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CURRICULAR REFORM FOR LAW SCHOOL NEEDS OF THE FUTURE*

CHARLES D. KELSO**

If we consider a law school to be a gathering of faculty members and students—a community of scholars, if you please—and attend only to their needs (giving “needs” its usual connotation of something that is badly wanted), we would have some very dramatic curricular reforms. In fact, we could neglect to construct what is commonly called a curriculum, for we would permit each professor to teach what he wanted to teach and we would encourage each student to study what he wanted to study. This might result in some teachers with many students, some teachers without students, some students without teachers, and one hell of an interesting place.

Educational conservatives may object that in Kelso wonderland some students might take courses from only a few members of the faculty—or might take the same course from a number of different teachers. At first blush this seems a bit shocking. But I recall that I have taken Jurisprudence four times—from different instructors—and learned something quite different each time. At Chicago, I took Constitutional Law three times. Each time it was different. Each time it was a great course. And I took Comparative Law twice from Professor Rheinstein. Both courses were wonderful. It just so happened that he was interested in something else the second time around.

I could push this line of reasoning to an extreme by postulating a law school whose Dean hired men interested only in criminal law. This Criminal Law School might collapse my straw man, but buried in the heap would be a deep conviction that great teachers (and teachers who may perhaps be less gifted in the classroom, but who nevertheless are teaching what they love), and students who are studying what they want to study, are far more important than making sure that each student is exposed to a carefully balanced set of courses listed in a finely structured bulletin.

Now let me re-interpret the title of this Round Table, and assume that by “Law School Needs of the Future,” we are referring to something more than the desires of those involved in the institution. We are considering the needs of society for the product of our work: our ideas and our trained graduates who will have ideas. How can we best reform our curriculum or decide whether reform is needed, in order not simply to have intellectual fun, but rather to carry out serious responsibilities.

* Delivered at the 1966 AALS Curriculum Committee Round Table, Washington, D.C.

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Usually if we think of curricular reform, we think of adding a course here or there, or subtracting a course, or transferring certain topics from one course to another. Occasionally, we are aware that the curriculum changes interstitially, as new law is made, new books are published, and new teachers are hired.

However, if we are to deal with reform and not merely gradual change, my first suggestion is that we should reformulate our basic perspective—indeed, we must reconstruct even the vocabulary with which we customarily think about reform. Analyzing an educational program into curriculum, courses, teaching methods and teaching materials is one of the most troublesome obstacles in the path of reform. These distinctions are not realistic and impede creative thinking when we consider, as we must, what goes on in the process of teaching and learning.

Men learn by responding to a sequence of stimuli, and by being reinforced, at least occasionally, for some of those responses. The sequence of stimuli and the timing and nature of reinforcement are the critical variables. Thus, Contracts under Professor X is not the same course as Contracts under Professor Y—even if both X and Y use the same casebook. If we are serious about reform, we must find out much more about what is really going on in our classrooms. Otherwise, for example, we might eliminate Agency as a first year course because we think it is more logically absorbed by Business Organizations—only to eliminate from our first year the teacher who best taught the students how to read cases with understanding.

The use of recording equipment in classes may help provide classroom data not now available for more enlightened reform of the educational program of a law school. Once the old distinctions are replaced with a modern conception of the learning process, many other useful devices for reform are suggested, and many questions are posed including some that pertain to that hallowed ground—the first year program.

Talk of curricular reform these days usually centers on the advanced years. Elsewhere I have contributed a few suggestions on that topic. The dialogue currently includes such concepts as realism, new fields of law, new roles for lawyers, new organizations of lawyers, para-legal training, and interdisciplinary teaching coupled with empirical research and modern technology. These matters have already been dealt with this evening, so I shall confine the balance of my remarks to reform of the first year educational program.

The perspective I have suggested as vital—a perspective which is based upon modern theories of learning and teaching produces questions—as I have said. Specifically, I am not satisfied that I know the answers to questions such as these:

1. If we mixed problem method teaching with case method teaching during the first year, would the students have an enhanced appetite for the case method in at least some of their advanced courses?
2. If we mixed beginning students with advanced students in at least one course, what kind of intellectual transfusions would take place? Many schools use a carousel for their second and third years. I know of one school which uses a complete merry-go-round for all students—with no visible evil effects. If the students run into unknown concepts, they get out hornbooks or *Am. Jur.* and do some hasty reading. Is that bad?
3. And, more seriously, by what criteria do our first year courses justify their continued required existence: frequency of application; social significance; doctrinal fundamentality?

Fundamental doctrine is the answer that seems to be most comfortable. However, I wonder how fundamental is our common law learning of offer, acceptance and consideration if much of it, for all practical purposes, can be wiped out by a few provisions of the Uniform Commercial Code, or if businessmen are seldom concerned with it. How fundamental is negligence, if a compensation statute replaces it? How many fee tails have you created lately?

Of course, some knowledge of procedure is required to read a case with full understanding. But I wonder whether a semester with the intricacies of pleading and practice gives those matters a prominence which later results in satisfaction with decisions based on such doctrine rather than on the human equities of the situation.

What alternatives do I have to offer—since most contracts and torts teachers are tenured?

One approach would be to assume that it is more important, initially, to instill students with a humanist approach to law and acquaint them with the law's all pervasive character. Thus, I think one could seriously consider placing our courses on civil rights, urban problems, and the like, in the first year, along with a general introductory course on case-reading, legal remedies, and legal system. For pervasiveness, as well as a balanced view on common law and legislation, how about taxation or commercial law in the first year?

When it came time to take senior courses, students so taught would tell their torts and contracts teachers, "We can read cases—let's see you teach us something that's really significant about these fields of law."

With less tongue in cheek, I offer my second suggestion: Let the present group of first year teachers take on the job of showing how law

is a humanist and pervasive activity. What might come of this? What changes would be in store?

Here are my bricks—tentative bricks because the mortar is still rather wet:

First: At least the following things should be learned by law students in the first year because they will be useful in all other courses and in their professional careers, no matter whether they remain generalists or become specialists:

- a. Relationships between law and values.
- b. The creation and functioning of a legal institution—that is, a group of jobs or tasks around which are organized a group of men responsible for the doing of those jobs.
- c. The devices by which the common law and the interpretation of legislation, including the constitution, are changed gradually over a period of time, and the kinds of situations and reasons that are associated with such change.
- d. Ways of dealing with disputes.
- e. How to read cases and statutes for and with understanding.
- f. How to engage in legal research.

Second: I don't think it makes much difference in which of the traditional first-year courses these things are done—or whether there is some overlapping or duplicating. Indeed, each one could be taught in every first year course. Third: I do have some hunches as to where they are most likely to be best done, and I shall pass along these hunches as my most specific recommendations for reform of our first year educational program.

A. Torts is the course best suited for reform that would help freshmen law students relate law and values. Sometimes we require a finding of fault in order to shift the financial burden of an injury from one person to another. Sometimes we do not. Why? Sometimes we shift the burden of compensating for injury to a causative actor or sometimes to one who is remote in a causal chain. Why? Some injuries or disappointments are spread over the entire society, as when we have severe floods or too little crops—or too many. Why those risks and not others?

The values are not all "moral values." We may have considerations here of efficiency in law administration versus accurate justice—as when we use tables in Workmen's Compensation. Why this? This "Why" is particularly timely because we know that compensation for damage caused by automobiles is on the verge of dramatically different approaches as well may be compensation for product injuries.

When the field of torts is approached from the point of view of values it merges gently into welfare and subsidy law. We now shift the burden of

certain non-fault injuries to the public through Medicare. Social Security includes a kind of public life insurance program. Is this so far off from the guaranteed annual income—or the negative income tax?

Torts—as I have been talking about it—no longer sounds too much like torts. But as I have been saying, course labels, like the word “curriculum,” are stultifying. Perhaps we need a new name here, such as Injury Compensation and Prevention.

B. In my opinion, Contracts is the course best suited for students to gain a preliminary understanding of legal institutions. Every contract creates a miniature legal institution. The emphasis, realistically, is not on offer, acceptance, consideration, and mutual assent, so much as it is on interpretation and drafting and the forces which influence men’s conduct in relation to the institution created by the contract.

Contracts seem ready-made for problem method treatment, at least after the cases are dealt with. Counselling functions should be emphasized. What caused the difficulty? What steps other than the law suit might have been taken? Contracts also provides a good stepping stone into agency problems and some introduction to the limitations imposed on freedom of contract, not only by doctrines of illegality, but also by governmental regulation. Here again law and values blend and merge.

C. Property is the course best suited for a realistic look at legal history. Not a history which ends with the statute of uses—but a history which extends into today and the hereafter. In this area, entire bodies of law can be seen gradually to disappear or decline in significance as the forms of wealth change from land to promissory expectations. Here also, we see the intrusion of new law as public concern is generated by population jamming, traffic, pollution, and the like.

D. Reading cases for and with understanding can be handled in many different kinds of introductory courses. However, my suggestion is that this general objective can very nicely be included in a course designed to teach students something about the ways in which disputes can be dealt with. I hesitate to call the course Civil Procedure because it would include not only adjudication, but also arbitration, mediation, negotiation and other means of dealing with citizens’ grievances against other citizens or public officials.

E. The teaching of legal research is one of those areas that we all talk about—and do least about. Few men really like to teach it. Those who do it well—such as Harry Kalven at Chicago—readily move on to more “worthwhile” things—such as teaching Torts.

This is an area where programmed instruction may have a great role to play. However, apart from method, I think improved research

projects are our most promising secret weapon. The students should be working on problems of real significance. As to the kinds of problems which have such bite, I refer you to the report of the 1966 AALS Committee on Research (1966 AALS Proceedings, Part I, p. 176):

1. Research, whatever its methodology and particular focus, should be aimed at exploring the problems that the community has in guiding its growth and in regularizing its relationships, and not simply the problems that lawyers encounter in participating in that process. Research in this frame of reference implies a disposition to take account of all potentially shaping forces in the development and regularizing process—social, economic, political, psychological and historical.
2. Specific research projects should be conceived, insofar as practicable, within the framework of major topical schemes—criminal law enforcement, land use control, water resource development, etc. This implies that general strategies should be developed within which specific studies assume relevance and are accordingly generated. The specific studies would thus be endowed with a general relevance while at the same time concentrated at the point of inquiry in the intricacies of fact and policy that good legal research requires.

Perhaps the most promising avenue for reform here is to establish a policy of assigning the teaching of legal research to the highest paid member of the faculty.

To Recap:

Let's no longer talk about curricular or course reform—as distinct from changes in methods and materials. Let's talk of change in our educational programs.

Let's put our faith primarily in men rather than in subject matter divisions.

Let's give a good hard look at our first year—as well as our advanced years.

And let's take that look in terms of some very general kinds of skills and knowledge we would like our students to acquire.

The result, I predict, will be a year much broader in concept, more practical in effect, more catalyzing for the advanced years, and more productive of useful research and the kinds of men we want to claim as our alumni.