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Commentary

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COMMENTARY*

HARDY C. DILLARD**

Mr. Chairman, as you know, we were coyly denied access to the speeches before this meeting, so we are playing it by ear. The scribbling you detected was my feeble attempt to capture some of the ideas launched by our three speakers. As I hastily reflect on them, I am reminded of something I once read in that wonderful purveyor of elite American culture, *The New Yorker*. It picked up a little sign, a kind of bright thought for the day, outside a Unitarian Church near London. The sign read, "Between scepticism on the one hand and dogmatism on the other hand, there is a middle way, which is our way—open-minded certainty."

(Laughter)

As I listened to Mr. Goldstein, Mr. Kelso and Mr. Mooney, I also became conscious of the 3 B's, because I was at once bemused, bewitched, and bewildered. Bemused by the diversity, bewitched by the ingenuity, and bewildered, I think, by the epistemological assumptions they were indulging and the possible consequences to which their approaches led.

I don't know whether they think of law as norms of decision and our science as a normative science, or whether they think of law as an instrument of analysis to be used as scientific hypotheses might be used. Nor was I sure whether they considered the rhetoric of law to be ascriptive or merely descriptive. Perhaps this is unimportant.

Mr. Goldstein stated that the motivating factor for the interesting Yale approach was rooted in the belief that our present curriculum reflected an archaic conception of the role of the lawyer in society. I think he said this archaic conception was tied to the "mystique" that lawyers were generalists.

Mr. Kelso's characteristically challenging thrust was less revolutionary than I had anticipated from previous exposures. He suggested that the first year curriculum, usually considered to be untouchable, should be stripped of its hallowed status and overhauled. To what end? If I understood him, each course should be converted into a kind of creative laboratory. The laboratory should be designed to make each course a bearer of something besides its own doctrinal or normative subject matter, thus Torts should be the vehicle for analyzing social values, Contracts the bearer of—what was it?—institutional matrices *et cetera*.

Mr. Mooney's message at first seemed to me to require the discard

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of all traditional concepts and categories in deference to an organizing principle based on a kind of multi-valued projection. I confess, however, I was so intrigued by his delivery and amused by his sallies that I may have missed the message.

I shall confine myself to commenting briefly on each of the three points above.

Mr. Goldstein excited my sense of envy. How wonderful to train the intellectual elite with a student faculty ratio of 16 to 1 which in the near future might even be reduced to 6 to 1, was that not the figure I heard?

(Laughter)

MR. GOLDSTEIN: One to one is our ultimate goal.

(Laughter)

MR. DILLARD: Now it is a truism to say that we are a pluralistic society, so perhaps we should not only tolerate but applaud a considerable diversity among law schools. While all serve common purposes not all serve identical purposes. Logicians speak of the difference between necessary and sufficient conditions. We will all agree, I am sure, on the necessary conditions. We are concerned to nourish the critical and release the creative faculties of our students in an environment and with materials relevant to the orderly management of conflict. We are concerned not so much to make the student a lawyer as to make it possible for him to become a good one. And I hasten to say, by way of digression, that we need not assume the "learning process" terminates on graduation.

Many schools can, of course, go beyond the necessary, basic stuff to more specialized and experimental programs. I would be inclined at this point to put in a plug for a better awareness of the need for cultivating a quality which is hard to define or even describe but which can be called legal imagination—the capacity to perceive not only similarities and dissimilarities within categories, but among and between categories. But this is a long story.

Reverting to Mr. Goldstein, are we agreed that the day of the lawyer generalist is over and that our curriculum should be patterned on the converse notion that each will be a specialist? I confess to having distinct reservations. My reservations are keyed both to his professional job and his larger role in society.

The lawyer in the little town of Crozet, Virginia and the lawyer in a big Wall Street firm share certain things in common even if one becomes more specialized than the other. In any event the professional work of the small town lawyer is by no means so specialized, and his future immobility so assured as to make desirable a highly specialized course selection based on a predetermination in law school of what he will do in the future.

In World War II we discovered that lawyers were good in civil affairs and military government operations. Why? I suggest that one reason was attributable to the fact that they were not over-specialized, as were so many fiscal experts and even public administration experts. Not being over-specialized they were not thrown off base by unexpected contingencies and disruptions.

Is this not true generally and does it not mark off the able, imaginative lawyer from one who is, at best, merely efficient and, at worst, only mediocre? Somehow the capacity to handle complex problems presupposes a capacity to detect their complexity without being upset by it—a quality which may be impeded by specialization. As was suggested earlier, it is the ability to perceive differences and similarities cutting across neat categories that needs to be nourished—a capacity that may elude the narrow specialist. As the old saying has it: "He knows not tax law who only tax law knows." But I am sure I am reading more into Professor Goldstein's comment than was intended and that he would not wish to be pushed into an extreme position in this matter.

Nor can all schools indulge the luxury of being small. This is particularly true of state law schools especially when they seek and secure a nationally composed student body.

Turning to Mr. Kelso's laboratories, I would not fuss with his notion that we should make a course something more than an exercise in jural syntax, although accuracy in analysis seems to me essential. I am inclined, however, to ask first whether this is not already being done either directly or indirectly though no doubt not to the extent and in the way he suggested. Take the *Henningsen* case. Does any Contract teacher not use it to illuminate one of the difficult institutional and value problems of our time?

Reference to "values" suggests also that a lot of loose talk can be accommodated under that alluring label. What is the relation between "interests" and "values"? How are values defined and determined? What of the "fact/value" controversy? What is the source of values? Recently in thumbing the pages of Ernest Nagle's great book on the "Structure of Science" I noted that he makes a distinction between "characterizing" and "appraising" values, a distinction also elucidated by Dewey though in different terms. And then you have apparent shifts in value postures in different times. Respect for "property" values gives way to deference to "civil rights"—why? Do we locate such shifts in an evolutionary way, as products of history unattended by new developments in logic and ethics and even metaphysics, or do the latter affect the process? If new concepts of the "nature of man" and his needs and aspirations are abroad, how are they determined and how do they gain acceptance? What is the role in analyzing value positions of reshuffles and shifts in the distribution

of governmental power? These questions are complex and the answers are not lightly to be assumed as something already understood as so many seem to do when they speak sweepingly of "policies" and "values" as furnishing an orienting principle for legal education. Please do not misunderstand me. I am not arguing at all that an awareness of policy issues and value preferences should be excluded from our understanding of the social process and the legal order. The point is they should be better understood and even more systematically understood, which may suggest the need for more emphasis on Jurisprudence.

But the problem that concerns the speakers is not focused on mere curricular tinkering. And I think we will all agree that discussions keyed to the number of hours for Contracts as opposed to Torts and whether Agency and Equity are worth doing and, if so, where—discussions of this kind, however necessary at times, tend to become at once boring and sterile. The profounder problem is focused on "relevance." What is "relevant" may require a continuing appraisal of the ongoing needs of our society and a willingness not merely to tinker with the curriculum but to explore the basic assumptions which condition its content. The speakers seem to me to deserve our thanks for pitching their talks that way. And while I detect a bit of exuberant over-emphasis on subject matter as opposed to the notion that a good teacher will ignore the edicts of planners, I am yet sure we all applaud the imagination and high intelligence they have brought to bear on the subject.

One final word. We would surely all agree that a good legal education is not a "thing" that you "acquire." It is not something you get by simply adding up a number of separate courses as you would acquire a Cadillac on the installment plan. Like law itself, education is not a "thing" but a "process." You do not acquire a process, you participate in it. But it is, of course, important that the participating process deal with issues that are relevant to the needs of today and the probable needs of the future. The danger comes when our conception of "needs" is too narrowly focused on problems that are immediate and pressing as opposed to those that are basic or those that portend significant changes. As a contemporary historian has put it: "The signs pointing to the future should not be confused with the noises of the present" and the art in thinking about the future is to separate the two. We need in the Association more good talk about how we can identify the signs so as to detect the emerging needs that should be met.

Mr. Chairman, that's about all I can say off the cuff. I fear what I have intoned is so vague as to qualify for a wry comment attributed to Whitehead. "The gentleman's explanation," he once said, "leaves the darkness unobscured."

(Applause)