The Relation Between Legal Ethics and Business Ethics

THE influence of a man's work can never be predicted; for, no matter how narrow the field may be, its influence may extend into remote and unexpected places. This may very well be said of Professor Costigan's work. It is too early to attempt any dependable envisagement of the extent to which his influence will reach, nor is any such prediction called for here. But it is not too early to assert that the field in which he particularly distinguished himself will definitely hereafter carry the imprint of his work, and it is no exaggeration to say that his influence has already made itself felt in the broader realms of both law and ethics. It may not be amiss, therefore, to attempt to discover whether there are any implications in the present status of legal ethics which may be cogent for the allied field of business ethics.

I

We should begin such an enquiry with a general comparison of the literatures available to law and business, not only as regards the adequacy and accuracy of their reflection of actual operations, but also with respect to their capacity, respectively, to constitute the basis of descriptive and analytical sciences. This, of course, is a task which far transcends the scope of an article, even if we should confine ourselves to what might be regarded as the pedagogical content of these two fields: the data upon which the classroom teacher has to depend, or the body of knowledge from which a lawyer or business man may draw enlightenment for the conduct of his future activities. Some observations on this point are in order, however.

It has been stated, so frequently as to become commonplace, that business literature is not nearly so abundant as is legal literature. But, like most observations of this sort, the statement has become increasingly trite rather than more refined and perspicacious. To permit such a statement to persist as an explanation of the tardy development of the science of business, is to fail to realize that the growth of a body of literary material depends as much on the development of a group of readers as *vice versa*. The increased speed of reading which marked general educational progress a century ago was a phenomenon which contributed largely to the subsequent improvement in the technique of printing; the more obvious influence of the latter on increased speed of reading is not to be denied, but the mutuality of the causal relationship must be recognized. Conversely, the fact that business men do not

do much reading has not only restricted very much the influence of such business literature as exists, but it has also deprived potential business literature of some of its procreative stimulus. The student of business literature, deploring the lack of business data, should realize that the difficulty is not alone that of production; he must recognize that there has also been no such active or extensive a demand for business literature as there has been for legal records.

Much has also been made of the observation that the preservation and use of legal literature has been occasioned largely by the rule of *stare decisis*, a rule which not only is inoperative in business but also would perhaps be fatal to the business student or administrator who relied too closely on it. But such a view assumes that legal literature is confined to the decisions in the law reports, and the reasons therefor, and that these reports are studied simply in order to predict future judicial decisions. Now, however fruitful the published law reports may be for students of the science of law, and however serious the lack of an analogous body of material may be in preventing the development of a science of business economics, the more abundant literary sources of legal research are to be found in court records and lawyers' files, most of them as yet unpublished. Hence, the absence of a business rule of *stare decisis* may not be crucial to the construction of an empirical science, or even so cogent as some have asserted. The body of *res judicata* is probably as great in business as in law, and the motive for its preservation would seem to be equally strong. For the hypothesis may be convincingly advanced that judicial-record systems were begun as officially authenticated chronicles summarizing the life history of cases, and largely for the benefit, not of lawyers, but of the litigants who had been vitally affected thereby. Is it possible that such a powerful motive has been inoperative among business men, or ineffective in encouraging the preservation of business records? The answer to this query may disclose an amazing lack of intelligent self-interest among business men, but it should reduce to a considerable degree the emphasis on *stare decisis* as a major criterion of the distinction between legal and business science. True, business units do not have the degree of immortality enjoyed by political societies or legal units, and the destruction of business documents has been tragically great. But here, again, we note the absence of business readers; we may safely infer that the destruction of business data would not have been contemplated if there had been present any reasonable conviction that the materials could or would be used. The obvious exception, the fear that the preservation and use of such materials would reflect on the conduct of business management, is highly significant for students of business ethics; but such positive motives for

destroying business records have been far less effective than has the general absence of any conceivable purpose on the part of business men in preserving them.¹

Contributing to this fundamental difficulty confronting the development of business literature—the lack of readers even more than of writers—has been the snobbish attitude of many research workers toward anything which savored of business or economics. The first fruits of the earlier archaeological excavations in Mesopotamia were greeted with derision—all they consisted in were some business agreements and records! The significance of the Code of the Prefect of Byzantium has only recently worked its way into the minds of those who were able to unlock its secrets, and an adequate study of the Hanseatic League has yet to be presented in the English language. The treatises of John Wheeler and Thomas Wilson have only recently been made available to the general reader. Schumpeter² has ingeniously suggested an explanation of the phenomenon of a doctrine of usury developing for over a thousand years in direct contrast with current practices; not only were the men who engaged in the prevalent commercial and banking practices neither writers nor readers, but also the men who did evolve the doctrine of usury in literature came in contact with only one phase of the practice, that involving the distressed debtor, and dealt with it as if it were an unclean thing. The gingerly manner in which the bread-and-butter activities of the human race have in general been approached by contemporary scholars and writers has resulted in an irreparable loss of much valuable material. Not only have many of the records of such activities been physically destroyed because they were so generally undervalued, even by those who might have profited directly thereby, but they have not even been perpetuated indirectly by critics or commentators.

There are, of course, comparable situations in other fields of social study. The archives in the Cabildo at New Orleans have yet to play their part in determining the extent and significance of the Latin influences in our own history, which has been written almost exclusively from the Teutonic point of view. The proper resolution of the conflict between riparian and prior rights to water in the arid west and southwest was long delayed by the *a priori* common-law conceptions originally

¹ The author has recently requested several hundred of the largest industrial corporations of the country for figures on number of employees and annual total wage costs for the period 1921-32; a surprisingly large number of replies report that the materials from which such data could be obtained have been destroyed. Not only would such data contribute materially to the formulation of present-day wage and employment policies, but they are also essential to prove or disprove many of the otherwise unsupported statements of employers regarding wage costs.

² SCHUMPETER, *THE THEORY OF ECONOMIC DEVELOPMENT* (1934) p. 178.

derived from soggy England; Spanish Law grew up in a more arid climate and better reflects the needs of the situation. And it is difficult today to construct a science of legal punishment, let alone remedial treatment, because of the absence of records as to what punishments were meted out or what became of the criminals afterward. But the absence of records may be attributed to the same basic explanation as may the non-use of such as exist: the reader or the critic has not stimulated their production or encouraged their preservation. And the same explanation leads one to insist on a different meaning from the usual one attaching to the trite phrase, the lack of business literature. Not only is there even yet probably a greater abundance of usable material than is necessary to make more progress than has been made in the science of business—the law reports themselves are rich in such materials, especially for those who refuse to stop short at headnotes or legal classifications and who penetrate the body of the reports and get at the source material—but also the lack is rather that of critical readers than of records. And it is highly doubtful if the recording of business-economic phenomena can proceed much more rapidly than it has without a marked general increase in the intelligent study of, and critical reflection on, such materials as have already been produced.

II

The status of business literature does not involve the matter of content alone, however; there are also considerations of method. In order to evaluate or compare the method of study of law and of business, we can very well confine ourselves initially to the problem of the case method. And we confront this problem in very much the form in which we might have expected it to appear. Here is a method which has been employed for some centuries in determining judicial decisions and developing a science of law; a method which was resorted to as an innovation in legal teaching less than a century ago but which has in the meantime become a dominant pedagogical device in that field, and which has even reached that stage of maturity in which reactions against it are already beginning to appear.³ And now this method has recently been carried over into business education with all the enthusiasm accompanying a novelty, and in some instances with conspicuous success, at the very time when it has reached a stage of maturity, if not of initial decline or qualification, in the mother field of the law. Not only, therefore, must we guard against the ordinary fallacies of analogy in making any comparisons between these two different fields of study, but there is also

³ See, e.g., Frank, *Why Not a Clinical Lawyer School?* (1933) 81 U. OF PA. L. REV. 907; Pound, Frank and Vanderbilt, *What Constitutes a Good Legal Education?* (1933) 7 AM. L. S. REV. 887.

latent in the situation the same sort of historical fallacy, or anachronism, which one may observe whenever an alien civilization is imposed on, let us say, a less developed people. It may well be asked, therefore, whether a method which has proved in the main to be eminently satisfactory in one field, and which has reached a stage of maturity there, may be successfully carried over relatively intact to another field of learning, or to what extent modifications are necessary in view of the obvious differences.

We have already indicated that business records are regarded as having provided a less fruitful source for the development of a science than have the legal records. The difficulty is not solely that of a lack of basic source material, however; it is also one of methodological laxness. Selection and analysis of the available business materials have not been sufficiently rigorous to warrant our regarding the resulting case material as being even empirically⁴ satisfactory, let alone adequate or cogent to the formulation of general rules or principles of a normative type. Precedent and authority admittedly do not have a sufficient effect to determine even a modicum of stability in business doctrine, even if the latter exists; prediction is unreliable, if not dangerous, because it becomes especially involved in analogical fallacies that follow from a false assumption of periodicity or continuity of the observed or described events; and control, as an exercise of arbitrary business power rather than of intelligible purposes or the use of rational means, cannot be understood by the pedagogue or the "business scientist" who is seeking facts and relations, because a failure to recognize it for what it is vitiates both empirical generalizations and predictions. Hence, there is all the more reason for methodological rigor in preparing case material for business science.

Contrast with this methodological situation confronting any attempt to establish a science of business the factors upon which a science of law may rely, conspicuously *stare decisis* and judicial sanction. So much do these legal factors contribute to the stability of developing doctrine that the incompatibility of their arbitrary or fiat ingredients with strict scientific objectivity no longer makes impossible approximating the course of future cases. In the case of "judge-made" law, it is the assurance of the continued operation of the "rule of law" in the future which enables an individual to govern his legal conduct with

⁴ It should not be necessary to define this word, but its recent misuse by a sect of sociologists makes it necessary to point out that we do not denote by this word the methods or lack of methods of the medical "empirics" of a century ago or the rule-of-thumb methods defended and criticised in the Middle Ages. Empiricism is a perfectly good word among natural and social scientists, and the method—as distinguished from *a priori* deductions on the one hand, and experimentation, on the other—is quite respectable, e.g., in astronomy, geology or economics.

foresight and intelligence. But the teacher of business or the business research worker has no such assurance as has the practicing lawyer, the teacher of law, or the man engaged in legal research, that his rational conclusions from recorded events will anticipate or control the future course of business development. This difference between legal and business prediction is not attributable solely to *stare decisis*, however, as we noted before and as is further evidenced by the fact that the civilians of France and Germany, and not only the common-law lawyers, "avidly" study reported judicial decisions as "determinants of judicial usage."⁵ Even rationalization, condemned alike by logic and science, contributes to legal stability by serving judges as an apologetic instrument for conserving precedent and doctrine; as used by business men to explain their past behavior, it is more apt to cloud the attempts of others to envisage unpredictable arbitrary behavior.

The student of business may plead the newness of the field in order to emphasize the difficulties with which he is confronted, but he should not be allowed thereby to apologize for his methodological shortcomings. For, even if we compare the present status of business science with the early, initial period of case law, the shortcomings of the former stand out prominently. Bracton's Notebook,⁶ written in the 13th Century, exhibits two characteristics which are wanting in most case literature in business. In the first place, he carefully selected his cases—his Notebook included only some 500 in all—and he not only rewrote them so as to bring out the issues more clearly but he also fearlessly criticized the analyses and conclusions of the judges. He thus accomplished by selection and critical analysis what Langdell more recently set as his objective, a compilation of "leading" cases; an objective which has subsequently been assumed by every legal case book worth its salt. True, for practical purposes, the "leading" case may lead a lawyer into difficulties if he fails to observe its specific jurisdictional aspects. But jurisdictional differences cannot be permitted to interfere with the construction of a general science of law; they are the accidents which must be developed into significant differentia. The "leading" case is the sort of material to which Mill referred when he stated that, for inductive purposes, "one good case" is as cogent as a million. In this respect, Bracton and his spiritual descendants avoided the two extremes which so largely determine present-day studies in business: the formulation, on the one hand, of abstract economic principles which have little relation to business phenomena, and, on the other hand, the doing of

⁵ Jaffin, *Prologue to Nomostatistics* (1935) 35 COL. L. REV. 1, 8.

⁶ Edited by Maitland, 1887; in which appears Vinogradoff's letter to the Atheneum. Cf. the author's article, *The Logic of the Case Method* (1928) 25 JOURNAL OF PHILOSOPHY 10, 253.

pick-and-shovel work which shows no sense of discrimination or critical refinement in its handling of the raw materials.⁷ The relative quantitative lack of business literature, in comparison with legal materials, may be argued today; but it certainly cannot be maintained that this lack prevents the formulation of a science of business, even if the comparison be made with the legal literature available in Bracton's day. The deficiency of business literature, in quality and significance, especially in the form of "leading" cases, is attributable far less to a dearth of materials than it is to the absence of a Bracton.

In the second place, as Lee points out,⁸ no one before Bracton had recognized "the value and binding authority of English judicial precedents in the determination of future cases." Now, selection and criticism were definitely within Bracton's power of control; the operation of legal precedent and judicial authority were not. But the ability to perceive the force and cogency of these latter factors enabled Bracton to establish law on a basis comparable in the main with the empirical sciences. For, however far short of completeness legal precedent may fall in establishing an adequate empirical basis for anticipating future legal developments, the lack is largely made up by the control element in law, namely, judicial authority sustained by the sanctions of a body politic. The discovery of this "control" element raised legal science above the level of the cruder type of empiricism, especially where it recognized the identity between the sources of established judicial doctrine and the data for the professional prophesy of future judicial decisions. This control element may not be operative in business. There is good reason to believe, however, that something broadly similar to it is operative in business management, but that it has not yet been perceived. And it has not been perceived, partly because of a lack of insight, but also partly because our business schools have nowhere yet achieved that degree of intellectual freedom—from the doctrinaire desires of influential business men as well as from the sectarian economic and social dogmas of their own administrators and staff—which the student of law takes for granted and which enables him fearlessly to "pierce the ermine." The clear perception of these control elements, and their fearless disclosure, are necessary to the soundness of any empirical social science. Business science has not yet erected a body of case material, carefully selected and critically analyzed, which can

⁷ One is reminded of the old colored man, working in the shops of the Illinois Central Railroad, who was awarded a plaque for his long service. "What do you do?" he was asked. "Ah hammahs de wheels," he replied. "But why do you hanmer the wheels?" "Ah dont know; they jes' tole me to hammah de wheels, an' that's what ah been doin' evah sence."

⁸ LEE, *HISTORICAL JURISPRUDENCE* (1922) p. 485.

compare in quality even with Bracton's achievement. This observation is evidenced alike by the present status of the quality and influence—outside the classroom—of the case material itself,⁹ and of the interpretative attitude toward the method.¹⁰

III

With these broader considerations in mind—the status of the content of the source of a science of business, as well as of the method of constructing such a science, especially by a proper use of the case method—we may approach with better understanding the more limited problem: What significance can be attached to Costigan's achievement in the field of legal ethics, especially as regards ethics in general or business ethics in particular?

Ethics has traditionally been normative and deductive; in this respect ethics has superficially resembled law. These two fields differ widely inductively, however, for the "case" has in ethics never transcended the status of an illustrative instance; it has never, as in the law, become a part of the cumulative record or been woven into the fabric of doctrine. The Aristotelian and Kantian systems of ethics are based primarily on postulates which have served to exclude certain types of human experience rather than to incorporate them into what otherwise would be a working set of comprehensive as well as adjustable hypotheses; and these postulates have not only remained limited and rigid, but they have become more rather than less controversial in reference to newly developing situations. Spinoza's ethics was strictly deductive; although he finally became bogged up in the residual concrete materials which accumulated to plague him fatally in his last book, he attempted to retain his *a priori* system throughout. Shaftesbury, Bentham, Mill, Spencer, Rousseau, Schopenhauer, Nietzsche, Royce, Nikolai Hartman, all are better known for their points of view than for the type of material they included in their observations. Indeed, it is not difficult to maintain the thesis—which probably, however, means merely insisting on a certain definition—that ethics, in its historical development, has become exclusively or characteristically *a priori* and deductive and cannot any longer employ empirical methods without becoming or being regarded as something else. The studies of Sumner, Frazer, Hobhouse and Westmarck, of Levy Brühl and Durkheim, of Kropotkin and Malinowski, and the interpretation of this and similar material by Dewey and Tufts, are thereby regarded as sociology and not ethics. We do not wish to engage in this terminological controversy. It will serve our purpose to point out that the case method, as known

⁹ Cf. Harvard Business Reports, 11 volumes of which have been published.

¹⁰ Cf. FRASER, THE CASE METHOD OF INSTRUCTION (1931)

to law, has had little currency in traditional ethics and that its use in more recent works practically "reads them out of the party."

We must advert critically, if not with suspicion, therefore, to the fact that Costigan's work in the field of legal ethics, and another pioneer in the field of general ethics—Cox's *The Public Conscience*¹¹—were both based almost entirely on legal cases. At least it may be said that both were imbued with the legal, rather than ethical, point of view. Costigan's work was avowedly so, although he did freshen the legal approach with additional ethical considerations. Cox's book attempted to evaluate public attitudes toward various unsocial acts by measuring the statutory penalties attaching to convictions. In this connection, it must also be noted that the law reports and the reports of public regulating bodies have contributed materially to collections of business cases, not only of business law or public-utility regulation, but also of the policy of technique involved in accounting, trust-company practice, labor problems, business reorganizations, price policies, trade names, *etc.* Frank C. Sharp has done some outstanding work in the field of business ethics, but he has drawn largely from the law reports;¹² indeed, he has stressed less the marginal cases in which ethics might be at variance with the law, and has been more inclined to accept the juristic conclusions as the positive elements of what purports to be a system of *business* ethics. In this, he, like other students of empirical ethics, has virtually accepted the legal view that there is no penumbral region of "fairness" or "unfairness" between legal and illegal conduct.¹³ So powerful has been the influence of case law in these related fields of enquiry, that we may well question not only the independent character of a social or business ethics derived therefrom, but we may go even further and question whether the hybrid term "legal ethics" doesn't after all refer primarily to law and only incidentally, if at all, to ethics.

Legal Ethics, in this sense, may be regarded as relatively unique, even among the avowed attempts at setting up other functional ethical systems. And, in view of the fact that it rests on established and recognized legal precedents, and that it is supported by judicial sanctions, it becomes so definitive as probably to have little significance beyond its own province except for the obvious analogical implications. Certainly, nothing comparable with it has been achieved in the other professions. The case method has been employed in the teaching of medicine, but medical ethics has not been developed by the case method; indeed, the *Principles of Medical Ethics* probably had far less empirical back-

¹¹ Subtitle, A CASEBOOK IN ETHICS (1922)

¹² Cf. Sharp, *The Ethics of Breach of Contract* (1934) 45 INT. JOUR. OF ETHICS 27.

¹³ Cf. *Mogul Steamship Co. v. McGregor, Gow & Co.* [1892] A. C. 25, 51.

ground—and certainly far fewer implications—than did the Ten Commandments or the Twelve Tables. The Committee on Ethics of the American Association of Engineers handled some 70 cases during the first 12 or 15 years of its existence, and the decisions did effect changes in succeeding drafts of the Code of Ethics of this Association; but the net result has been largely academic, for the older “founder” societies of engineers do not pay much attention to these decisions, and they cannot be effectively enforced even within the membership of the Association itself. True, this may be largely due to a lack of sanctions and it does not deny that the case method has been employed. But it is also true that a part of the sanction of Costigan’s legal ethics, as of the law itself, lies in the persuasive quality resulting from the careful selection, penetrating analysis and pointed organization of the case material itself, and not solely in the ultimates of public opinion and the sheriff’s posse.¹⁴

A pertinent example of what the more adequate empirical method, as exhibited in Costigan’s work, can do, is afforded by the treatment of the case material published by the New York County Lawyers Association.¹⁵ This material is published currently as the cases are decided, and they were incorporated in Costigan’s case books—some 128 “questions” had been “answered” when the earlier edition was published; some 323, when the 1933 edition appeared. In 1923 the New York Committee itself published an analysis and summary,¹⁶ and although the former dealt only with the material which involved professional or ethical sanctions, both operated to present an intelligible and convincing set of professional standards. And although this material furnished much grist for Costigan’s mill, especially for the later editions of his book, many of the subsequent cases of the Association, as well as the *Analysis* and *Summary*, may be regarded as pragmatic results of Costigan’s method.

Business ethics, like most professional ethics, began with the form-

¹⁴ This remark should perhaps be somewhat qualified so as to fit more closely the development of legal ethics by Costigan, as evidenced by the differences between the 1917 and the 1933 editions of his case book. The later edition, in conformity with its enlarged title, includes more of the history and etiquette of the profession—*cf.*, also, HICKS, *ORGANIZATION AND ETHICS OF THE BENCH AND BAR* (1932)—and illegality is more clearly subordinated to moral considerations and their social-economic backgrounds. But the sixteen-year interval brought forth practically no change in the list of topics; although the sections on “admission to the bar” and “discipline” were considerably enlarged, thus supporting my contention of the importance of legal sanctions in legal ethics.

¹⁵ Questions respecting Proper Professional Conduct, with the Committee’s Answers, published from their rooms, 165 Broadway, New York City.

¹⁶ Analysis of the Committee’s Answers, and A Summary Statement of Causes for the Discipline of Lawyers.

ulation of "codes." These represented a loose codification of experience, but not of customs and rules as is ordinarily implied in the term. And this method of determining and formulating the standards of conduct in business, other than by law, has predominated; it has even determined largely the substantive parts of the NRA codes. Many of these standards are stated in such vague terms as to be meaningless, some are easily recognized as camouflage or apologetics clouded with sentiment, and many of them flatly contradict one another. The case material which might then supposedly have contributed to such general declarations was non-existent, and subsequent concrete situations have operated less to clarify the codes than to disclose the ineptness of their provisions. Rotary International has made a few sporadic attempts to encourage an empirical treatment of the problem, but with no appreciable results. And this organization and the Chamber of Commerce have encouraged particular industries or trade associations to "functionalize" their respective general codes into suitable sets of rules and regulations; but the method remains largely deductive, without becoming penetratingly or realistically analytical. One recalls Kant's famous phrase regarding concepts and precepts: the codes without the case material remain empty while the case material without codification remains blind. Inasmuch as these two extremes have seldom been brought together in business ethics, the subject remains largely either blind or empty. Business ethics, like ethics in general, has not advanced appreciably empirically.

IV

Jerome Frank's attack on the case method of law is concentrated on Langdell's postulate, that "all the available materials . . . are contained in printed books." Langdell's declaration was not made *de novo*, however, but grew out of a reflective criticism of at least two preceding stages of legal education to which Frank himself would revert; namely, the earlier apprentice system, and the later period characterized by systematic textbooks dealing with substantive law. In comparison with these earlier stages, Langdell's inductive method appeared, at least at the time, as a distant scientific advance; especially if one recalls his use of the Socratic method in the classroom. True, his method had its objective largely in brief writing rather than with the hustle and bustle of the lawyer-client relationship or that of the courtroom trial, where badly prepared cases are sometimes as difficult to fight as are the well-prepared; and it concerned itself less with the case material than it did with the printed decision, especially with the cognizance of precedents in appeal cases. These characteristics narrowed the field of legal education considerably and made the "science" of law largely academic. But a law school, like other parts of a university, is an academic insti-

tution; and, after all, no methodological device has yet been invented which better sifts the welter of human experience and reduces it to an objective and intelligible basis than the printed symbol—whether this be a mathematical formula, a blue print, or a précis.¹⁷ Frank's alternative suggestion is that we revert in spirit to the apprentice system in legal education, by studying the actual operations of the lawyer's office and the actual procedure of the courts; that "live" problems be stressed, rather than "dead" records; and that such "cases" as are studied include not only the complete records from inception to final appeal, but also—recognizing the growing importance of administrative law—all pertinent allied material, economic, ethical, political, etc.¹⁸ He "views with alarm" the influence of Langdell, and "points with pride" to the Yale Law School and the Harvard Business School as examples of his contentions.

Now, this thesis, or set of allegations, bites far deeper into the fruit than the thickness of the case-method rind. We are now dealing with Dr. Flexner's pet aversion;¹⁹ the sort of thing his *bêtes noires*, the Pragmatists and the Progressive Education groups, like to talk about. We must study life as she is lived! We must deal with the tangible realities! Leaving aside the unfair observation that, once this pragmatic ideal—or real—is reduced to blue prints, so that there may be a common understanding as to what is proposed, the doctrine differs little from what all good teachers have as an objective; and the fact that Dr. Flexner himself comes to the conclusion that professional and business training schools themselves have no place in a university; we come directly to the pointed query as to whether law, or business, or the ethics of either, is to be developed and studied through the medium of the printed word, with the library as the heart and core of the university, or whether education is to proceed by actual contact with human behavior in its practical environment. If the latter is desirable and possible, then we should not be satisfied with the case method in its present or worst form; and we need not be concerned if the case method has not been successfully followed in any particular field, such as business ethics, on the ground that the failure of an inadequate or undesirable method is a blessing.

The necessity as well as desirability of emphasizing a pedagogical alternative to the case method becomes especially significant for business ethics in view of an important practical problem which makes

¹⁷ Cf. Crabitès, *Napoleon Bonaparte and the Code Napoleon* (1927) 13 A. B. A. J. 439.

¹⁸ See also Shepherd, *Some Problems in Modern Legal Education* (1931) 6 WASH. L. REV. 4, 145; and Snyder, *The Frontier of the Law—Suggestions for Improvement in Legal Education* (1933) 11 LAW STUDENT 1.

¹⁹ See e.g., his *MEDICAL EDUCATION* (1925); and his *UNIVERSITIES, AMERICAN, ENGLISH AND GERMAN* (1930).

difficult the collection and use of case material. Most of the case material presented to the business student has been subjected to the device of disguising names, of companies, of persons, of places, of dates, in some cases of commodities; and generally the amounts of the figures involved have been changed, although the ratios are maintained. The purpose of this disguise is to avoid identifying the source of the information, most of which—that part not available in printed form and publicly circulated—has been obtained in confidence. To disclose such information might not only single out certain companies for unfair publicity and give considerable advantages to their competitors, but it would result eventually in drying up most sources of such information. Business case material is, therefore, further removed from reality than are the law reports; and even the safeguarding of confidences by resorting to the device of disguise fails to elicit as much factual information regarding problems of business ethics as it does regarding problems of business policy or technique. In any case, the practical limitation imposed by disguise on the reality of the case material which can be made available to the business student is so serious as to prevent a thorough testing and checking of that material by other persons—the ultimate test of sound scholarship. It becomes imperative to remove the disguise from business cases if these are to contribute to the sound construction of a dependable science of business or of business ethics. Furthermore, the practical consideration alleged in behalf of disguise so emasculates the realistically informational content of most business cases, involving technique or policy, that the inferences—economic, social, ethical—drawn therefrom are apt to partake of the ephemeral fabrications of a similarly constructed Druidic law.

Contrast this situation with that of the natural sciences or of law. The natural sciences have accumulated a body of dependable objective data in large part by the publication of methods and results, with an implied general challenge to any one to repeat the observations and experiments in order to disprove or verify them. The law reports may be devoted too largely to publishing decisions and opinions, but at least they do not disguise the identifying marks of the basic phenomena. Not only are they descriptive records of phenomena which have been subjected to the critical examination of contending parties, and which have been hammered out in the forge of combative trials and judicial process; but the reports as printed also give clues which enable any student of the law to reach back extensively into the phenomenal realities of the case. No approximation to such a test can be encouraged by the business case so long as the basic business phenomenon reaches the descriptive stage only after passing through the grid to disguise.

The disguising of a case does not interfere seriously with its effective use as a pedagogical device. Indeed, it has been alleged that there is merit in disguising a case for classroom or examination purposes in order to prevent any unfair advantage from accruing to such students as may have a mere intimate knowledge of certain business companies or industries than others. But this very point still further accentuates the argument that the disguised case does not admit of sufficiently penetrating or expert criticism to warrant its acceptance as a suitable datum for a science of business: it obviously prevents further realistic criticism by those who are acquainted with the basic facts but who are prevented by the disguise from identifying the case. And it is significant that those educational institutions which have been most addicted to the employment of the case method in business instruction have not produced a commensurate amount of declaratory texts which observe the standards of, and can be subjected to, scholarly criticism. Furthermore, as we pointed out before, disguised case material dealing with technical business problems can seldom be used for developing the ethical problems which may be latent therein; business ethics is thereby deprived of a considerable portion of material, already partly digested, which all philosophical subjects have been accustomed to regard as utilizable material.

The result has been, fortunately or unfortunately, that the development of business ethics has been forced to the alternative of utilizing more directly the basic sources. This means a relatively inordinate amount of pick-and-shovel work, which may be good for the philosopher's soul but which does divert energy from the more reflective work which philosophy is primarily expected to do. The small amount of reality which trickles more directly from reluctant sources through the critical filter into descriptive material is inadequate to the proper development of a science of business ethics. Even though such direct studies would have to be made anyway for the purpose of analyzing certain epochmaking cases, the development of the composite case or of those which show chronic trends presupposes the more direct work of the business technician. And should the student of business ethics furthermore dare to leave his post at the lighthouse in order to take charge, as pilot, of the boats floundering about in the offing—the practical task of “reform” is a doubtful part of the task of business ethics anyway²⁰—his troubles will be greatly multiplied and magnified.

V

The case method has obviously been successful as a pedagogical device in law, and it has unquestionably stabilized legal practice. Sup-

²⁰ Cf. WEBER AND TISCHLEDER, *WIRTSCHAFTSETHIK* (1931) p. xiv.

plemented by the reference to the appropriate sociological context and by the use of the statistical method, and perhaps, if this be possible, by experimental checks, particularly in connection with the effectiveness of judicial decisions and sentences in both civil and criminal cases, the case method may be regarded as the core of a fruitful legal science. This is also probably true as regards the field of legal ethics, but candor requires that we assert that its influence in determining similar activities in other professions has been practically nil. Similarly, the case method has been successfully employed as a pedagogical device in many fields of business teaching, but it does not at present afford much encouragement to those who expected thereby to establish a science of business. When we enquire further, and ask if the case method is a possible device for developing empirically the field of business ethics, and possibly thereby fructifying the field of ethics in general, we may not have to sound a note of despair; but we do need to establish a caesural pause for raising a fundamental question. May the successful use of the case method in law, particularly in legal ethics, be due, not to the analytical or empirical factors involved, but rather to the extrinsic operation of sanctions peculiar to legal administration? And, if this be true, can we carry over the case method with any hope of success to the field of business ethics, or for that matter to business or to ethics in the broader sense?

Sanctions are hard to define. Perhaps, therefore, we should not use the term. What we have in mind are those forces which impel and compel human behavior; "forces" denominating the effective exercise of habits, rituals, taboos, conscience, religious fears and hopes, *etc.*, as well as guns, clubs, fists, fines, gavels, maces, referees' whistles, and the like. Now, it is a conspicuous fact that the law has shown an extraordinary amount of skill in utilizing effective sanctions for the purpose of administering social behavior. Conspicuous among these sanctions are the physical and economic, but there are also the less tangible sanctions of public opinion, reason and authority; in legal ethics, they consist more particularly in professional pressure, exercised by the judiciary and practically resolved to possible disbarment, suspension from practice, fines or censure. On the other hand, it is an equally conspicuous fact that the other professions and business have no such effective set of sanctions at their disposal, especially for determining the type of conduct which is analogous to that of legal ethics or compliance with the law. Furthermore, there is a fundamental incompatibility, if not inconsistency, between ethical conduct and the extrinsic or compelling type of sanction, whether the latter be punishment, deterrent, irritant, incentive or reward; traditional ethics has relied more

on internal sanctions, such as conscience or reasoned conviction, which too frequently are difficult to distinguish from hypocrisy or rationalization. By virtue of the fact that business ethics has neither the developed case material nor the sanctions available to law or to legal ethics, it is difficult to determine which of these two factors is the more necessary in order to develop an effective set of ethical standards for business conduct.

There is no lack of business sanctions, nor can their effectiveness be denied. The profit motive, the wage incentive, the satisfaction arising from the exercise of executive power—we may even recall Professor Roger's advice to "be a snob and marry the boss's daughter"—these and many other factors so effectively control business behavior as to determine social patterns even against legal obstructions or the competition of other social values. But most of these business sanctions are operative in such a way as to induce individualistic or acquisitive acts which fall short of socially desirable behavior, unless we accept the questionable proposition that the welfare of a society is a composite of the separate welfares of its parts or units. Even though business behavior has more recently taken the form of functional group conduct—*e.g.*, in the formation of corporations and trade associations, and of pools and trusts, as well as in a growing recognition of the more recent industrial rather than the former individual character of competition—practically no code of business ethics has resorted to the sanctions peculiar to that type of behavior, and few have exhibited an intelligent recognition of such objectives. Long-range business planning, even though motivated by expediency or enlightened self-interest, and the development of policies mutually advantageous to most of the members of a functional group—customers, laborers, management, stockholders—the two objectives most nearly resembling the objectives of law or government, have not been conspicuous in business. Even when challenged recently by government to write its own codes, business found itself unable to present an adequate or convincing basis for asserting generally acceptable social principles or rules of sound economic conduct, both of which are essential to ethical standards of behavior; and there was a deplorable lack of such imaginative and concrete suggestion as might have supplanted the deficiency of recorded or accepted practice. Government, therefore, is again attempting—through default of business to regulate itself—to apply the inept if effective machinery of criminal or tort law to a field, business-economic regulation, for which it was never intended.

The ideal of business self-regulation, so dear to the heart of the advocate of *laissez-faire*, or of functional pluralism, and an essential

part of any system of business ethics, has failed at least temporarily of realization. As a result, government is again in the saddle, and will continue to exercise control over business as it has for several centuries. Business has failed to regulate itself either because it has not yet learned to adopt socially acceptable objectives or because it does not have available the pattern of sanctions which will effectively orient business conduct to those objectives. Is there a third possible explanation? May it be that the difficulty lies in the failure to analyze business experience with sufficient penetration to discover therein the workable standards of socially acceptable business conduct? An affirmative answer would be given by those who have become thoroughly grounded in the case method of law and business. And it is probable that the success of the law in the administration of human affairs has been due less to the use of effective sanctions than to its analytical and critical descriptions of human behavior. For these descriptions have not only governed the administrators of the law, but they have also by their convincing quality enlisted the support of that powerful if intangible sanction, public opinion. No teacher of law would deny that the case method has been deficient in respect to sociological adequacy or with reference to clinical or experimental control. But, even so, it does provide a standard toward which the business case may still direct itself. And it is in this sense that Costigan's achievement in legal ethics offers a challenge to students of ethics in general, and of business ethics in particular; a challenge which has not yet been satisfactorily met. Neither the present condition of business literature nor the absence of appropriate or effective sanctions should be put forward as extenuating circumstances. The harsh, bald fact must be faced that a sufficient amount of application has been wanting in the analysis and interpretation of business phenomena.

It is not in our stars, dear Brutus,
But in ourselves, that we are underlings!

Carl F. Taeusch.

WASHINGTON, D. C.