Questioning the Law in Corporate America

Agenda for Reform

Gerald L. Houseman

Questioning the Law in Corporate America

Agenda for Reform

Gerald L. Houseman

CONTRIBUTIONS IN LEGAL STUDIES, NUMBER 71
Paul Murphy, Series Adviser

Greenwood Press
Westport, Connecticut • London

Dedicated to two residents of Fort Wayne, Indiana—
David B. Keller, a lawyer who sets an example for his profession, and
John Stein, an entrepreneur who sets an example for his profession

Library of Congress Cataloging-in-Publication Data

Houseman, Gerald L.
Questioning the law in corporate America : agenda for reform / Gerald L. Houseman.
p. cm.—(Contributions in legal studies, ISSN 0147-1074 ; no. 71)
Includes index.
ISBN 0-313-26341-8 (alk. paper)
1. Law reform—United States. 2. Corporation law—United States. I. Title. II. Series.
KF384.H68 1993
349.73—dc20
[347.3] 92-35554

British Library Cataloguing in Publication Data is available.

Library of Congress Catalog Card Number: 92-35554
ISBN: 0-313-26341-8
ISSN: 0147-1074

First published in 1993

Greenwood Press, 88 Post Road West, Westport, CT 06881
An imprint of Greenwood Publishing Group, Inc.

Printed in the United States of America

The paper used in this book complies with the Permanent Paper Standard issued by the National Information Standards Organization (Z39.48-1984).

10 9 8 7 6 5 4 3 2 1

Questioning the Law in Corporate America

Recent Titles in
Contributions in Legal Studies

Common Law in Southern Africa: Conflict of Laws and Torts Precedents
Peter B Kutner

A History of the Anglo-American Common Law of Contract
Kevin M. Teeven

"We Have a Duty": The Supreme Court and the Watergate Tapes Litigation
Howard Ball

The Shaping of Nineteenth-Century Law: John Appleton and Responsible Individualism
David M. Gold

Comparative Constitutional Federalism: Europe and America
Mark Tushnet, editor

Church-State Constitutional Issues: Making Sense of the Establishment Clause
Donald L. Drakeman

The Politics of Obscenity: Group Litigation in a Time of Legal Change
Joseph F. Kobylka

An Essential Safeguard: Essays on the United States Supreme Court and Its Justices
D. Grier Stephenson, Jr., editor

A "Representative" Supreme Court? The Impact of Race, Religion, and Gender on Appointments
Barbara A. Perry

State Constitutions and Criminal Justice
Barry Latzer

The Sixth Amendment in Modern American Jurisprudence: A Critical Perspective
Alfredo Garcia

Positive Neutrality: Letting Religious Freedom Ring
Stephen V. Monsma

Preface

SINCE THIS BOOK was written, this nation and its cities have been recovering from events in Los Angeles and other locales—the riots and the Rodney King case verdict which served as their catalyst. The delicate balances and arrangements of society, law, and civilization have been allowed to fall apart once again.

The American people and much of the world appear shocked, and words condemning lawlessness, killing, and property destruction are easily falling from the lips of citizens, mayors, community leaders, politicians, and the president. The violence and wanton disregard endemic in all riots are universally condemned; but, to their credit, the American people seem also to condemn the King trial verdict in which police brutality was sanctioned by an all-white suburban jury.

President George Bush's perspective was different. He believed that the riots could be blamed upon the indulgences of the 1960s and the shortcomings of Lyndon Johnson's Great Society programs. More important, he said nothing at all about the King verdict except that he was shocked. This fit with his political priorities.

These two events—the trial and the outbreak of riots—bring into sharp perspective the issues that are the subject of this book: the issues of human rights and the distorting effect upon these wrought by the exaggeration and overemphasis upon one of them, namely, property rights. The first two chapters demonstrate that the setting, the background, the very premises of American law provide us with two harsh realities: the education of lawyers, the most important group of practitioners in the field of public policy, which is heavily and egregiously overburdened with exaggerated claims and emphases on property rights; and the education of the American people on human rights questions, which is

sorely lacking in most basic respects and all too often accepts the overemphasis upon property rights at the expense of other rights of greater or equal value.

Property rights contain a psychological dimension not found in other human rights issues. Other human rights issues tend to emphasize the equality of men and women before the law, the justice of fair treatment, and the real impossibility of stating that one person's claim to rights is somehow innately to be preferred to another's. But the arena of property rights can—and does—quite deliberately set out, often in precise dollar terms, the differences in claims made upon the legal and policy systems of this nation; and though it is not always said that one claim is innately superior to another, such an assertion is hardly unusual. Congress has decided that some banks cannot be permitted to fail, whereas others can; that Chrysler Corporation should have loan guarantees that other corporations cannot have; and that the wealthy should not pay taxes in the proportions paid by lesser folk.

Policy reasons offered for such measures are usually found to be bereft of logic when they are rigorously examined. Hard data are seldom friendly to conservative causes. It is therefore important to review the premises of policies and the institutions that benefit from them, which is the goal of Part II. The focus of Part II is the business corporation, because it is the dominant propaganda organ for, and beneficiary of, property rights considerations even when these are detrimental to the vast majority of us. Distortion and rigging of the elections process are among the results; denial of the rights of organized labor is one of the others. Behind such machinations lie the assumptions of the corporate structure itself, which should be examined and questioned, though it seldom is, and the truly excessive games that they play, such as merger and takeover mania. It is certainly the case that these chapters can be seen as part of a larger picture, one in which the corporation, continuing to operate upon the basis of archaic legal assumptions, reaches quite directly—and uniformly in an unwholesome way for the body politic—into our lives, destroying jobs and the economy through maniacal and ego-driven takeover activity, destroying the political process with an election system that is close to becoming a farce, and destroying even our chance to compete with the corporation in the economic arena by bashing unions through mostly illegal means.

There are some intellectual foundations for such excesses. Most of these can be dismissed because they are inconsistent, transparent, at odds with the facts, violative of our hopes for human justice, or, not to be overlooked, simply a badly built set of explanations hampered by a willingness to accept anything the Establishment may do. There is one school, however—known by the name of "law and economics"—that is given validity by legal and policy scholars and that seems, at least at first, to contain strong resources. These are strong enough, in fact, to reach the seats of the U.S. Supreme Court and some of the respected groves of academia. It is therefore simply not a thorough effort to focus upon institutional practices without looking at and examining their intellectual props. This, then, is the concern of Part III and the Chapter 7.

What, then, is the result? For an author, the immediate answer is that one must hope—hope that the book will be read and the arguments will be listened to, joined, and debated. In this world of many media messages, perhaps that is all that one can reasonably expect.

My hopes go further, however. I still desire deep and lasting social and political change. Many of the skeptics in my area of life, the university, will smile at this; they have long since learned that the system is quite unresponsive, and that if it is ever going to change its ways (not to mention its manners), it is unlikely that the changes that ultimately occur will take forms even remotely resembling those advocated by an academic writer.

My response is that although I would never refuse a radical label for my work—at least in the classic sense of getting to the root of problems—this is really just a call for basic decency, something that has been sorely missing from the American body politic. This is a plea for doing some of the things that are already being done, and reasonably well at that, in like societies throughout the world. Indeed, this should be regarded as a manifesto against the worn-out, stale, and out-of-touch policies and assumptions that have dominated our lives long after any possible usefulness for them has expired.

It is also hoped that the debates on these topics will contain awareness of that most political of elements, time, and its effect upon policies and, above all, upon people. Ten years ago I wrote *City of the Right* for Greenwood Press, a book in which I argued that the various conservative solutions offered for the cities would not work. And they didn't; but few, apparently, listened. So we have been doing a lot of nothing for a lot of years; how much longer do we have to begin the response to our problems?

No effort of this sort can be completed without reliance upon the insights, or sometimes of the direct help, of various friends, associates, and, in some cases, upon scholars I know only by their writings. I must therefore acknowledge strong intellectual debt to John Brigham, Eugene Hogan, Michael W. McCann, C. Herman Pritchett, H. Mark Roelofs, and Victor Wallis. In addition, the insights and support of the following people must be recognized: Elliot Bartky, Ted Becker, Donna Bialik, Leif Carter, James Jordan, Ronald Kahn, Carl Kalvelage, David Keller, Samuel Krislov, Charles E. Lindblom, Howard Margolis, John Massaro, John Modic, Kristen Renwick Monroe, Stuart Nagel, Srinivasan Narayanan, Mary Cornelia Porter, Ronald Pynn, Phyllis Farley Rippey, Kim Scheppele, Martin Shapiro, Philippa Strum, Harry Stumpf, John Taylor, Georgia W. Ulmschneider, Conrad P. Waligorski, Lettie Wenner, Paul Wice, and Aaron Wildavsky. Three students—Laura Lineback, Ardeth Maung, and Christine Platz—have assisted this project in various ways. The research papers of graduate students Bill Gaugler, Helen Heckman, John Kurtz, and Annette M. Teders also proved helpful. Finally, I must thank above all Penelope Houseman and my daughter Victoria, who is an insightful critic and author in her own right.

Contents

Tables *vii*
Preface *ix*

PART I
FORCES RETARDING CHANGE IN THE AMERICAN POLICY ARENA 1
1 Lawyers and the Study of Law 3
2 Bill of Rights Freedoms and the American People 15

PART II
QUESTIONING THE CORPORATE-PROPERTY POWER ESTABLISHMENT 37
3 Questioning Corporations Law 39
4 Questioning Merger Mania and Corporate Regulation 75
5 Questioning Labor Law 107
6 Questioning Elections Law 127

PART III
ESTABLISHMENT IDEOLOGY 143
7 Questioning Law and Economics 145

Epilogue 163
Selected Bibliography 169
Index 171

PART I

FORCES RETARDING CHANGE IN THE AMERICAN POLICY ARENA

1 Lawyers and the Study of Law

Whose law are we learning? What kinds of clients are we being prepared to serve?

—Philip M. Stern, muckraking journalist and former law student[1]

AN UNDERSTANDING OF THE LEGAL PROFESSION and its values is critical to an understanding of our political system. Access to the law, and therefore to the decision-making levers of society, is not only a matter of observed differentiations in what we usually describe as a democratic society; it is quite strictly a description of the workings of the system. The many questions one could ask about access to, and allocation of, justice can take up volumes. For example, we could ask *how much* law is available to the majority of Americans today? The answer might be very little indeed if we consider the availability of legal services.

A tragic paradox is at work here; for although the United States has more lawyers than any country in the world and continues to turn out thousands more of them every year, the bulk of legal services is placed only at the disposal of the business world and the well-to-do.[2] A skewing of rights, responsibilities, priorities, and public policy is therefore the result of this imbalance.

This information is hardly new; it has been commented upon many times. Law, political science, and other disciplines have been made aware of these problems through studies of such matters as the political attitudes of judges, the serious flaws found in both federal and state systems of judicial administration, and the deleterious effects of some of the socialization patterns found in the law school experience, among other concerns.[3] The bar explains that it is not happy with this. There have been repeated calls over the years for making lawyers and the law accessible to the broad public.[4] There have been urgings for the bar to provide more volunteer lawyers, public interest lawyers, legal aid work, group plans, and other reforms aimed in this direction. The American Bar Foundation has an ongoing research program aimed at improving the responsiveness of the bar to public needs.

LEGAL EDUCATION: CONSERVATIVE AND DYSFUNCTIONAL

It is a short step from the current malaise to an examination of the place of professional origin for lawyers, the law school. And this subject has hardly been neglected. The *Journal of Legal Education*, an academic periodical, is devoted exclusively to the subject; the bar foundation also promotes studies in this area; a variety of academics, not all of them from the discipline of law, searches out ways to make law schools relevant to society's needs; and, very importantly, the law schools themselves carry out programs of self-examination and improvement. The demands for reform are a continuing feature of this dialogue. There have been calls for review of the law school curriculum, of the Socratic method of teaching law courses, of the case method of study, and of the overemphasis upon appellate decisions. The latter are alleged to be only the concerns of people wealthy enough to fight appeals against trial verdicts. There are also admonitions for an awareness of the results of the socialization patterns found to dominate law school life.[5] It must be admitted that some salutary changes have been made as a result of these efforts. Courses on Poverty Law, Civil Rights, Women and the Law, and Consumer Law are now included in many curricula. Clinics are commonly established both to provide hands-on, practical legal training and to give helpful legal advice and assistance to those who could not otherwise afford it. And there are dedicated students, faculty, and administrators whose aims and, more important, accomplishments are grounded in social and political conscience.

It also should be pointed out that the history of legal scholarship is hardly a story of stagnation or purposelessness. Dynamic and encouraging trends have been beneficial not only to the profession but to our politics and the development of worthwhile public policies. The Realists used the third and fourth decades of this century to break the chains of a stodgy, mechanistic, and classist system of law that had sought to enshroud itself in something resembling a divine mystique. Later, the small but effective Law and Language movement provided more than its share of new and refreshing insights, led to a great extent by James Boyd White of the University of Michigan.[6] Behavioral social science has made its contributions as well, enabling us to look at motivational factors in the work of judges, lawyers, prosecutors, and others. The Law and Economics movement, in my view, has not given us very much at all, but even those scholars must be said to occasionally force a reexamination of premises (see Chapter 7). (It can also be acknowledged that this movement did fit in well with the social and political climate of the 1980s and the early 1990s, but this is hardly a compliment.) Certainly, the Critical Legal Studies movement has given us a feast of debunking and gray-matter provocation while it has mounted socially and politically useful assaults upon all manner of assumptions, including many associated with legal education.[7]

Among the latter is Duncan Kennedy's article entitled "Legal Education as Training for Hierarchy."[8] Kennedy believes that the Socratic method is in most

instances a matter of "pseudoparticipation," and that virtually everything in the law school experience—dialogue, method, curriculum, motivations of the law school community, and assuredly the processes of legal reasoning—militates against progressive social change and in favor of privileged and status quo forces. Law school, in a word, is conservative; it is also socially dysfunctional.[9] This is a serious set of comments we might pay some heed to, even if there are elements with which we disagree. Kennedy is basically telling us that his profession is flawed from the beginning of its earliest development in the first year of required courses.

THE BAR, PUBLIC RELATIONS, AND PUBLIC OPINION

We all know that there are widely held notions about lawyers, judges, and the law that hardly speak well for the profession. An organization known as HALT —Help Against Lawyers' Tyranny—has been around for about a decade, ambitiously lobbying for nonlawyers' rights to perform a variety of services it feels do not require a member of the bar. *AntiShyster*, a free newsletter, has developed a popular following by simply chronicling how lawyers take advantage of the public.[10] A recurrent theme of the raucous *Washington Monthly* holds that we have too many lawyers doing too many expensive and unnecessary tasks, and doing them in quite ham-handed and inefficient ways. And even though many of us now believe that we have put Watergate behind us, there is no doubt that the various scandals we place under that rubric had as one of their recurrent themes the infidelity, cowardice, and greediness of lawyers, including, and perhaps especially, attorneys-general.

It is safe to assume that a segment of the public holds opinions about lawyers that may lead to reluctance to consult with one even when she/he is faced with a demanding legal issue or problem. A Gallup Poll done in 1988, the most recent available, found lawyers getting a high or very high rating from 18 percent of the sample, an average rating from 45 percent, and a low or very low rating from 33 percent.[11] This may not be a total disaster: Lawyers rate better with the public than politicians, stockbrokers, advertising professionals, or the sellers of used cars or insurance. At the same time, they are below bankers, doctors, pharmacists, television and newspaper reporters and commentators, building contractors, and funeral directors. Lawyers are also the butt of many jokes, some of which have an edge to them. And because the esteem variables of lawyers cannot be said to be too good, it follows that their educational process may be perceived to have some problems as well.

The history of legal education does not necessarily help their cause either. The abandonment of the apprenticeship system in the early decades of this century and its replacement by an almost airtight system of American Bar Association (ABA) control is a tale of many tawdry details as well as of a great and overarching concern for the development of a monopoly on certification. We are

probably better off without the apprenticeship system, it must be conceded, and a better system with more public input could have been developed instead.

In all events, a major result of ABA control has been the general requirement of seven years of higher education to earn a law degree in addition to a period of qualifying for the bar examination. A shorter span of time is generally the requirement in most countries. Clearly, this has the effect of reducing access to legal education, but it should be borne in mind that this was the original intention. The intention, in fact, is even seamier than this if one looks at the history of the bar in New York, Pennsylvania, Illinois, Ohio, and many other states.[12] The major motivations, plainly put, were anti-Semitic and anti-foreigner, and this was explicitly stated by many august leaders of the bar who openly worried that the law might be spoiled by the presence of practitioners who had sprung from diverse and unacceptable roots.[13] Any serious survey of legal education must, unfortunately, take into account these loathsome deeds and their results.

THE UNCHANGING LAW SCHOOL

Putting aside history and public relations problems of the bar, it is safe to assume that law school is generally seen as a powerful socializing agent. The student learns a new language. Even more important, she or he learns a reasoning process that is accepted not only because students usually accept things, but because it appears to be practical, worldly, and satisfactory in explaining how laypersons are not conversant with the law, and how they are often to be found at odds with its logic and its balancing factors.[14] Learning this process is the essence of that which sets off a lawyer's terms of reference from the terms understood in the broader public.

A number of caveats and qualifiers is in order. It is true, for example, that law students have been subject to many socializing forces during the course of their education, and many or most of these forces are derived from education in some other context. In addition, law students are a diverse lot, and they are more diverse today than ever before. The range of ages, backgrounds, and values comes from a much larger cross-section of the public now found in the law schools. Gender alone has been a major change in recent decades, for the female law student—today representing half the student body—was a rarity, comparatively considered, just two decades ago. Finally, it must be conceded that some students—albeit a minority in the 3 to 10 percent range—come to law school with a public interest purpose in mind and remain committed through their three years of law school socialization and environment.[15]

Keeping all of these considerations in mind, it is still accurate to say that law schools have shown a marked resistance and resilience in encountering the forces of change. The Socratic method remains in place despite charges of "pseudo-participation" and, perhaps more profoundly, the very real problems of covering necessary materials in the allotted time. The case method is still overwhelmingly

dominant despite the reduced role of cases as a source of law in the face of massive statutory, administrative, and regulatory activity at all levels of government.[16] The faculty remains almost totally made up of law-trained people, and in many schools, they do not have advanced degrees; there is little room, however, for historians, psychologists, social scientists, or others, even though these may have a great deal to offer to legal education. Professor Martin Shapiro of the University of California, Berkeley, for example, is one of the very few political scientists found on a law school faculty with a permanent appointment. And it is generally conceded that the curriculum has seen remarkably few changes since the turn of the century. There have been additions, of course, but the core and most of the accoutrements of this curriculum have remained the same, in place decade after decade. Much of the curriculum had to be revised—actually more enlarged than revised—after the two most active and interventionist eras of government, the years of the Roosevelt and Johnson administrations. This revision, or enlargement, whichever it may be, did not alter the basic character of legal education, however, nor did the relatively few courses (in the bulk of the law schools) that have been added to heed some of the interests of women, minorities, consumers, the poor, and other groups.[17]

CLASSIFYING THE CURRICULUM

What is the basic law school curriculum, then, and what values does it represent? A review of the courses offered in law schools will show that they tend to break down into three groups:

1. "How to" or "neutral impact" courses
2. "Property rights" or "property rights emphasis" courses
3. "Human rights" or "broad social value" courses

"How to" or "neutral impact" courses are purposefully centered on the development of lawyerly skills, are practical in nature, and provide methods and factual bases for a great variety of work in other courses or fields of legal endeavor. Some examples: Civil Procedure I and II, Evidence, Federal Courts and Jurisdiction, Legal Accounting, Conflict of Laws, Remedies, and Counseling and Negotiation. These are defined here as "neutral impact" courses because there is nothing obviously found in the character of these courses that would enable their inclusion in either of the two more controversial categories listed above. The knowledge and skills to be gained from such courses can conceivably be put to any use considered legitimate to the ends of legal practice. It is not the case that these courses should be considered "neutral" in terms of their impact upon the socialization of law students. After all, they provide important tools that help to define the services of the aspiring lawyer in either of the other two categories.

"Property rights" or "property rights emphasis" courses are vital to legal education but are concerned only with that one bundle of rights pertaining to the ownership, acquisition, disposal, conveyance, and use of property. Obviously, such courses are of greatest value to those whose predilections are directed toward servicing propertied interests. Courses such as Property I and II, Trusts and Estates, Corporations, Taxation, and Securities Regulation fit this category. Naturally, it can be argued that property rights are important to all of us, propertied or not, because a convenient set of rules has been laid down that we can all rely upon as we carry out our lives; but this carries us out of the concerns of this study. The observation should be made that even those scholars most committed to property rights and who argue for their enlargement must always finally concede the recognition of other rights as well as the powers of government to regulate, control, and even take (with just compensation) property.[18] Property rights, regardless of such arguments, clearly set up a definable category, and most certainly conclusions can be drawn from the relative importance placed upon this category, for it is a truth as well as a truism that other human rights are just as valuable or even more valuable than property rights. It will not spoil any suspense to disclose that, as anyone familiar with the study of law would anticipate, this group of courses dominates the law school curriculum of today, of this century, and before.

"Human rights" or "broad social values" courses are concerned with that broad panoply of human rights and allied considerations—other than property rights and categorically independent and separable from property rights—that is found in the assumptions of free, democratic, and civilized communities of the world. Courses in this area would include Constitutional Law I and II, Criminal Law I and II, Civil Rights, Jurisprudence, and Poverty Law. The connection of law with the concept of justice comes readily to the fore in such courses; to many people, this is what the study of law is all about or at least should be all about. It is also this set of courses that most interests and excites social scientists and other lay commentators and observers of the legal system. Few political scientists, sociologists, or journalists spend their time or concerns on the matters related to the first two listed categories of legal studies.

Any number of acceptable methods and approaches can be taken to derive something resembling a standard law school curriculum in the United States. The method used here was to randomly select twenty-one law school bulletins from the great batch available to any prelaw counselor (which is sometimes one of my campus duties). Such a selection should include regional variations of curriculum as well as other considerations that might make a difference—national versus local or regional law school, prestige versus ordinary, public and private, large and small, traditional and experimental, and so forth. The schools selected appear to cover these variations in one way or another.[19] Then a simple count was made of all of the course offerings listed by the law schools. Any course that proved (sometimes under various names) to be a consensual offering —in other words, an offering of at least eleven of the twenty-one schools—was