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Commentary

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COMMENTARY*

WALTER GELLHORN**

We have heard much this evening concerning the organizing principles upon which the modern law school curriculum should be structured. I believe the chairman asked me to be part of the panel because he thought me disorganized, unprincipled, antiquated, and predisposed against structure. To all these disadvantages I add that I am also unprepared, the main speakers having kept their thoughts to themselves until their expression here. So my comments come under the heading of Quick Reactions rather than Matured Reflections.

I squarely agree with most of Professor Kelso's points, but particularly with his expressed faith in men rather than in subject matter divisions. That is also my view about the curriculum and about legal education. The quality of legal educators individually is tremendously important; and so too is the sum of their individual capabilities and characters. But I am not sure that we can construct a faculty as though it were a true entity. In short, I am not sure that we can put together the talents and attitudes of able, diverse, elevated persons and make them into a harmonious whole, or into a machine that functions as though the parts really had been tooled to fit one another. I doubt that any of us law professors would like to be sandpapered or emerywheeled to rub off our rough edges so that we would exactly mesh with others of our colleagues.

Worrying constantly about the nature of law courses or the sequence of their offering does not strike me as very useful. On this also I find myself in agreement with Mr. Kelso, though when he came to framing his ideal curriculum, he seemed to forget his own views on that subject. He proposed that the relationship of law and value systems be taught in the Torts course, that Contracts should develop an understanding of legal institutions, that research insights be the responsibility of some other course, and so on. That didn't impress me very much, to be perfectly truthful about it, because it seems to me that one course is about as good as another for accomplishing these things. We can't very well say to a member of the faculty, "Now look, bud, you are teaching a course named Torts, and you are supposed to be worried about values." And to another instructor, "You are teaching a course called Contracts, and you are to be worried about legal institutions." And to yet a third instructor, "You are teaching a course called Property, and you are to deal with history." Why, no professor in his right mind teaching any one of those courses

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would exclude himself from teaching all of these things when dealing with the subject matters embraced by his course.

Course titles tell us little about the actualities of a curriculum, in any event. Forty years ago I took a course called "Property" at Columbia Law School. According to the best of my recollection, it consisted largely of the Rule in *Dumpor's Case*. Needless to say, I no longer know what that rule was, but the course paid much attention to it and to ejectment and to the fascinating problem of who could claim ownership of a branch of a tree that fell down over the fence onto the neighbor's property. That was what "Property" was all about in those distant days. Now, we still have a course called "Property" in the first year at Columbia, but it deals with land use controls and urban redevelopment, and similar problems of our times. The content of the course is entirely different, though the course title is the same. The curriculum, if you will, hasn't changed, because "Property" continues to be a required first-year course. But today's focus is far from yesterday's.

Now these alterations in the course weren't produced by the political process to which Mr. Morris referred; nobody bargained for this or that change, and persuaded somebody else to adopt it. These changes were produced by the internal combustion of the professor in charge of the course, who, consulting his own notions of what was timely or, at any rate, what interested him, went ahead and changed the curriculum. And he didn't ask his colleagues' permission to make changes. His colleagues learned about the altered content of the course offering as time passed, and they haven't ousted him; but so far as I know, there was no particular group process about it.

This has happened, I believe, with course after course. I take very seriously the point that Mr. Kelso made—it was picked up and commented on by Mr. Morris—that, after all, some professors acquire not only tenure, but also bad habits or laziness which may prevent their reconsidering or reorganizing or restructuring what they have been doing comfortably for some time past. So it may well be that a time lag of an entire generation will occur between the probable need to update the content of a course and its actual updating. The needed updating may be postponed until the tired, unimaginative, or slothful teacher has been succeeded by the next generation. But in my estimation that is not too high a price to pay for the values that we think inhere in the system of academic tenure, designed to assure a stable relationship between a faculty member and the institution he serves. The time lag is not an invariable occurrence, after all. Only rarely does a course remain essentially unaltered throughout the thirty or forty years that a professor may be teaching it. An infrequent failure to keep abreast of modernity is not likely to prove fatal.

Why isn't it fatal? Because other professors in other courses will be

doing some of the things that the professor in Course "X" perhaps should have been doing himself. Law faculties of this day and age have tremendous strength in their diversity. Very few of our schools still consist of four or five professors all stamped out of the same piece of material. Contemporary faculties tend to be both numerous and composed of markedly different types of persons. Thus students are assured of exposure to assorted attitudes without the faculty's having consciously to structure the curriculum in a particular way in order to achieve diversity of intellectual experience.

In some respects this automatic diversity may be more desirable than a carefully planned structure. One of my fears about the structured curriculum is that it creates a vested interest in things as they are, not only in one's own course, but in its relationship to others, in the place that it appears in the curriculum, and so on. It is the devil's own job to shake anybody loose from his vested interest without hurting his feelings and running the risk that in return he will hurt yours.

This is just one of the sad realities of life. It is part of the legal realism to which Mr. Goldstein referred at the outset of our session this evening. We might as well be legal realists about the fact that you as a professor can't tinker very much with what another professor is doing.

But, by the same token, he isn't in a strong position to limit you in doing what you want to do. I rather like the idea that Mr. Kelso put forward, of allowing each professor to teach whatever he may choose. That, as Mr. Kelso suggested, is what most professors do in fact. It wouldn't seem to me to be terribly hurtful if law faculties were to adopt that policy quite candidly.

One of the reasons why I am not so hectically troubled as others about the current state of affairs is that—to be blunt about it—I don't think we have as much influence on our students as we say we do. The students are with us, after all, for only three years. As to any one instructor, they may come under his benign influence for no more than thirty or forty or fifty hours in the course of those three years. An awful lot of other influences are operating on those students at the same time—not only colleagues' mild influences, but also external community influences, family influences, peer group influences, and economic influences that shape them a good deal more powerfully, I fear, than we do.

This leads me to be hesitant to take credit for all of the forward-looking accomplishments of my products. But it also encourages me not to take the blame for the stodginess of bar associations and the anti-social attitudes of some lawyers. By contrast my friend Mooney wants to wear a hair shirt if he hears about a rotter in some small town in Kentucky who studied under him ten years ago; Mooney thinks he is blame-

worthy because his former student turned out to be such a deplorable adult.

Now, it really wasn't Mr. Mooney's fault. Professors don't necessarily and indelibly color their students. Mr. Mooney is an exhibit to the contrary. He attended a law school that, when he was a law student, had a simple, old-fashioned curriculum. One can't find much evidence, however, that Mr. Mooney's professors warped and twisted him, or inhibited the development of his imagination, intellect, and independence. You can see for yourselves, in the light of his presentation in this discussion, that he has not felt it necessary simply to copy his old teachers and to follow faithfully in their footsteps. If Mr. Mooney is not to be blamed on his professors, I don't see why Mr. Mooney should take the blame for his own students' later lives.

One could make the same point by examining the career of Mr. Kelso, who studied at the University of Chicago at a time when that law school regarded St. Thomas Aquinas as the only reliable, and certainly the most modern, authority for almost any problem that might arise. And yet, without benefit of any instruction by the University of Chicago law faculty, Mr. Kelso subsequently mastered the Skinner theory of learning and has become a great electronic engineer, as you can see by visiting the exhibition of teaching aids in the hall next to this.

So it does seem to me that a student can possibly survive even your ministrations.

If the curriculum as such is not the most important concern of legal educators, what really should be important to us? I think it important that law professors be *excited*. They ought to be terribly concerned about what they are doing—even if it is wealth preservation. If a fellow felt strongly about wealth preservation and how to go about it, I wouldn't see anything intrinsically wrong with that. Of course I wouldn't like everybody on the faculty to have that same fixation to the exclusion of all else. But everybody on the faculty ought to be terribly concerned about something. Then each teacher should communicate his concern and his enthusiasm through the work that he is doing with students. The upshot of his efforts will be, probably, that ninety-nine out of a hundred students who study under him will not even perceive that he is concerned. And it is just a 50-50 chance whether the 100th student will say, "By gosh, old Professor X certainly is steamed up over what should be done about unwed mothers, so I am going to devote the rest of my life to that"—or, conversely, "Gosh, what a stupid old crock Professor X is. Instead of being worried about preservation of wealth, he is worried about the preservation of the unwed mother."

You really can't tell, you see, how a professor's efforts will affect his students. But at least one out of a hundred should know that the professor

cares. And that I think is what we ought to do: we ought to care deeply about the problems to which we address ourselves.

I am very impressed by what Mr. Goldstein has been telling us about Yale and some of its aspirations—"A book in every student's bag. Self-written, I mean; don't bother to go to the library where you have to read somebody else's writing; go to your room and do your own." I think that this is a fine thing within limits. But we have diverse students. They come to us for all sorts of reasons. Some come because they have a thirst for certainty; they are going to be looking at the few things that are certain in law, the dull things, and that is all they are going to do. They are probably not going to have any more imagination when they get through than when they began their law studies. Others will bring with them to law school the capacity and the quality of imagination; those men and women will respond to the sort of thing that Hardy Dillard wants to do with them. We are going to strike different people differently. We shouldn't act as though we had a homogeneous mass. Students are not fungibles. We cannot process them alike with the expectation that a systematized exposure to topics or techniques will assure our graduates' possessing precisely the qualities we professors think they should have. In the end, one student will have one quality, or maybe five or six, and another student will have another set of qualities, and nothing we can do is going to standardize our products.

But I am a great believer in trying to fire every student's enthusiasm. The best way to do that is to bring him into association with professorial enthusiasts.