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Commentary

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This criticism of law school curricula brought to my mind another kind of criticism—the great revolution called "legal realism" that swept our profession beginning in the early part of this century. One of the things that must be realized is that most judges sitting today had their legal education after that revolution was well under way. Insofar as legal education could have any effect, they started their professional lives as legal realists.

Now the early legal realists, when they were criticizing the doctrinaire courts of yore, had a relatively easy task; for the opinions they criticized were written by men from the previous century. It was easy, then, to point out that the courts were valuing logical symmetry too highly and not paying enough attention to the realm of action—to the functional consequences of the rules of law. After all, the judges had been trained as students in the 19th century, to think of law as primarily a body of concepts.

One would have hoped that by now things would have changed, and that legal realists would not be able to find as much to criticize in contemporary opinions; but recent judges trained by legal realists seem almost as subject to the same kind of criticism as their predecessors were. I take it that this is because judges are, in some sense, habitual creatures, and that this year's judges understand their jobs to be successors to last year's judges. They have, therefore, adopted the mode of their predecessors in spite of their training.

My point is that this is true of law professors, too. The conception of our job that Mr. Mooney criticized is one that we have because we are, in some sense, imitators of the professors we had when we were students. We must imitate them to a considerable degree, whether we want to or not. Indeed, we come into the profession of teaching law primarily because we find it attractive, and the "it" which attracts us is what we saw our old professors doing when we were students.

For instance, our student-teacher ratio, which we are stuck with, and which our predecessors were stuck with, leads to a certain kind of education which, in spite of its deficiencies, we are satisfied to practice. We feel that our students ought to do something active, because being a lawyer is lawyering; but with the mass of students that we have in front of us, what can we require them to do? The only thing we have time for them to do is to call upon them to recite and "make a noise like a law-

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yer." Of course, lawyers do not make noises that way, not good lawyers. The student's recitation can only be a tentative first draft, and I take it lawyering, good lawyering, is not merely first drafts. But a hasty first draft is all that we expect of our students, both in class and in examinations. In class, we give each recitation a quick critique, and move quickly on to the next man, because we have a lot of students to teach.

We call it the "socratic method" but it is not. Socrates never taught that way, with eighty-three people seated in alphabetic order so that he would know their names. We give it a Greek name to give it dignity, but Greek names cover up the real meaning, to make the unacceptable more acceptable. (Like the "Oedipus Complex," which in simpler more straightforward language would simply be obscene.)

But we are content with this, and we envy the 16-to-1 student teacher ratio at Yale, which is still atrocious, when compared to the ratio in any other post-graduate education or in most good undergraduate institutions. But if we improve the ratio, can we take advantage of the change? Isn't it true that most of us enjoy teaching in this way, and if assigned a smaller class, we would not change our methods? We came to law faculties to do what our old professors did. That is what we want to do. A change to smaller classes, with its opportunities for assigning written work to be critiqued and rewritten, will not accomplish very much because we want to teach in the good old way—we will not take full advantage of the change.

I was struck by the statement that most torts teachers and contracts teachers are tenured. That is another way of saying that we are stuck with ourselves. Any improvements must be our improvements. But "it has always been that way." Well, some things always have to be that way. You can't change everything at once; no one is willing to. Those who would be willing would be thought a bit mad. So only a few things can be done at a time.

I was attracted by Professor Kelso's case knife aproach—the way he was going to use fictions to do this—to cause us to have some changes that we might not admit we were having. We weren't going to teach a course in torts. We could call it torts, but it would be a course in values. Call it contracts but teach legal institutions. Thus is born the legal-education-fiction.

Now I have been on curriculum committees for a long time, and I have been impressed with curriculum committees as political organizations. Can one change legal education by manipulating the curriculum? I have tried it a couple of times, and there is no way of telling whether one has accomplished anything when one has changed a curriculum. The curriculum is not the law school, and faculties are not likely to change

much of what they do merely because the courses have new labels. As a matter of fact, if we try to make them change very much, they will talk about academic freedom and the teacher's prerogatives, and you are not going to get the courses taught differently. I was told a little while ago about a professor whose courses were Procedure I, Procedure II, and an advanced course called Oil and Gas. But the students called his courses Oil and Gas I, Oil and Gas II, and Oil and Gas III.

So, I get to the conclusion that Professor Mooney's position really means that we need a new kind of professor. It is a problem for the personnel committee, not the curriculum committee. Well, I don't think many of us are going to resign. If we did, I don't know who would come in to take our place. I shudder to think.

And as Professor Mooney pointed out, we are imbalanced in our approach—all these "wealth" courses. Of course we are imbalanced. The law is of life, but it is not life itself. It has a peculiar approach to life. By contrast, Medicine is about life too. It may be about all aspects of man, but most of medicine is about guts and sickness, clearly a one-sided approach.

The fact is, that while we are very good, or we profess to be very good, at criticizing social institutions and suggesting methods for their reform; much of what I have heard here, and what I have heard generally on this topic, has not been a good job of using our skills. The law school is also a social institution, consisting of individuals who have their roots in peculiar backgrounds, and serving a group of students with particular goals. The students come to learn those skills which will help them make a living. Of course they are interested in the problems of wealth. They will serve clients with money problems. We may not admire them, because they come to us only to learn to make money. We cannot really understand our students: they came to law school to get out; we came to stay.

But the institution includes both them and us. And how you go about reforming this kind of institution is a difficult problem. We are in the business of studying how institutions are manipulated. Can we make such a study of law schools and use our skills as manipulators of social institutions to reform legal education? If we try, we will be involved in using our skills for ourselves. And the lawyer who pleads his own case has a fool for a client; but that is the position I am afraid that we are in.