material, which I have mentioned, indicate the character of one of the necessary changes. Another is in a sense ancillary thereto. That is the development in the students of techniques for handling and interpreting factual material, in obtaining broad social points of view on current issues, and of appreciating the tasks and limitations of government.

Such changes are fundamental. If they were adopted, legal education would move out into new zones. It would traverse some of the ground presently covered by business schools. The experience of business schools in this field would be helpful. Yet it is to be doubted if there could be salvaged from present business-school curricula much which could be readily adapted to this new objective, for we would be apt to find them costly collections of irrelevant facts. This is true because the niceties of the requirements for integration of law and other social phenomena are great and demand special effort and precise

objectives. Also, I suspect that business schools have had at least as narrow a trade or professional point of view as have law schools.

The significance and importance of these changes would doubtless be more readily and quickly recognized by practitioners than by teachers. The reason for this is that they call for the use of techniques with which lawyers are familiar. Practitioners would be the first to admit that the content of a judicial opinion is an unreliable guide for determining or predicting the result of the next case. Practitioners would be among the first to recognize the utility of exploration into these other areas. Practitioners would be among the first to admit the relevancy of much of this so-called nonlegal material to the study of law. They would be among the first to do so because the techniques which they themselves consciously or unconsciously employ involve consideration of these other factors. It is thus that the teacher of law rather than the practitioner tends to the narrow view of legal education.

Such a movement must have the same quality of discipline and vigor as the present methods of legal education. If it degenerates into chatter of "what the business man thinks" or into the musings of fireside philosophers, it may not have failed more genuinely than the present system of legal education, but it will have fallen far short of its ultimate objectives. To assure these stern and vigorous qualities the development of such a program must be painstakingly slow. It will take years to develop. Its full development will entail either partial mergers of law and business schools or the growth of offshoots of our present law schools, devoted to higher ideals of public service than either schools of law or schools of business have yet attained.

[FN 1] While on the faculty of the Yale Law School, Mr. Douglas sought to enable his students to study corporation law against the background of the contemporary problems of business and finance. He was instrumental in organizing a series of courses in finance and law given jointly by the Yale Law School and the Harvard Graduate School of Business Administration.

[FN 2] Frank, "Why Not a Clinical Law School*?" University of Pennsylvania Law Review*, LXXXI (1933), 907, 911.

[FN 3] *Idem*, p. 912.

[FN 4] I refer to men like Cook, Moore, Llewellyn, Arnold, Clark, Frankfurter, Landis, Powell, Hamilton.