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1967-1968 Problems In Legal Education

(A Survey)

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[*Editor's Note:* Six problems in legal education, much discussed recently, were posed by the Editors of this Review to leading legal educators.

These questions were and are frankly difficult and controversial, but their answers are important to our system of legal education and to our society. Capsule answers given by these distinguished legal educators are believed to be interesting and significant. Each is a personal rather than a representative opinion.

Brief answers such as these, of course, are not expected to be, nor do they pretend to be, complete or profound. Their purpose is to indicate succinctly the approach of outstanding American "opinion makers" to difficult policy problems of legal education.]

I. Student Participation in Law School Administration?

The Problem: As in colleges and universities generally, though as yet to a lesser extent, law students are showing signs of desire to participate in law school policy and decision-making, such as faculty committee work (e.g., as to curriculum, faculty recruitment and promotion, etc.), and also to have student representation at faculty meetings in appropriate problem-discussions (or, at least a student observer present).

Question: Should law student participation in administrative and faculty decision and policy making be encouraged or discouraged?

Answers:

Prof. Cavers: Having provided for student government affairs, a law school would do well also to facilitate the exchange of views between

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faculty and students on matters of law school policy and to secure students' opinions relevant to decisions to be made by the faculty. With respect to most questions, I do not think student participation in, or observation of, meetings of the faculty or its committees would help the faculty in the discharge of its responsibilities. In dealing with some matters concerning which students would provide useful information, a faculty or faculty committee would find it advantageous to have student representatives present and solicit their views—but not their votes.

Dean Drinan: Law student participation in decision making of the administration and faculty should definitely be encouraged. All points of view from law students should be heard before important decisions are made.

Dean Forrester: Consultation with students can be relevant and helpful. I doubt the wisdom, however, of formal and fixed arrangements. These may degenerate into collective bargaining sessions with negative impact on the school's atmosphere and on faculty student relations.

Dean Grabb: Encouraged to a limited extent. We have student "advisors" to several committees who are asked for their views, but have no vote.

Dean Kelso: A law student should be reinforced for any responsible action that tends to improve the quality of his legal education. Of course, the most productive student behavior is total commitment to study and research. However, a student can also improve his lawyering skills and benefit his school if—individually and through student organizations—he asks perceptive questions about school policies, programs, or administration, and if he helps identify problems, provides pertinent information, suggests solutions, or offers constructive criticism. Such activity may catalyze useful student-faculty committees and might lead to beneficial student involvement in decision and policy making.

However, granting students a controlling voice in the management of a law school would not be wise. Since students attend school for such a short span of years, they could neither perceive nor be expected to accept the immediate responsibility that naturally attends a faculty or decanal position.

Prof. Malone: Certainly there should be afforded adequate means for expression of student point of view. The mechanisms appropriate for this are varied, but a definite effective scheme of some sort, including confrontation between students and faculty, should be provided.

Prof. Mentschikoff: Discouraged except for indications and suggestions as to areas of interest for course and seminar work. Faculty waxes and wanes in popularity—students come and go, are incompetent to judge research qualifications and course content.

Dean Miller: No—law schools are arms of the legal profession—students are not yet members of the profession—faculty people should work with students, but there can be no constitution for student participation.

Dean Oleck: Yes. Students often can offer helpful information and assistance, especially as to probable student attitudes for or against particular proposals. They should be heard, though they should not be permitted to vote, except to a very limited extent if at all. Student-observer presence at faculty meetings, except when subjects not properly their concern are being discussed, is salutary for both the students and the faculty.

Dean Pollak: Administrative and faculty consultation with law students on matters of important educational policy should, in my judgment, be strongly encouraged. I do not, however, think that students should be drawn into the decision-making process itself. Faculty members are selected both to teach and to assume responsibility for making decisions about e.g., the scope of the curriculum and the composition of the faculty (and student body). Students are not selected for admission to Law School (or indeed any other part of the University) with an eye to their readiness to decide, *and to take responsibility for deciding*, complex questions of educational policy in a field in which they are, by definition, apprentices. In this setting, it would be inappropriate to force such responsibility upon students. But, to repeat, this is not to say that student advice should not be solicited and given great weight by those who do bear institutional responsibility.

II. Law School Autonomy?

The Problem: Dictatorial domination over a law school by its parent university is said to occur, now and then, in various places, though most people say that a law school must be autonomous to *some* extent. Some say that university affiliation is indispensable in order to have a quality law school, even at the price of all autonomy. Others say that law schools are better professional schools when not dominated by parent universities. Some say that complete independence is the best course for law, medical, or other professional schools. But some people sneer at unaffiliated professional schools, while others sneer at graduate professional schools that accept subordination to other departments of the university.

Question: Should law schools be university affiliated and dominated, affiliated but autonomous, or independent?

Answers:

Prof. Cavers: I believe law schools should be university-affiliated and autonomous with respect to matters of special consequence to their educational programs. The dichotomy, “dominated” versus “autonomous,”

conceals the complexity of the relationship embodied in affiliation. To determine in a given case what would constitute an optimum relationship requires knowledge of the situation in the particular university involved.

Dean Drinan: I doubt if anyone would say that a law school should be "dominated" by a university. A law school should have the resources of other social scientists available to the faculty and students of the law school. An affiliation with the university or other center of learning should be arranged so that these services are available.

Dean Forrester: University affiliation affords a law school the proper setting and environment. It is nearly essential. Domination is not a problem normally, in a good university.

Dean Grabb: University affiliated. I don't know what "dominated" means.

Dean Kelso: The question cannot be given a categorical answer. A law school, whether university-affiliated or not, should be of such nature and so located that it attracts a sufficiently large number of qualified students and competent faculty members. Large cities are desirable locations because clinical observation and experiences are increasingly becoming important phases of legal education; and problems arising in cities are—and will remain—in the forefront of the law. However, regardless of whether it is in a large city, a law school usually needs university affiliation to be assured of an adequate financial base. Also, it should be useful to have available nearby a supply of experts in related disciplines, a large non-legal library, a computer, and related features of a center for learning and research.

Prof. Malone: *Affiliated*, but autonomous. Traditional legal education can be justifiably criticized on the ground of its isolation from the current of modern life in general, and other social disciplines in particular. A full opportunity for cooperation with sociology, political science, psychology, etc., must be possible.

Prof. Mentschikoff: None of your alternatives. Law schools should be an integral part of a university with freedom as to curriculum and faculty designations, but with close and intimate relations to departments, schools and individual faculty members working in the same areas of interest—joint research and teaching are frequently desirable.

Dean Miller: Not necessarily—it's good—but if the law school has resources, it can do a good job on its own. These cross fertilization possibilities are overrated.

Dean Oleck: University-affiliation for a law school is a sacred cow kind of thing, not really necessary for a graduate-professional school; viz., the medical schools that do well without university affiliation. Affiliation, with great autonomy, is a desirable arrangement, but not a necessity.

Needed and/or wanted assistance from other disciplines can be had without affiliation. Financial support from the university is desirable, in addition to the law school's own tuition and endowment income, but the law school's own alumni and friends are its main supporters in the last analysis. Law schools sometimes have been oppressed rather than supported by their affiliated universities.

Dean Pollak: A law school which hopes to be a major center of legal education ought to be affiliated with a university; and the reasons for this become insistently more evident as the horizons of legal education are progressively enlarged. A law school which lacks the opportunity for close connections with strong Departments of Economics, History, Psychology, Sociology, etc., is gravely handicapped. A law faculty worth its salt will not tolerate domination of the school by University authority. A good law faculty will not be enervated by, it will draw strength from, university affiliation.

III. Academic Credit for Clinical Work?

The Problem: Many lawyers urge that law schooling include substantial training of the practical "how-to" or "clinical" type, such as O.E.O. or Legal Aid Society service, for academic credit, in order to produce lawyers who are "street-wise" practitioners as well as theorists. Others argue that the time available to law schools hardly suffices for analytical and theoretical (i.e., as compared with "practical") training, and that practical experience should be picked up in clerking after completion of law school.

Question: Should law schooling include substantial "practical" training, for academic credit, or not for credit, or little, or not at all?

Answers:

Prof. Cavers: If a school provides sufficient supervision and guidance to the student participants in clinical work, and if adequate opportunity is afforded them to do meaningful legal work, so as to make their experience instructive and its evaluation possible, I think a modest amount of academic credit for the work would be desirable.

Dean Drinan: There is no clear answer whether credit should or should not be given for the co-curricular courses mentioned in this question. It may be that some of these courses are not susceptible to academic credit since it is very difficult to grade an individual performance.

Dean Forrester: Some practical training is desirable, with or without credit, but it should not be overdone. Theory and analysis come first.

Dean Grabb: We give three credits for two full years in Legal Aid Clinic and have a nine credit Practice-Evidence course with two mock trials.

Dean Kelso: Training in legal theory is the most practical thing a law school can do. However, many students will learn more theory if they

can fit it into a framework which, at least in part, is provided by active participation in the administration or creation of law—whether it be on law review, in a legal aid clinic, or as clerk to a judge. If such activity is properly supervised and evaluated, academic credit is entirely appropriate and may help stimulate work of high quality.

Prof. Malone: Legal education should afford students an opportunity to see human problems at first hand. The goal is not primarily the mastery of practical techniques, but the gaining of a realistic perspective on the role of the lawyer. Allowance of credit cannot be answered definitively in a sentence.

Prof. Mentschikoff: Clinical work and seminars are desirable—if the broad theoretical foundations for decent practice are articulated as the work is done—credit can then be given. Pure “service” type work should be extra-curricular as is moot court and law review.

Dean Miller: There should be a lot of it in every course—but we have to rely on the instructor’s experiences to make their class presentations real—much practical training is a waste of time—I am thinking of mock trials—and leg work for lawyers.

Dean Oleck: Of course, and for some reasonable amount of credit (e.g., five or six semester hours). This clinical work is as valuable to a lawyer as is the equivalent in medical schools. Yet, the theoretical and analytical training must remain the greatest part of law schooling, by far; never again will the lawyer-to-be have such time and facilities for broad training in the conceptual sense.

Dean Pollak: Room should be made for clinical training in the law school curriculum, and appropriate academic credit given for it. But it is vital for the faculty to see to it that clinical training is not mere “how-to-do-it” activity; the training ought to be under faculty supervision, even if at times that supervision has to take place at a substantial distance, so that there can be assurance that the training a student receives will insistently compel him to ask himself the wider relevance of the day-to-day problems he is tackling.

IV. Training in Use of Law Computers?

The Problem: Some people say that programming of computerized legal knowledge, and research through use of computer banks, will be the norms in law practice in years to come. Therefore, they urge training now, in the law schools, in the skills of use of computers for legal research. Others say that computers are merely another (and expensive and impractical) form of law library and card catalog-index. They say that study of computer skills by law students is a waste of time.

Question: Should computer-use for legal research be taught by law schools?

Answers:

Prof. Cavers: If an effective technique is developed for using computers in legal research, it will surely employ methods that can be picked up by users who are well trained in law without any extensive additional instruction. More important for future law school programs is the question whether the multiplying uses of the computer by lawyers' clients will not require law schools to devise ways to throw light on the mysteries of computer operations as they affect lawyers' problems.

Dean Drinan: At least all of the information now available with regard to the use of computers for legal research should in general be given to law students.

Dean Forrester: Yes, if the instructor is competent and has enough to say.

Dean Grabb: I personally doubt it.

Dean Kelso: Computer use need not be taught by all law schools as Torts and Contracts are. However, in a few years everywhere, as in a few places today, the computer will play a prominent role in legal practice, research, and education. Thus, some law schools should actively be engaged in preparing men to fill the predictable needs for lawyers and legal scholars who can work creatively with these useful, flexible, and increasingly indispensable components of American and world technology.

Prof. Malone: Not regularly at this stage of our progress. Some such techniques might be offered as electives to those who are interested.

Prof. Mentschikoff: No. When research needs require computer use, students and faculty can pick up the needed knowledge easily.

Dean Miller: I don't know enough about computers to have an opinion.

Dean Oleck: I say that computers (in legal research and/or practice) still are baloney—and the heck with them, as far as training in law schools is concerned.

Dean Pollak: I don't feel that computer-use for legal research has thus far reached a level of sophisticated utility high enough so as to entitle it to take its place—very likely at substantial cost, both in time and dollars—within the confines of the regular law school curriculum. On the other hand, it is of course clear that computers have become indispensable instruments for empirical research in a variety of allied social science disciplines; and, to the extent that a law student's advanced research takes him into areas where techniques of this kind will advance his work, it is certainly desirable that the law school try to find ways to facilitate the training and funding of those of their students for whom these research techniques become important.

V. Interdisciplinary Courses in Law School?

The Problem: Some law teachers say that legal training should include training in appropriate subjects other than law, when a student begins to specialize in some area of special interest. Thus, the law student's program might include high-level courses in other disciplines, such as behavioral sciences for a student specializing in criminal law, and these courses would be taken in other than the law division of the university, or even at another school entirely. Others say that the law schools hardly have enough time to teach the fundamentals of law alone, without surrendering time for concurrent non-law studies.

Question: Should law schools encourage, discourage, or tolerate inclusion of studies in other disciplines while the student is in law school?

Answers:

Prof. Cavers: Ordinarily, teaching in a discipline other than law must, to be effective for law school purposes, be keyed into law courses or seminars. This calls for adjustments both in the instruction in the other discipline and in the relevant law courses or seminars. When this can be successfully done—and it is very difficult—I believe the time required by the work in the other field can be spared from the conventional law curriculum. However, answers to the questions for any particular law school, how much and in what areas interdisciplinary work should be encouraged should turn on the extent of its ability to provide instruction of the kind and quality needed and on the needs of the practice which its students are likely to be entering.

Dean Drinan: Law schools should definitely encourage the inclusion of studies in the other social sciences in law school. After all it was Justice Brandeis who said that the lawyer without an adequate knowledge of economics or social sciences may well turn out to be a public enemy.

Dean Forrester: Such studies should be encouraged. The scope and vision of legal education should be broadened.

Dean Grabb: We encourage a small amount.

Dean Kelso: The creation and administration of law is guided by facts and considerations whose pertinent characteristics have frequently been more systematically studied by non-lawyers than by lawyers. Comprehension of this fact and communication with non-legal specialists would be considerably enhanced if law students studied disciplines in addition to law. Many different formats are appropriate: bring a non-lawyer to the faculty; have jointly taught courses; invite non-legal students to law classes; mix law students in other departments; etc.

Prof. Malone: See my response to II.

Prof. Mentschikoff: The issue seems to me to be more one of having integrated courses in the law school, or joint seminars and courses and the like. The problem is to educate the faculty so that the full scope of the problems looked at from a legal frame are known to the faculty member involved.

Dean Miller: (Unanswered).

Dean Oleck: Consideration of all relevant knowledge, from every relevant discipline, is an essential part of analysis of most legal problems and determination of most legal policies and provisions. Study of all relevant matters should accompany law study insofar as it does not unduly cut into the time available for study of the law as such.

Dean Pollak: Encourage.

VI. Weighted Voting by Faculty Members?

The Problem: Many educators say that faculty voting, like democratic voting generally, should be based on "one man—one vote." Others say that tenured faculty men's votes should count for more than those of new teachers who have just joined the faculty. Some say that part-time law teachers should have at least fractional votes, after a reasonable period of service; while others say that they should have no vote at all. [This question is important to students as well as to faculty—*viz:* in a vote on a petition for readmission, or etc.]

Question: Should faculty men's votes be weighted according to tenure, length of service, part-time or full-time status, etc.?

Answers:

Prof. Cavers: Matters of appointments and promotions and those occasional questions of serious consequence to the long-term prospects of a law school may properly be left to the votes of its faculty members having tenure. On lesser matters, however, I think the votes of all members of the instructional staff should be invited and counted on a one-man, one-vote basis. Incidentally, I had never run into the notion of weighted voting in faculty voting before reading this question. I should view with some dismay serving on a faculty which operated on that basis.

Dean Drinan: No.

Dean Forrester: Generally speaking—one man-one vote, except on special questions, such as tenure.

Dean Grabb: We vote one vote per regular faculty (except tenure faculty alone votes on tenure). I think this is right.

Dean Kelso: To devise a system of weighted voting would be to place undue emphasis on the vote as a significant step in policy making and those phases of administration which go before the faculty. An issue

whose outcome might be influenced by a weighted rather than a one-man, one-vote system is not really ready for a vote or should not have been presented to the faculty at all.

Most part-time teachers do not have sufficient day-to-day contact with school affairs to vote intelligently as team members. Nor have I ever heard a part-time teacher express a desire to have the responsibility of a vote.

Prof. Malone: (Unanswered).

Prof. Mentschikoff: No, as to full time; part-time should not vote at all; non-tenure should be viewed advisory on new faculty appointments or tenure, if counted at all.

Dean Miller: (Unanswered).

Dean Oleck: No. If a man is good enough to be on the full-time faculty he should have a vote equal to other full-time men, except as to granting of tenure, which should be by vote of tenured men only, or at least by men with a few years of experience on the full-time faculty. Part-time men are not sufficiently involved with day-to-day school problems to warrant any voting power on the faculty, in the view of practically all professional legal educators.

Dean Pollak: Members of the teaching faculty who devote all or the bulk of their professional time to the work of the law school should have equality of voting rights—with respect to whatever issues are, under the statutes of the university, within the faculty's jurisdiction—without regard to tenure or seniority.