CORRESPONDENCE

The following are responses to Professor Duncan Kennedy's article, The Political Significance of the Structure of the Law School Curriculum, *which appears at page one of this volume. Professor Kennedy's reply to Professor Gellhorn's criticism has been reprinted at page 1085.*

LAW SCHOOL CURRICULUM: A REPLY TO KENNEDY

*Chris Langdell**

Duncan Kennedy's article, *The Political Significance of the Structure of the Law School Curriculum*,[1] performs an important service. Not that I agree with Kennedy's program—far from it. But Kennedy is to be commended for reviving the debate about curriculum—a debate which, ultimately, confronts us with the question of what is the proper role of American legal education in the last quarter of the twentieth century.

I will state my value premise explicitly: The purpose of a law school education is to train lawyers. Note that I don't claim that the purpose of *law school* is to train lawyers. Law schools may have other functions—for example, their professors may engage in various forms of scholarship that at best have a remote relationship with training lawyers. These may well be legitimate functions for a law school. My premise is limited to legal *education*, by which I mean classroom discussion, homework assignments, and the various devices (examinations, papers, grading, and professors' recommendations) that distinguish "good" students from "average" students.[2]

In saying that the function of a legal education is to train lawyers, I don't mean to deny the force of Kennedy's charge that this function has "political" content. Of course it does. We cannot train lawyers to practice in our legal system without inculcating, to some degree, the shared values of that system. That the typical student emerges from law school with a healthy respect for the adversary system and the rule of law is hardly surprising; nor is it unsettling to find these values coupled with acceptance of the culture's prevailing political norms. The extent of a law school curriculum's contribution

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[1] 14 SETON HALL L. REV. 1 (1983).

[2] We no longer seem to have "bad" students.

to this process is debatable, but it doubtless does have some "socializing" influence on many young lawyers.

Where I differ with Kennedy is that I am not too troubled by this. Our culture has accepted that lawyers are the agents of the rule of law. As "officers of the court," they are charged with aiding and abetting the law-making and law-applying functions of judges and quasi-judicial officials such as administrative boards or arbitrators.

Lawyers never have been, and never will be, the *causes* of social evolution. They may, at times, be the *agents* of change, but only in their capacity as representatives of clients. And even where lawyers do further the process of change—as illustrated most dramatically by their role in the civil rights movement—their major contribution is conservative in spirit: They channel political disputes into the legal/political process, where disagreements can be resolved through the rule of law rather than through force and arms. If civil rights lawyers had not been successful in the courts and the political branches, we doubtless would have seen some of our disputes resolved on the streets in a considerably less amicable manner.

So I say unabashedly that the function of legal education is to train students to be good lawyers in an adversary system. We are successful to the extent that we make our students wiser and more creative counsellors to their clients in transacting the affairs of home or business, and better and more vigorous advocates of their clients' interests when disputes arise.

If this is, indeed, the proper function of legal education, how effective have we been at meeting that challenge? I believe we could do a much better job than we have heretofore. As Professor Kennedy rightly observes, the traditional curricula at law schools today reflects a basic "core" of common law subjects, surrounded by a "periphery" of other subjects, mostly arising out of the New Deal enthusiasms of the generation of law school professors now retiring. To this we have recently added a smattering of courses entitled "Law and ____"—"Law and Economics," "Law and Anthropology," "Law and Literature," etc. These courses have provided a sometimes important view of the law from the standpoint of another discipline,[3] but they have not accomplished anything like a fundamental re-examination of the law school curriculum.

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[3] The Law and Economics movement, in particular, has had an immense and beneficial influence in legal scholarship.

If we examine the typical law school curriculum afresh, and apply our standard that the function of legal education is to train good lawyers, two glaring shortcomings emerge. First, we pay almost no attention to the lawyer's role as it influences the legal system. Second, we fail to provide even minimally adequate instruction in vast areas of substantive law that are tremendously important to practicing lawyers.

It is a remarkable feature of current legal education that we spend hundreds of hours examining the courts as social institutions, but almost no time examining the institution of the bar. Indeed, the typical law school course assumes lawyers out of existence. Judicial opinions are evaluated in terms of the judge's craftsmanship, reasoning powers, or social philosophy. All kinds of other influences on judicial decisions are also studied—except, ironically, the one which ought to be closest to a law school's heart: the influence of its graduates on judicial behavior. Yet, if we think lawyers are significant in the litigation process, we must believe that a lawyer's advocacy is often the most important influence on a judge's decision.

The implicit model of a lawyer conveyed in law school classes is that of a cipher whose influence on the growth and development of law is purely secular. Lawyers, to the extent that their influence is acknowledged at all, are viewed as perfect agents of their clients. The fact that a lawyer's interests may deviate substantially from the client's is rarely mentioned. Students at many law schools spend three years learning about doctrine without once hearing their professors acknowledge that lawyers work for a fee. Yet attorneys' fees and agency problems between lawyer and client have had the most profound influence on the nature and shape of our legal system.

Surely the personal injury litigation explosion, and the often-noted increase in litigiousness generally in our society, has some relationship to the growth of contingency fee arrangements or to the increase in the number of lawyers *per capita*. Class actions and shareholders derivative suits, which have so significantly influenced the legal system in recent years, have as their *sine qua non* the common fund/common benefit exception to the American rule on attorneys' fee shifting. And in the many substantive areas where Congress or state legislatures have enacted plaintiff-favoring fee statutes, lawyers have been given the incentive to try out ever more "creative" legal theories, with important consequences for the development of substantive law in these areas.

Even when lawyers are acknowledged to exist and to act as the imperfect agents of clients, law is not recognized to be a *craft*. The concept of a craft implies a notion of tolerances: the point is to do the

job adequately and at the lowest cost in time or money. A potter who takes a year to make a pot may be a good artist; she is not a good craftsman. A lawyer who takes a year to write a brief may be an excellent scholar; she is not a good lawyer.

Law schools emphatically do not teach their students that one of the primary skills of a good lawyer is a finely-developed sense of tolerances. To the contrary, heavy emphasis is placed on "thoroughness": A law student is penalized severely for missing a denial of certiorari in a case citation or failing to produce perfectly proofread copy. It is considered virtuous to read every single case in an area; reading only a few or (worse yet) relying on secondary sources is disparaged. The prevailing ethos is reinforced by the institution of Law Review, the symbol of law school success, which makes a fetish out of the most nitpicking care in the research, editing, and presentation of articles and notes.

Students learn about tolerances, not through explicit law school instruction, but rather through figuring out how to "beat" the law school system by reading Emanuel law outlines, obtaining old syntheses of professors' courses, footnoting the "right" sorts of citations in written work, and so on. This may be an effective, if inadvertent, teaching method, but it conveys exactly the wrong message to the student—it says that giving the optimal amount of effort to a legal task is some sort of shady corner-cutting, rather than the proper attitude for a lawyer to take if she is sincerely interested in the best interests of her client.

The second major shortcoming of contemporary curricula is their failure to cover vast and important areas of contemporary legal practice. Students emerge from law school with *some* capacity, probably, to write a contract or try a personal injury case. But the legal practices of many law school graduates have nothing to do with these matters. Large firm practice today is highly specialized. Practitioners are immensely skilled in sophisticated, technical areas of the law. And their practices tend to be highly industry-specific—they deal almost exclusively with clients in a single, broad line of business.

Most law school graduates are woefully unprepared for this type of practice. The sad fact is that even minimally adequate courses are simply not offered in most specialized areas. Thousands of lawyers can and do spend their entire professional lives in areas such as energy law, international trade, telecommunications, insurance regulation, banking, utilities, pension and health benefit plans, transportation, housing, water and air pollution, welfare, and charitable organiza-

tions. Yet rare indeed is the law school that offers courses in more than a few of these important areas.[4]

Most of these areas, of course, implicate concepts that are taught in the traditional course curriculum—antitrust, corporations, contracts, etc. Thus it could be argued that these courses are essentially unnecessary, or at least expendable, because they simply recombine elements that are taught elsewhere. But the fact is that all these courses present unique and important issues. To the extent that they put together concepts learned elsewhere, they do so in new ways that add greatly to the student's understanding.

It could also be argued that law schools are simply not equipped to teach in these areas. Such courses require that professors become familiar with arcane, complex, and rapidly evolving legal landscapes—areas a practitioner could spend a life in and not know fully. A law school—especially a smaller law school—simply does not have the luxury of allowing professors to specialize this heavily. Also, these courses may demand a knowledge of specific industries that is outside the competence of some law professors or law libraries.

But not being able to specialize in everything doesn't mean a law school can't specialize in a *few* things. More of these courses could be offered; and students might be encouraged to take advanced courses at other schools if a particular course were not available at their institution. And the industry-specific problem could be alleviated in many cases by closer association between law and business schools.

In the final analysis, both of these problems—the lack of adequate attention to lawyers as a social institution and the failure to offer important substantive courses—probably stem from the same root cause: the gulf between law schools and law practice. Most law professors either know nothing of practice or have forgotten what they once knew. The professoriat tends to dismiss the practicing bar as narrow and unreflective; the bar, for its part, thinks of law teachers as unrealistic and uninformed.[5] My proposal, I suppose, is partly intended to narrow this gulf between theory and practice—to achieve, in some small measure, what Duncan Kennedy might call "praxis."

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[4] The specialized areas where we do have courses—securities, labor law, etc.—were mostly introduced by the New Deal era generation of professors. But new courses have not been created as other statutory areas of the law have become important in legal practice.

[5] This is not, of course, to say that individual practitioners or lawyers do not maintain close contacts with the other side of the profession.

February 13, 1984

Mr. Kevin H. Marino
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Dear Mr. Marino:

I have just read Professor Duncan Kennedy's paper, "The Political Significance of the Structure of the Law School Curriculum," in your vol.14, no.1. I realize that it is simply a replaying of Professor Kennedy's talk at the University of Victoria, and that it does not have the fine tuning one might expect in a serious law review article. Some of the paper's theses are, however, related to imprecise representations of the past and seem to me to be doubtfully worthy of an "intellectual movement" the Kennedy paper is meant to advance.

I will start with administrative law. Professor Kennedy asserted at the bottom of page 3 that it "came into existence as a result of the creation of the regulatory welfare state. There was no meaningful body of administrative law in any of the English-speaking countries until the creation of the welfare state, with its public assistance programs and its manifold different modes of intervention in economic life." This is inexact. As shown in the opening pages of my book *Federal Administrative Proceedings*, published in 1941, the use of administrative officers has been a response to "felt governmental problems" ever since 1789, when the Constitution became operative.

Professor Kennedy then declared that Constitutional Law as an academic discipline emerged only "as part of the critique of right-wing invalidation of leftist social legislation, and is sustained today by nostalgia for the Warren Court." Of course when the author said that to a Canadian audience he may have intended merely to elicit some chuckles and perhaps he even succeeded in doing so. In any case, he was badly mistaken concerning the facts. Constitutional Law as an academic discipline long antedated *Lochner v. New York* and its ilk.

Professor Kennedy may have been right in saying that no courses in taxation were taught until after the First World War. He was wrong, though, in saying that no courses in Administrative Law existed until "between about 1930 and about 1950." Here at Columbia Frank Goodnow was a teacher of major consequence in that particular area of the law for thirty years before he became president of Johns Hopkins University in 1914. At Chicago Ernst Freund was

writing and teaching before World War I, let alone before 1930. I have small doubt that an historian of legal education, which I am not, would provide other illustrations; I mention only two of the persons who were influential not only in my youth, but before my youth. When Administrative Law received expanded attention—and I do agree that that occurred after the subject became headline news because of some judges' resistance to somewhat innovative statutes—it was not taught or propagated "openly and explicitly by young liberal faculty members who thought that they were an enormously important part of the curriculum for the simple reason that they embodied the new wave of social legislation." I was one of the "young liberal faculty members" of that period and I daresay that my Administrative Law teaching materials, first published in 1940, had something to do with the shape given the course in some law schools other than my own. I do not think that I regarded myself as an "enormously important part of the curriculum," and assuredly not for the reason Professor Kennedy stated. I thought Administrative Law was important then (and still do think it) because persons outside the government are significantly affected by determinations of both an adjudicatory and rulemaking and general policy nature made by administrators rather than by judges, who had previously been the major focus of attention of legal educators. I believe that the administrative *process* was and is worthy of study; and I think so wholly without reference to the particular subject matters or the particular policy emphases that may be involved.

The Kennedy paper sometimes makes points by the sparkling nature of its assertions rather than by accuracy of revelation. Thus, for example, page 6 declares that "the legal process orientation was initially designed to show that there is a role for each legal institution in a global overall plan to maximize welfare through reform, and that the courts should cooperate with rather than obstruct that program." I do not think that that was at all the point of the Hart & Sacks *Legal Process Materials* (1958), said by Professor Kennedy to be the "best known formulation." Professors Henry Hart and Albert Sacks were showing that sometimes one uses an axe and sometimes a knife and sometimes scissors to cut; one can not choose the most suitable cutting instrument or the most suitable "legal process" without first understanding the task to be accomplished and the materials at hand. The authors to whom Professor Kennedy referred talked about such things as means of resolving controversies about the quality of perishable commodities, an issue that might embroil a shipper and a consignee in angry dispute. Was a suit at law the best instrument that man could design for dealing with that sort of conflict, or could something else be

done? That has nothing at all to do, in my estimation, with "a global overall plan to maximize welfare through reform" nor does it necessarily result in the conclusion that "courts should cooperate with rather than obstruct . . . ." Very possibly, analysis of a problem in the Hart and Sacks style would show that the courts were precisely the best organ fitted to inquiring and deciding. Messrs. Hart and Sacks were simply showing that one needed to be concerned with function, not with a preconceived "right way of doing things." That is very different from the Kennedy characterization.

In sum, Professor Kennedy's assertedly descriptive comments and characterizations corresponded only slightly with what I have myself observed. In the law school I know best, I doubt that any classroom emphasizes "the memorization of a list of rules," as the paper asserts happens elsewhere. The prevailing purpose of modern legal education is to help students learn how to learn. Good students tend also to be skeptical and non-accepting persons, ready to reexamine presuppositions, their own as well as others'. Acceptance of ex cathedra pronouncements (or their academic equivalents) is indeed rare. Indoctrination is not easily accomplished, even if attempted, because a law school worthy of notice embraces too broad a range of opinions (or, of opinionated persons, both professors and students) to make for declaration or acceptance of the "one true faith." Not invariably, but for the most part, law professors seek to identify what is relevant to a problem under consideration and to describe realistically, rather than hyperbolically or whimsically, the available factual information. Few of those whom I happen to know and know to be generally well regarded are hermeneuticists or phenomenologists who, as Professor Kennedy says, engage in a "high-flown, mystificatory *Dance of the Big Words* designed more to establish the choreographer's prestige than to communicate with the audience." His vision of what legal education and legal educators should be may be right, but I believe he misperceives what they in fact are.

Sincerely yours,

s/s Walter Gellhorn

WG/cl

cc: Professor Kennedy

Duncan Kennedy replies:

I was way off in asserting that there were no courses in Administrative Law until the 1930's, and I'm grateful to Professor Gellhorn for pointing that out. But I don't think his other criticisms hold water.

Of course, I agree that our government has used administrative officers ever since 1789. The question I was addressing was the emergence of what could rightfully be called a major body of law, an interrelated complex of doctrines occupying a significant spot in the corpus juris of a given period. Administrative law didn't achieve that status in this country until the 20th century. *See generally* W. Chase, *The American Law School & The Rise of Administrative Government* 23-59 (1982).

I say in the paper that young administrative law teachers in the 1930's thought their subject important at least in part because it dealt with the legal form of the New Deal legislation that was supposed to transform American laissez-faire capitalism. It would be hard to read Louis Jaffe's article, *Law Making By Private Groups*, 51 Harv. L. Rev. 201 (1937), for example, without getting this impression.

A reader of Professor Gellhorn's 1935 article, *Contracts and Public Policy*, 35 Colum. L. Rev. 679, gets a quite different sense of the author than that conveyed in the bloodless portrait he paints of himself in his letter. See also W. Chase, *supra*, at 136-47, and especially 145 (discussing Professor Gellhorn's article, *Stone on Administrative Law*, 46 Colum. L. Rev. 735 (1946)).

I think Professor Gellhorn is wrong about the origins of constitutional law as an academic subject. Before the 1890's, there were a few large black letter treatises—Story, Rawle, Sedgwick, Cooley—written mostly by judges and practitioners, but no extensive scholarly literature, let alone a body of books. The subject was debated in judicial opinions. In the '90's, law teachers began to create a periodical literature, epitomized by Thayer's pathbreaking article on judicial review, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 129 (1893) (citing almost exclusively to opinions). This literature centered from the beginning on the role of the federal courts in relation to social legislation and labor injunctions.

As for the legal process orientation, a reader of pages 110 to 206 of the Hart & Sacks materials, H. Hart & A. Sacks, *The Legal Process* 110-206 (tent. ed. 1958), will find ample support for my assertion that those authors were concerned to define dovetailing roles for different legal institutions, with a view to welfare maximization.

The notion that the "prevailing purpose of modern legal education is to help students learn how to learn," along with the corollaries Professor Gellhorn draws about what legal education is like, strike me as pious hopes rather than as descriptions of reality. Would that it were so.