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1966-1967 Issues in Legal Education

(A Survey)

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[Editor's Note: Six issues 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. LAW SCHOOL EXPANSION?

The Problem: I. Expand or Restrict Law School Admissions?

Increased population and increased numbers of applicants for admission to law schools are facts of life today. Some legal educators say that this primarily means that law schools should become more selective in admissions. Others say that this primarily requires the law schools to expand. Still others say that it calls

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for balanced increase both in selective standards and in numbers admitted.

Question: What should be the basic policy of law schools in meeting the problem of increased numbers of applicants for admission?

Answers:

Prof. Cavers: "I do not see a need for an over-all national policy with respect to law school admissions. I believe each school should consider the question in the light of the need of the community, state, or region it serves for the kind of education it can provide, the effect that increasing its enrollment would have on the quality of legal education it is providing, and the level of competence of the students it is now admitting."

Dean Cowan: "Our increasing population and the increasing number of applicants for admission to law schools present law schools with both a tremendous opportunity and challenge. On one hand, these developments do provide the schools with the opportunity for raising standards. On the other, they demand facilities adequate for educating not only the practicing lawyers needed by society, but also those persons who can use a legal education effectively in areas other than the law. I believe the state law schools have a very specific obligation to expand along with the population and application increases without an undue increase in admissions standards. Private institutions, on the other hand, may well decide that they do not have the same obligation and are therefore in a position to raise their admission standards drastically."

Prof. Gellhorn: "An individual school should not expand numerically beyond what it regards as most efficiently suited to its facilities and teaching methods. But law schools collectively have considerable room for expansion while at the same time raising admission standards. We should not worry about 'overcrowding the profession.'"

Dean Hervey: "It depends upon the objective of the school. If the over-all enrollment be limited by the governing authorities, there should be greater emphasis on selective admissions. If the over-all number be not fixed, then it would appear that a school should strive for a balanced increase in admission standards and number admitted."

Dean Keeton: "At least $\frac{1}{3}$ of the applicants for admission to most law schools ought to be rejected. So law schools should become more selective, but there should also be expansion, and the increased number of applicants will make it possible to do both."

Prof. Kelso: "Because of (a) increasing complexity in social, economic and political affairs, (b) gradual recognition that every man has a right to legal counsel, and (c) the evolution of values

calling for ever more governmental implementation, our population growth is exceeded by the need for lawyers to fill traditional roles, new positions in government and business, and society's need for policy makers, managers, organizers, and expounders. Each law school should determine how it can most effectively contribute to the nature and volume of society's needs in the geographic areas (where) its graduates probably will center their careers. The A.B.A., the A.A.L.S., and the schools should cooperate in intensified efforts to gather information that will help each school reach the best decision. I believe that a few existing law schools should rapidly expand; some should become much more selective; and most should balance. A few new law schools should be created which use a moderately selective admissions policy. Possibly one or two highly selective and very experimental law schools should also be created."

Prof. Malone: "Balanced increase both in selective standards and in numbers admitted."

Prof. McDougal: "Number of schools should be increased."

Dean Oleck: "Basic policy for most law schools should be to raise standards when opportunity arises. Secondarily, expansion must be appropriate to the needs of the community and of the legal profession. Balanced increase in selective standards and in numbers admitted should be the policy of both publicly and privately supported schools."

Dean Ritchie: "Law schools should be increasingly selective in admissions and some schools (particularly State University Schools) should expand."

Dean Stapleton: "Selective standards should not be made so high as to exclude the average student who will perform competently and well in the practice of law, 85 per cent of which is pure drudgery, the main requisites being integrity, diligence, and average capacity. Granted that the standards of a particular school are met, the number of applicants admitted should have some relation to increased population and the demands of government agencies and private business."

Dean Young: "Admission standards should remain high. Schools capable of expanding without loss of quality should expand and new law schools should be started so that all well qualified applicants have an opportunity for a legal education."

II. REFUGE FROM DRAFT?

The Problem: II. Refuge from Military Draft?

Some law students and applicants for admission to law schools today frankly admit that a major factor in their pursuit of legal education is avoidance of draft into military service. Some people say that such an admission, or revelation of that purpose, should result in exclusion of the applicant or student. Others say that such a value (or duty, or character, or etc.) judgment is not a proper basis for law school rejection.

Question: What should be the attitude of law schools towards applicants or students whose prime purpose in pursuing law study is the avoidance of military service?

Answers:

Prof. Cavers: "I believe motivation is a relevant factor for a law school employing a selective admission system to consider where motivation can be reliably ascertained, and, in an otherwise questionable case, the lack of motivation on the part of an applicant who seeks to avoid the draft by law study might well be taken into account. However, I believe the basic problem which such applicants raise is the wisdom of our draft law. I do not believe law school offices are a suitable instrument for correcting inequities."

Dean Cowen: "I believe law schools have a basic obligation to those who are motivated toward the law as a profession or as training for other work. If an applicant's prime purpose in pursuing the study of law is the avoidance of military service, he is likely to make a poor student and a poorer lawyer. I therefore believe that the law schools are entitled to take motives into account when acting upon applications for admission."

Prof. Gellhorn: "Since added professional education enhances capacity for later public service, I see nothing reprehensible about a person's pursuing further studies in preference to military activity—so long as the option exists. Law schools have not been called upon to shape the nation's policy concerning compulsory entry into the armed forces. The United States has thus far chosen a selective service system instead of a universal service system. A young man does nothing discreditable when, instead of becoming a soldier, he becomes a law student."

Dean Hervey: "Not a matter of concern to the law school. Other motivations by other students may be equally deplorable, e.g., deferment of gainful employment."

Dean Keeton: "I do not believe there is any feasible way to make the investigation that would be required to make the findings of fact that would be necessary to distinguish between those whose motives are to avoid military service from others. No inquiry should be made as to this."

Prof. Kelso: "I have seen only scant evidence linking academic achievement or career performance with initial motivation or a student's 'prime purpose' in attending law school. Therefore, I think a law school should inquire into an applicant's attitude toward military service only if (a) government regulations legally required it, (b) the nation becomes so deeply involved in war that a desire to avoid military service would signal a substantial defect of character or judgment, or (c) the school must choose between applicants otherwise equally qualified and is casting about for some 'last straw' to assist in that decision."

Prof. Malone: "There can be no definite answer. How is a school to determine in advance the motive that underlies an application?"

Prof. McDougal: "Exclusion."

Dean Oleck: "If an applicant's prime purpose is actually admitted or proved to be the avoidance of (legal or moral) military or other obligations, that tells much about his character. Some applicants frankly admit such motivation. The fact that an applicant is one who deliberately evades his legal or moral obligations is pertinent in evaluating his application."

Dean Ritchie: "I doubt that our Admissions Committee would select a student who disclosed that his prime purpose in attending law school is to avoid military service. Certainly I would not accept him if I were the admissions officer."

Dean Stapleton: "As to those students already in law school, a contract has been entered into subject to academic competence and moral turpitude. Those students who, seeking to enroll, admit that their only interest in the study of law is avoidance of military service should be denied admission."

Dean Young: "For every one student who will admit entering school to avoid the draft there will be at least ten who will not. If the applicant is otherwise qualified his motive should be regarded as irrelevant."

III. FRAGMENTED CURRICULA?

The Problem: III. Fragmentation of Legal Education?

Some legal educators say that law school curricula now are becoming so replete with "special," "enrichment" and "peripheral" subjects that they do not sufficiently train the students in basic subjects. Others say that such increased range of choice is sound and healthy, and is an indication of improvement in legal education. Others want law training to be "integrated with" the social sciences, etc.

Question: Is American legal education too fragmented, not varied enough in range of subjects, or well balanced in range of subjects?

Answers:

Prof. Cavers: "It is quite impossible to generalize on the point raised by this question. The range and diversity of law school curricula are too great to permit one to do so. However, I think it plain that some schools take too narrow a view of their mission. Whether the curricula of schools with varied offerings result in an undue diffusion of student and faculty effort would require a school-by-school evaluation. I believe there is still much room for experimentation in law school curricula and teaching methods."

Dean Cowen: "In my judgment the law schools are responding well to the knowledge explosion. The increased range of choice is inevitable and because it is not likely that the length of required undergraduate law study will be increased substantially during the next several years it may well be that some sort of required continuing legal education will be necessary."

Prof. Gellhorn: "If, as the feller sez, the law is indeed a seamless web, what is peripheral? The importance of subject matter is over-estimated, in my opinion."

Dean Hervey: "By and large it appears that the range of subjects is fairly well balanced. Fragmentation to satisfy the desire of a particular teacher to instruct in a particular subject which intrigues him, or to aid the teacher in preparation of a case book or horn book, should be avoided. Moreover, the course offerings in all schools need not be the same. One of the blights in legal education has been the copy-cat proliferation of courses. All of the course offerings in a national law school need not be offered in a local or regional school."

Dean Keeton: "Small law schools should not attempt many 'special' courses but should be content with training students to think, talk and write as lawyers through basic courses. Large law schools can provide a varied program of special courses and seminars but only if students are required to satisfy a 'core' requirement of basic courses. Social science integration should be done largely by the law professor in regular law school courses."

Prof. Kelso: "The range of subjects actually taken by most American law students is not sufficiently varied. Law school bulletins describe almost identical first years. Further, over one-half of the advanced courses are found almost everywhere—and those which also appear on bar examinations usually get the heaviest enrollment."

"More law students should be dealing with complex legal and legal-social problems created by urbanization, racial relations, international affairs, the dynamics of institutional organization, management and planning, and overlapping value systems competing in a society increasingly dependent upon technological systems of men and machines."

"I hope curricular breakthroughs will result from (1) research on the nature of efficient teaching and on the basic skills of effective lawyering, and (2) a broadening of our jurisprudential perspective to include (a) 'legal prudence'—the study of legislative and administrative premises and processes and how they do and should interact with common law doctrines and the variables which influence judicial decisions, and (b) 'jurimetrics'—the study of how scientific methodology can be used by lawyers."

Prof. Malone: "There is no standard or average school. A healthy balance should be the answer."

Prof. McDougal: "Much too fragmented."

Dean Oleck: "Routine sameness is evident in the curricula of many law schools, though not in all. Today's (and tomorrow's) problems call for ever widening varieties of knowledge and training. Policy ought to be to add as much enrichment material as is possible without damaging the essential core material coverage."

Dean Ritchie: "I suppose this varies from school to school, but on the whole I think the contemporary curricula are reasonably well balanced."

Dean Stapleton: "The basic course in law is demanding enough to require at least two-thirds or more of the students' time in law school. Some states, e.g., Ohio, demand certification in basic subjects that take as much as 80 per cent to 85 per cent of the students' aggregate time. Enrichment courses are good, but should be offered only in relation to the underlying core, otherwise there will be a fragmentation that could be unhealthy."

Dean Young: "I do not believe legal education today is too 'fragmented,' which is sort of a loaded word. There is so much variation from school to school that it is impossible to generalize. The law is not static and additions to the curriculum are necessary and desirable as times change."

IV. NATIONAL BAR EXAM?

The Problem: IV. A National Bar Examination?

Some legal educators and bar examiners advocate adoption of a National Bar Examination, covering some core, basic areas of knowledge and skills, which would be required to be tested for by the same questions on bar examinations in all states. Others say that bar examinations should remain purely intra-state matters.

Question: Should a National Bar Examination be adopted?

Answers:

Prof. Cavers: "With the increasing quality of state bar examinations, the case for the National Bar Examination seems to me to be weakening, although the addition of a national examination on federal law might be useful. The state examination puts pressure on the candidate to engage in a systematic survey of the examining state's law. For law school graduates who have studied in law schools approaching law nationally, this is probably a salutary experience. Moreover, any attempt to implement the National Bar Examination idea would raise a number of difficult questions which the question does not permit one to explore."

Dean Cowen: "In my opinion no case has been made for the establishment of a National Bar Examination. I know of no one who claims that any substantial number of qualified persons are

being denied admission to various state bars under present practices, and if some states are admitting persons who ought not to be lawyers, the problems thus created are first and foremost those of the state's concern and should be handled there."

Prof. Gellhorn: "State bar examinations too often tend to be particularistic, testing one's momentary grasp of information rather than one's capacity to use it. A national examination would probably fall a good deal short of perfection, but it should be just about as good as the better state exams and far better than the worst."

Dean Hervey: "Yes—to test for legal skills and in the core, basic subjects which are common to all admitting jurisdictions. This is being made necessary because of the mobility of law school graduates and law students. Such a national bar examination should, however, make allowance for areas of law indigenous to particular admitting jurisdictions. Water and irrigation law, for example, is of importance in Western states but not in Maine or Rhode Island. Likewise with mineral law in some states and adjective law in each jurisdiction. A national bar examination might embrace 75% of the subjects on which applicant is examined."

Dean Keeton: "I agree with those who favor a National Bar Examination. The purpose of any bar examination should be to test the applicant's ability to think and write as a lawyer, and not to ascertain his knowledge and information about local law."

Prof. Kelso: "States should retain power to set standards for bar admission and to insist, if they wish, that applicants be tested on certain local doctrines. However, experience with the Law School Aptitude Test indicates that creating a well financed national bar examination service would produce more adequate appraisals of test objectives, more scientifically designed tests, and more uniform application of grading standards. Even if an examination were created and administered by a national testing service, each state could determine its own 'fail point,' just as the law schools do in deciding what significance to give an applicant's LSAT score."

Prof. Malone: "No."

Prof. McDougal: "Yes. State differences are much less than commonly supposed and the responsibility for an adequate bar can only be resolved as a national responsibility."

Dean Oleck: "Yes. Such a uniform national examination on basic subjects would tend to improve standards throughout the nation. It should cover the core material common to all states, such as federal law, contracts, torts, etc.; leaving to the examiners in each individual state plenty of latitude for dealing with law that is peculiar to (or specially important to) the particular state. A national committee might draft the national questions, leaving grading to the local bar examiners, who thus would be able to protect local values."

Dean Ritchie: "It seems to me ideally that a student would be admitted to practice in a state if he passed either a national or the state bar examination. I should be reluctant, however, to have a national examination supplant the state examination."

Dean Stapleton: "A National Bar Examination could well make the life of law school men easier, but inasmuch as the Supreme Courts of the several states have sole jurisdiction of who shall be admitted to the Bar in such state, and inasmuch as many states have particular legal areas for the practitioner which are not present in other states, in my opinion it would be presumptuous for law school men to press the matter."

Dean Young: "I see nothing to be gained from a National Bar Examination and some danger that something might be lost because of confining the curriculum."

V. J.D. DEGREE?

The Problem: V. J.D. or LL.B.?

Many legal educators urge that law schools, generally, adopt the J.D. Degree as the first degree in law for students who already hold a bachelor's degree. Others say that the LL.B. should be continued, generally, as the first degree in law.

Question: Should the J.D. or the LL.B., generally, be the first degree in law?

Answers:

Prof. Cavers: I believe the LL.B. should remain the first degree in law, although I share the annoyance of those who find that, in certain university and governmental contexts, the possessor of the LL.B. is disadvantaged relative to the possessor of the J.D. The cure for that would seem some educational work among the discriminators rather than an effort to play a letter game with them. Until clients start greeting their J.D. attorneys as 'Doctor,' the controversy over the J.D. will continue to strike me as much ado about not very much."

Dean Cowen: "Again I believe that no adequate case has been made for a change. If I were deciding on the first degree in law as an original proposition, I would probably choose the J.D. over the LL.B. But since the LL.B. has been firmly established for so many years, I think the burden of persuasion is on the advocates of change. So far I have not been convinced by their arguments."

Prof. Gellhorn: "I favor the J.D. as connoting professional education beyond the baccalaureate. Law schools that do not require that their entering students should have previously earned a bachelor's degree should continue to award the LL.B."

Dean Hervey: "The J.D. should be the first professional degree in law for those who hold a prior B.A. or B.S. degree. There is no less reason for conferring the professional doctorate of J.D."

upon such law school graduates than for conferring the professional doctorate of M.D. upon the medical school graduates or D.D.S. upon graduates of the dental schools."

Dean Keeton: "I do not consider this a very important question. I am reluctant to abandon the LL.B. as the first professional degree in law and I do not believe we need the doctorate label to get respectability and recognition as lawyers."

Prof. Kelso: "National uniformity in designating the first medical degree as M.D. has been of value to the medical profession. The same thing would be true for the legal profession. Since almost all law students now hold at least a bachelor's degree, must spend at least three years in law school, and usually must engage in a substantial amount of writing and research, Dean Hervey is quite right in recommending the J.D. as the first degree in law."

Prof. Malone: "I am slowly concluding that the J.D. is the answer, provided a bachelor's degree is a prerequisite to admission."

Prof. McDougal: "The J.D. degree. This would remove many discriminations against law graduates."

Dean Oleck: "The J.D. should be the first degree in law for those who already possess a bachelor's degree. Use of a mere 'bachelor's' degree downgrades the profession not only in the eyes of the public, but also in the minds (or subconscious) of lawyers themselves. A 'J.D.' from a good law school is just as hard to attain as a doctorate in other disciplines."

Dean Ritchie: "The J.D. for those students who hold a bachelor's degree when they enroll in law school."

Dean Stapleton: "Granted that the law candidate has an underlying Bachelor's Degree, the J.D. Degree as a first degree in law should certainly be awarded. As the first degree in law it is recognition of the work done at the graduate level. It secures certain financial benefits to a holder against one who has the LL.B., and with a constantly shrinking world, business-wise, the holder has a status symbol outside the United States which cannot be discounted."

Dean Young: "The trend is toward the J.D. and should continue until hopefully uniformity is reached. The LL.B. is an anachronism dating from the days when no pre-legal education was required to enter law school."

VI. GRADUATE PROGRAMS?

The Problem: VI. Continuing (Graduate) Legal Education:

Some say that only a few law schools, possessing special research libraries and faculty staffs, should offer LL.M. and S.J.D. Degrees. Others say that many law schools, especially in big cities, should offer Continuing Legal Education (and LL.M. Degree) Programs. Some say that bar associations rather than

law schools should offer C.L.E. courses; others argue to the contrary.

Question: What should be the policy of law schools regarding Continuing Legal Education and Graduate Degree programs?

Answers:

Prof. Cavers: "I believe the purposes of the Continuing Legal Education program tend to be—and probably should be—rather different from those of the full-time graduate programs at the relatively few law schools that offer them. Therefore, the question confronting a law school considering a C.L.E. program for an LL.M. degree is distinct from the question whether to initiate a full-time graduate program. I should suppose that a school could conduct a rather different and more ambitious C.L.E. program than could a bar association. Whether it should attempt to do so ought to depend not only on the quality of offerings it could provide but also on the effect of the activity on the quality of its LL.B. program."

Dean Cowens: "I feel emphatically that continuing legal education is a major responsibility of the law schools. This responsibility can be met in part through formal LL.M. degree programs and in part through non-credit courses, institutes and seminars. Research degree programs, on the other hand, present to my mind a different problem. This does require special library services and large faculties. Any school contemplating offering the S.J.D. degree ought first to give itself a very rigorous self-examination. There is, however, no reason why any school with adequate resources ought not to undertake such a program if it so desires."

Prof. Gellhorn: "The LL.M. and S.J.D. degrees should, in my judgment, be the product of genuine graduate work on a full-time basis, with a large component of research (which presupposes massive library resources and a faculty both able and willing to advise, supervise, and evaluate). Continuing legal education programs have value, too, of course; but they should not be confused with academic graduate work. If a program of courses and lectures for practitioners needs a degree for psychological or other reasons, the degree should be manufactured to fit the need—e.g., M.L. (meaning Master of Laws). A small law school with an over-strained faculty should concentrate on its main work of teaching undergraduate law students and should not be burdened by a continuing legal education program as well."

Dean Hervey: "The law schools should offer courses in continuing legal education but not necessarily leading to a degree. Only those schools which have adequate resources should undertake instruction leading to degrees beyond the first professional degree in law."

Dean Keeton: "Nearly every law school should participate in the efforts of the organized bar to provide Continuing Legal Education. However, the offering of graduate programs is a separate issue, and most law schools should concentrate on doing an outstanding job of undergraduate training."

Prof. Kelso: Lawyers should view continuing legal education as part of their professional career. Resources for developing educational programs are centered in the law schools. Thus, law schools should aggressively promote continuing legal education. Of course this effort might well be enhanced if carried on in cooperation with bar associations.

"If a particular program requires a substantial amount of work and the students must submit a number of writings or tests for professional evaluation, it makes sense to acknowledge and encourage this effort with a degree, such as LL.M.

"The S.J.D. degree has traditionally been reserved for teachers and legal scholars, acknowledging an original contribution to law or jurisprudence, based upon a substantial amount of research. It is my impression that only a few schools have resources adequate to maintain S.J.D. programs of high quality."

Prof. Malone: "Graduate training proper should be restricted to a few exceptionally equipped schools. Post admission training should be distinguished and the participant awarded a 'fellowship' certificate. Many schools could engage in this latter activity."

Prof. McDougal: "Many schools should offer graduate programs and all should assume responsibility for the quality of continuing legal education."

Dean Oleck: "Every law school that is able to do so should offer Continuing Legal Education, and almost every lawyer should take C.L.E. courses. Law schools should offer LL.M. programs if able to do so and if there is demand for such programs in their communities. In a pluralistic society such as ours, the quality LL.M. degree (or the poor one) will find its own level of acceptance among lawyers and law educators. Continuing Legal Education is best treated as distinct from graduate degree work, which should have a strong research quality. S.J.D. work, which is research work above all, should be left to those schools which have the faculties and facilities for it."

Dean Ritchie: "Law schools should offer continuing legal education programs of their own and should cooperate with the organized bar in offering co-sponsored continuing legal education programs, but I see no reason why degrees should be awarded to those taking these programs. In my view only schools equipped with research libraries and other facilities for research should award graduate degrees."

Dean Stapleton: "Certainly the law schools should offer continuing legal education which may or may not lead to the LL.M. Degree. By reason of staff and library facilities the schools

by and large are better equipped to do this than Bar Associations or practicing law institutions.

"The S.J. D. Degree, however, should be offered only by those schools where there can be no question concerning staff available and possibility of research in depth."

Dean Young: "Law schools with adequate faculty and facilities should participate in both continuing legal education and graduate degree programs."