

THE IMPLICATIONS OF MODERN LEGISLATION TO  
LAW TEACHING

By

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Gentlemen, naturally, coming back to this Association after having been away a couple of years, and having been away during those years from the whole atmosphere of law teaching, offers a real challenge.

The topic that I suggested to the Chairman was, "The Implications of Modern Legislation to Law Teaching." My own experience has given me a sense that that legislation has many implications, and now I want to take the time to think about what those experiences might mean to law teaching.

If one would make a survey of juristic literature and literature centering about law teaching over the past decade or so, one would feel a certain doubt over the entire content of law. In the schools we find talk of such matters as the functional approach, as the introduction into the legal curriculum of subjects not distinctly related to law, such as economics, accounting, psychology, and the like. In other words, one sees throughout the whole program of law teaching to-day a distinct effort to reach outside the confines of law itself for some means whereby to criticize the type of material that we are teaching.

If we contrast this development in juristic literature with the development in the minds of student bodies, I think you will find a very striking parallel. Our better students are generally dissatisfied by the end of their law school course with the type of instruction that they have gotten during the third year. We introduce them in the first year to this thing called the case system which, in itself, is very exciting. It engages their attention, as offering something different from ordinary teaching in the college. They are asked to examine, perhaps for the first time, the sources of their thought. They are asked to probe the generalizations that they make and to test those generalizations by applying them to a hundred and one concrete situations. But to become adept in the case system doesn't ordinarily take three years. By the end of the second or third year this process of case instruction ceases to engage their interest, and the students themselves then look, as we law teachers are looking, for something more than mere conformity with precedent or mere ability to take your various rules and regulations and to make them into a systematic whole.

One of my instructors once made the observation that you could teach law students a great deal in the way of how to think but you could not teach them wisdom. But both from the standpoint of the law teaching profession as well as from the standpoint of the student, there is a distinct effort

to find this quality that we call wisdom. We are always searching for some critical apparatus that lies outside the law to see whether or not the norms that we think of in the law are valid or have any particular relation to social aims. It is a search for that that I think lies back of these influences that now make uneasy law teachers and students.

Perhaps I can make this idea clearer if I become more concrete about it. If you take a field such as commercial law, particularly a field like contracts, where the systematizing and ordering of the materials has been in the hands of the greatest masters of the legal profession for the past fifty years, you find a lack in bringing into that field other materials than the strictly legal materials.

I remember my own amazement when I was teaching contracts, when I went through the voluminous literature on a case such as *Shadwell v. Shadwell*. You remember that case raised the question as to whether or not legal benefit by itself was sufficient consideration. After going through that mass of critical comment, I could not find a single reason for either denying or allowing the cause of action in that case except that of logical consistency. That was the only test I could find. Or to take such a subject as consideration, we have yet to see an analysis of that subject from the standpoint of determining whether or not the legal device of consideration is the wise device to separate enforceable from unenforceable promises. The same tendencies are true in nearly every branch of the subject. For example, in the matter of impossibility of performance, or the release of the surety by the alteration of the rights of the obligations of the principal obligor, the problem revolves itself around the question of precedent or of logical consistency.

For several years we have seen an attempt to utilize a critical apparatus of a different nature for the examination of our legal rules. I remember when I first started teaching I was often confronted with this formula, namely, that the question of whether or not this decision or that decision should be made should be determined by economic, political, and social considerations. The more you heard that formula, the more you wondered what was meant by it for rarely was there any analysis of the political, economic, and social considerations that were involved in the particular problem. It came as the finale to the discussion of a case but sounded strangely empty.

It is the insistent demand for a critical apparatus that, again, is responsible for the rise of sociological jurisprudence, an effort to weigh interests that are involved in a particular legal problem. This helped to bring into the law the techniques of the other social sciences. It insisted that law teachers

as well as law students should not only be educated in the law, but should be truly educated. But sociological jurisprudence, though it has voiced a demand for other materials, has in itself supplied the law with little of their content.

In considering that subject, I have always thought that there are two aspects of our legal system that have been ignored in this effort to develop materials and techniques outside the purely legal ones for critically weighing our legal system. The first of these is not my subject, but I mention it simply in passing, and that is administrative law.

Obviously, the demand for administrative tribunals arises because of the breakdown of the legal system in particular fields. The demand for those administrative tribunals arises because the problems are too complex, too difficult to be handled by the average judge. Consequently there is demand that these fields be handled by men who have an equipment other than that of mere law.

Administrators themselves are not bound by precedent; they do not have to follow precedents. They are expected to bring to the determination of the cases that arise before them considerations which are drawn from other sources than the traditional sources of the law.

In the teaching of administrative law this aspect has too often been neglected. We teach administrative law largely from the standpoint of administrative remedies, or of the control of courts over administrative tribunals as such, rather than from the standpoint of inquiring how these tribunals have tried to work out appropriate solutions of problems when the legal system has broken down.

The second group of materials in our legal system that have been ignored, even more than administrative law, in this effort to go outside the law to get something which will afford an appropriate critical apparatus, are those materials known as legislation.

The legislative process, quite distinct from the judicial process, tries to reach a solution on the basis of political or social expediency. It reaches certain balances which the judicial process can't reach because of the limitations that are inherent in that process, and it rejects balances that have become immured in the judicial system, because it is convinced that those balances are unwise in the light of the ends towards which society at the time is moving.

Legislation thus focalizes a certain wisdom that is supposed to reside in a body of men seeking to reach solutions to a particular problem.

Again, let me be concrete in making this point. Some years ago I used to teach labor law, and in the teaching of labor law I thought that one of the most important legal data of the past decade was the rejection by the Senate of the United States of the nomination of John J. Parker as a Justice of the Supreme Court of the United States. You remember that rejection was based upon the ground that he, in his Red Jacket decision, had followed the decision of the Supreme Court in the Hitchman Case and the Coppage and Adair Cases. The rejection by the Senate, and by an informed Senate, of the basis of decision by the Supreme Court of the United States in those cases, seems to me something that it is impossible to ignore in any attempt to teach those cases and to try and give those cases their proper weight in future adjudication on this subject.

Furthermore, at the time of the Norris-La Guardia Bill, that bill, when it went through Congress, didn't find one single defender among those who voted against it for the institution of the yellow-dog contract. That fact is an important legal fact, much more important than many of the legal facts that are contained in decisions and in text-books.

The result of this movement, of course, was section 7A of the National Industrial Recovery Act, and the adumbration of that section 7A by interpretation and adjudication by the National Labor Board and the National Labor Relations Board.

That story seems to me important for two reasons: In the first place, you have a definite attempt on the part of a national legislature, on this occasion singularly expressing national consciousness, deliberately to reject certain hypotheses upon which much judicial doctrine in this field has been based. Secondly, no one who reads the decisions of those boards can doubt but that there is more wisdom in those decisions than in the fifty years of judicial handling of this subject in the past. Of course, it is only a beginning, but those decisions exhibit a more scientific approach to the subject and a better consciousness of what the problems are. I say that advisedly because I have recently spent my time in going over the judicial decisions, trying to find what there was in those decisions that really counted for something. But I found in the year and one-half of operation of these administrative boards, a better attempt to grapple concretely with the problems than in the judicial decisions.

This value that statutes possess, in furnishing a critical basis for many of the implications that are in our judge-made law, has been heightened immensely in the recent legislation. That legislation has not only been improved from a scientific standpoint, for expert draftsmanship has made for great improvement, but, more than that, that legislation is responsive to pressing needs in most cases. It is a deliberate attempt to deal with certain pressing problems that face us. From that standpoint it mirrors a better attempt to deal with the problems that are inherent in the economic structure of

to-day than other legislation which is merely responsive to a particular class, an interest or a particular pressure. To take the consequences of this legislation in certain fields of private law is to recognize its tremendous importance. For example, in the field of restraint of trade, the thousand and one codes that have been promulgated under the National Recovery Administration exhibit an effort to deal with the problems that have been left open by the existing law.

It would be idle for me here to defend the wisdom of any series of these code provisions, but, nevertheless, they do represent distinct efforts to deal with certain problems in a fashion that they have not hitherto been dealt with. They bring into existence ideas which have not had much attention as yet from judges; for example, the idea that there is a limit to economic competition, an idea which was very naively rejected in the Dr. Miles' Medical Case by the Supreme Court of the United States. This legislation certainly now forces one to make a better analysis of the allowable limits of economic competition than you will find in such a decision. Or, to take the effect of the codes in the field of labor relations, you cannot find a more rapid legal revolution in this country than is being created at the present time by the minimum wage restrictions in the codes. Remember, hardly a decade ago, the power of government to do this thing was denied by the Supreme Court of the United States. But to-day it exists; it is a practical fact. Certainly the rejection of that decision on a national scale brings up for judicial reconsideration factors that were neglected in favor of what might be called new sentimental thinking upon the subject. The codes show that the demand for minimum wage does not have its origin purely in humanitarian reasons, nor in sentimental reason, but the demand comes from industry itself, because industry is insisting for economic and competitive reasons that there are certain levels below which competition shall not be allowed to exist.

Let me turn from this to another aspect of this legislation, which I think deserves far more thought than has been given to it up to the present time. This is the attempt of the administrative acting under this legislation to make law more definite and more certain. If a visitor came in from another planet and one told him that law never is but only will be, he might be surprised, and yet that is the essential characteristic of our law. We don't know whether in particular situations we have violated the law until a court shall have declared subsequently what law was in existence at the time we acted. From a business standpoint, of course, that kind of uncertainty is something against which the desire of business for predictability inveighs. So far ingenuity on the part of the legal profession has gone no further in drawing in advance the line between what is legal and illegal than by developing devices such as the declaratory judgment or the procedure in equity of bills of peace and injunctions.

Now administrative regulation and administrative interpretation are striving to meet this need. How well it is thus being met, many may question, but nevertheless there is the effort being made to bring into law some of the predictability that is supposed to be one of its virtues.

There is another development, in administrative action being pursued under our present legislation that deserves comment, and that is this, that more and more the administrative process is being allowed to act without being checked by the judicial process. The reasons for this are partly legislative, partly developed out of the exigencies of the situation. For example, take such a situation as occurs under the National Industrial Recovery codes where a particular individual's right to have advantageous relations with the government or with other persons is withdrawn. He has no opportunity generally under these circumstances because of the need for swift administrative action, to appeal to the courts. In fact, few of those cases have ever reached the courts, and the administrative process is thus practically final. Or, we may take another situation which arises under the Securities Act of 1933.

If one is dealing with a responsible issuer and one takes the position with that issuer that, unless certain changes are made, stop order proceedings will be instituted, the issuer practically cannot defend itself by appeal to the courts. True, there is an appeal to the courts, but an appeal is an empty remedy if it involves three months' delay in the sale of an issue. In other words, administrative finality is the practical result of many situations in our modern legislation.

Let me take an act such as the Securities Act of 1933 to illustrate the implications of legislation to some of the fundamental hypotheses of the common law. If one considers what has happened in the past decade in the distribution of security issues, one perceives a pretty tragic picture. When one realizes that this vaunted legal system of ours did nothing to prevent those consequences from happening and, furthermore, did nothing to compensate for the losses that occurred, pride in the legal system must suffer. It is because of these failure that this new legislative effort was made. That legislation rejected as utterly inefficacious the common-law remedy that we had in that situation. The tort remedy of deceit was useless. Not only was the whole system weighted against a plaintiff, but the very laws under which corporations are formed made for escape from responsibility. The average corporate indenture expressly permits action to be taken without any legal check upon either the trustee or the obligor.

It was a recognition that the ordinary legal remedies had failed that made necessary new law.

The common-law tort of deceit was remodeled entirely. Intentional deceit was done away with as the English Parliament did away with it after *Derry v. Peek*. The narrow ideas of causal relationship were abandoned in favor of genuine causal relationship which would recognize the connection between the statements made at the time of the issuance of the security and its later purchase by investors in the open market. Furthermore, not only was there a remodeling of civil liability, but an additional administrative remedy against the issuer was created by that act. Originally, I thought that that remedy would not be very efficacious. I have been convinced of the contrary. I have watched registrants under our act paying little regard to whether or not civil liability might be incurred. In other words, even assuming you have carved out a theoretically and practically adequate civil remedy, it operates only in an ex post facto way, and it doesn't operate to deter. Some preventive remedy must be carved out in order to stop misconduct before it starts.

As I have watched the operation of that act, it seems to me the preventive remedies of the act are of as much consequence as the remedy created in lieu of the common-law remedy of deceit.

The implications of this legislation to corporate law as a whole are of great importance. Let me take one problem to illustrate what I mean. One of the most difficult problems that we have faced is the problem of determining just exactly what valuation can be put by a promoter on property that he turns over to a corporation which he himself controls and against which stock is to be issued to him. This property is set up in the balance sheet at a certain figure and stock is sold to the general public on the basis of those balance sheet figures. Overvaluation leads to stock watering, but the common law has never dealt effectively with this problem. You can search the common-law decisions for help in the solution of that problem, and you will fail. Of course, there are cases regarding the assessability of stock given to the promoter, cases where courts have held promoters liable at the suit of creditors, but what standards of valuation have these cases worked out? Cash value, market value, valuation based upon the directors' judgment provided that it isn't fraudulent. Try and apply these standards scientifically. It is almost hopeless. If you could succeed in developing some scientific standards, there, by that very token, you would have made useless for future law students a large portion of their case material that is embodied in those sections of your corporation case-book dealing with cases like *See v. Heppenheimer*.



Let me take another illustration of the type of problems that we have. Many of the important problems that are raised by an act of that nature concern accounting. Of course, accounting is a science for measuring by the dollar mark certain aspects of corporate enterprise. As such, it may not be the lawyer's concern, but it becomes very much the lawyer's concern when that measure is being used to demonstrate to other people how efficient or how far from efficient this particular corporate enterprise is. Naturally, the problems are complex. How many of our law schools have courses in accounting? Practically none. Hardly any of them have ever tried to make of the lawyer something of a critic of accounting. Some of the few law schools that have taught accounting have taught it from the standpoint of trying to make the lawyer an accountant instead of trying to make him a critic of accounting, a very important difference, I assure you. Yet here is something that it seems to me becomes the concern of every person who wants to be able to understand corporate enterprise, because one of the most important legal aspects of corporate enterprise arises out of efforts to understand the interpretations that accounts give us.

But I must hurry along. I just want to give you an indication of what I conceive to be some of the by-products of legislation of this character upon the subjects that we teach day by day in the law schools. Certainly an act like the Securities Exchange Act gives us much the same material for criticizing existing legal methods of handling certain problems of corporate finance. What casebook in corporations, what course in corporations, emphasizes the important thing that is being emphasized to-day, namely, how far has there been divorce between management and ownership? How far have we looked at our corporate problems from that standpoint so essential to their understanding? The insistence that there shall be some connection between management and ownership, or that, at least, ownership shall be given an understanding of what management is doing with this legal entity known as the corporation, is one of the things that is the concern of today's legislation, and yet, how far are we concerned with that in our methods of instruction?

It seemed obvious to me several years ago that one of the best ways by which to make a good public utility lawyer was to teach him the Interstate Commerce Act, or to teach him an act like the recent Federal Communications Act. I felt myself that there was a repository of true knowledge in those acts, evidenced, by the fact, as in the case of the Interstate Commerce Act, of their amendment at almost every session of Congress. I thought that there was as much of law concerning public utilities in these acts as is contained between the covers of a text-book.

This legislation reveals the effort to deal with concrete, living problems, to reach solutions that are dictated by political and social expediency, as distinguished from what are considerations

often of no present moment that govern too many court decisions.

I do not want to leave my general subject without comment upon the type of materials that modern government is developing which deserve study by a group such as this, concerned with the scholarly treatment of the law. Those materials are primarily of three kinds: First, for example, we find the extensive reports that, in large measure, underlie modern legislation. For example, such a report as that which the Federal Trade Commission is now concluding on public utilities and their operation will eventually be translated into formal legislation. But more than this such a report offers the opportunity of observing facts which may change one's whole approach to the problems of public utility law.

Subjects like holding companies, affiliates, transactions of directors with their own and with their affiliated companies, topics such as reproduction cost now viewed from the new angle of affording a basis for the issuance of securities, all have new meaning, when read in the light of that rich background. More matters of a social consequence are contained in a report of that character than are to be found in the mass of decisions that you can get on isolated and sporadic handling of the general problem by the courts.

Or to take a report like that of the Senate committee investigating stock market practices, one would get from it a different idea of the legal conceptions that ought to attend, we will say, institutions such as brokerage or trusteeship, especially when one realizes how that latter institution has been prostituted by the modern corporate indenture. One gets a different conception of misleading advertising when one realizes that market manipulation of itself is misleading advertising, for activities of that nature are one of the most potent factors for creating apparent values.

A second mass of materials that I think deserve study are the administrative rules and regulations themselves. Despite the fact that one may deplore their mass, they are fulfilling certain very definite needs. Study of them undoubtedly will bring to your attention a series of factual situations and a series of solutions which ought to enrich one's thinking. Certainly, a course in restraint of trade would be better if one used the codes as a basis for teaching it rather than following the traditional method of beginning with the Knight Case and chronologically developing the various decisions. Such a course would have the advantage of dealing with problems hot off the griddle, yet at the same time sufficient historical perspective could be provided to give it the necessary balance.

The student of administrative law will be interested in one feature common to many of these rules and regulations, namely the interesting new remedies that are developing. Government has

learned something from the advertising trade. It has learned the value of publicity. It is surprising to note how frequently use is being made of publicity as a mechanism of enforcement in the various administrative regulations that are being promulgated to-day. The sanctions of the Labor Board rest practically upon that power alone. In our Commission it is often only important to give publicity to certain matters, and the consequence of so doing may make a criminal prosecution unnecessary. A concern will fold up or go out of business and the desired result will have been accomplished.

Another interesting administrative mechanism is the use of the government's consuming power, its purchasing power, as a means for bringing pressure upon individuals and groups of individuals to live according to certain standards. But I do not need to enumerate these various new devices. They ought, however, to be studied from the standpoint of devising ways and means of effectuating policies.

Finally, the mass of materials that I think deserves concern by persons who wish to deal with the social aspects of law is that mass that is frequently the by-product of the new legislation. No study of underwriting agreements, deposit agreements, certificates of deposit, corporate indentures, of the financial structure of corporations, could get any richer material than those that now exist on the shelves of the Securities and Exchange Commission. No Rockefeller Foundation or Sage Foundation could produce a mass of materials as valuable for study as those. But I have yet to see the man who has come there to study those materials uninvited. I have an impression that what I have often called the philatelic instinct of law writing - and that is the collecting of as many cases as one can, pro and con, on a particular topic so as to get a nice, neat footnote - is still pretty dominant. It may be a pleasant pastime but it certainly is far from fruitful as compared with dealing with materials such as those I mentioned. Almost every agency of the government possesses records like these, whose analysis would contribute very largely to further our knowledge of the subjects we teach.

Some years ago I happened to study the legislative program of the British Parliament from 1832 to 1834. That was the period, as you will remember, of the Reform Bill. That program is one of the most interesting that has ever occurred, for reform after reform was taking place in the law. Our modern law both procedural and substantive, grows in large measure from that program. But it took years to recognize the full implications of that legislation. The legislative program of the last two years is like that of 1832, in that not since then has there been as comprehensive and as permeating a legislative program in the English legal world. It ought thus to engage the interest of the law teaching profession and afford it a real challenge. Let us see if we cannot appreciate its implications before we are overwhelmed by them.