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Make Room For the Students: Governance of the Law School

John J. Regan*

SHOULD STUDENTS SHARE THE POWER? The issue of student participation in the governance of colleges and universities concerns virtually every institution of higher education in the country. Confrontations at some universities have focused on this issue as one of the prime causes of student discontent. Other institutions have plunged quickly into investigations and discussions of the question to head off such disturbances. This issue may well outlive those substantive issues of the '60's which provoked it in the first place—the Vietnam War, the draft, military recruitment, and the university-military complex.

The proposition that students should share in university governance has recently received two impressive endorsements. The President's Commission on Student Unrest recommended: "University governance systems should be reformed to increase participation of students and faculty in the formulation of university policies that affect them."¹ The American Association of University Professors declared in its Draft Statement on Student Participation in College and University Government: "The statement... is based on the premise that students as members of the academic community... have a distinctive role which... qualifies them to share in the exercise of responsible authority on campus."²

Law schools have shared concern over this issue, although for the most part their student constituencies tend to be less radical than their undergraduate counterparts elsewhere in the university. Most law schools have made adaptations in policy and structure to accommodate the student movement and to make the faculty more aware of student opinions.³ Professor Morris, of University of Washington, describes a wide variety of such structures, ranging from institutions where students are full voting members at law school faculty meetings to schools where students are permitted only to voice complaints through a student bar association.⁴ Just as the practice differs widely, so does the rationale or

* B.A., Mary Immaculate College; M.A., St. John's University; J.D., Columbia Law School; Ford Urban Law Fellow; member of the New York City Bar.


³ The issue may well be to what extent, not whether, there should be student participation. Bischoff, The Student and Law School Governance, 18 Clev-Mar. L. Rev. 234 (1969).

the ideal guiding the practice. Dean Vernon X. Miller, a distinguished legal educator, remarked, as recently as 1968, that student participation should be discouraged because law schools are arms of the legal professions, of which students are not yet members. Yet in 1969, Andrew Dolan, a Columbia Law School student, told the Association of American Law Schools Convention that “ten years from now we may have a session on the faculty role in law school governance.”

Some Preliminary Points

We shall deal with the question of student participation in law school governance on its merits and at the level of principle, rather than as a concession in the face of a student demonstration or confrontation. We shall analyze its potential contribution to legal education instead of treating it as the unwelcome result of any uneasy truce worked out to buy peace for a harassed administration or faculty.

Student participation at law schools cannot be considered in isolation from the role students do or should play in university governance. Nearly all law schools today are affiliated with universities of varying sizes and complexity. The parent university may already have come to grips with the issue and have an established policy requiring some form of student role in decision-making throughout the schools or departments of the university. Indeed, many of those who propose some type of student participation in university governance point out that the most meaningful and successful student involvement occurs at the departmental or professional school level. They believe that university or college level bodies (e.g., a university senate) perform a necessary and desirable function when they open their membership rolls to students. Only a handful of students, however, can take part in such university-wide governance, and communications between the student representatives and their constituencies tend to be tenuous. Moreover, the masses of non-participating students frequently do not sense that they are any closer to having a real influence on university policy than they had before such representation was permitted. The decisions which most directly affect students in their daily academic lives are those made at the department level. The solution is participation at the lower levels in the hierarchy of decision-making. Thus the law school faculty may not be master of its own fate on this issue. It may find that university

policy, or at least university welfare, may dictate that law students assume an active role in the governance of the law school. A further note of realism will be injected into this discussion if we consider the type of student who will be entering the law school in the '70's. In increasing numbers he will be a student who has become accustomed to having a say or even a vote in the decisions that affect his education. He will have experienced participation in his undergraduate college and perhaps in his high school days. He will have learned that his ideas may make a significant contribution to the policy-making process of an institution, and he will have seen firsthand the terrible fallability of faculty judgments and statements about policy. He will therefore expect a larger role in law school governance.

Why Do Students Want Power?

The drive toward student power has its roots in campus unrest. This unrest is not a single or uniform thing, according to the President's Commission on Campus Unrest, but the sum of thousands of individual value choices which students as individuals make. These choices or commitments are powerfully affected by the conditions under which students live, and thus these conditions are the contributing causes of campus unrest. The Commission identified five such causes: (1) the pressing problems of American society, particularly the war in Southeast Asia and the conditions of minority groups; (2) the changing status and attitudes of youth in America; (3) the distinctive character of the American university during the post-war period; (4) an escalating spiral of reaction to student protest from public opinion and an escalating spiral of violence; and (5) broad evolutionary changes occurring in the culture and structure of modern Western society.

Other versions of student motives touch one or another of these themes. Robert Powell, a student leader, sees the issues of racism, poverty and war at the root of student unrest. He believes that the liberal

8 Paul Woodring, in a review of a new book, "Should Students Share the Power?" by Earl McGrath, summarizes McGrath's reporting of the results of a poll instituted by the American Academy of Arts and Sciences in 1969. "The responses from 875 colleges and universities indicate that while most of them have not yet moved very far; the trend is clearly in the direction of a larger voice for students. Of the institutions responding, 88.3% have admitted students to membership on at least one policy-making body. Only 20% admit them to board meetings, and only 2.7% of the boards give them a vote; but, in the kinds of policy-making for which the faculty usually is responsible, the student role is substantially greater. About one institution in four now has students on its executive committees, and nearly half (most of them small liberal arts colleges) include students as voting members on curriculum committees. However, only 3.3% gives students voting membership on the committees that govern faculty selection, promotion, and tenure." See Woodring, Student Power, 53 Saturday Rev. at 74 (Nov. 21, 1970).

9 Scranton Commission, supra n. 1 at 27, 28.

10 Powell, Student Power and the Student Role in Institutional Governance, 55 Liberal Education at 24 (1969).
administrator or faculty member on the campus has misused the technique of persuasion through dialogue and, therefore, only a student share in decision-making power will again set the university on the right track. Nevitt Sanford believes that authoritarianism, generated in childhood and perpetuated in schools and colleges by teachers who demand obedience and respect, not because they deserve it, but merely because of the positions they occupy, is the root cause of student unrest in the university. J. Otis Cochran, a black law student, told the 1969 AALS Convention that blacks and students alike could not believe in institutions which were unresponsive to their needs by categorically denying significant participation in the decisions of those institutions.

The common theme running through these comments is the revolution in values which has occurred in the minds of many young people, coupled with a high degree of self-confidence in their ability to put these values into practice if only given a chance. We might call it a "new moralism," and like all moralisms it easily becomes the inspiration for a crusade. This crusade may well prove irresistible.

Theories of Student Participation

We shall discuss three basic models for student participation in law school governance: the democratic model, the aristocratic model, and the community or shared authority model.

The democratic model requires that certain features inherent in a democracy be identified in the law school. Prof. Morris singles out two conditions essential for a democracy to function as an appropriate and effective form of government:

1. a definite community of some kind so that one can clearly identify who is and who is not a member of that community having a right to participate in it, and
2. a complete equality of all members, each of whom has an equal voice in community affairs because of his equality of status.

To these we might add a third condition: the purpose of the democracy is the well-being of all members of the democratic society. Lewy and Rothman explain the basis for this equality:

For purposes of casting their votes, all citizens, despite their manifest inequalities in possessions or intellectual endowment, are equal. The theoretical assumption is that such a democratically elected and politically accountable government will best advance the interests and well-being of all members of society. In Aristotle's

11 Sanford, The Campus Crisis in Authority, 51 Educational Record at 112 (1968).
12 Cochran, supra n. 6 at 63.
13 Bloustein, The New Student and His Role in American Colleges, 54 Liberal Education 345 (1968).
14 Morris, supra n. 4 at 138.
classical formulation, the cook is the person best able to prepare the meal but the guests are the best judges of the quality of the feast. Or again, the wearer of the shoe, not the shoemaker, is the person who must decide whether the shoe pinches.\textsuperscript{15}

Can the democratic model described above be applied to the university? It seems not. The purpose of the university is specialized and its primary mission is the advancement and dissemination of knowledge for the benefit of its students as well as the community at large. This purpose requires skill, knowledge and experience in those who impart knowledge, and therefore, two distinct roles are readily discernible in those who are members of the university. In vastly oversimplified terms, the faculty teaches and the students learn. These distinctive roles are not artificially imposed by some arbitrary policy within the society but flow from the very nature of the university's mission. This differentiation of role produces an inherent inequality between faculty and students in achieving the university's purpose. This is not to say that the faculty alone can fulfill this purpose, for students teach the faculty and one another, and faculty learn from students and one another as well. The point is rather that the primary role of each participant in the university society is inherently different and therefore productive of a fundamental inequality.

Morris advances other reasons for rejecting the democratic model less convincing than those given above.\textsuperscript{16} The democratic principle of one-man, one-vote leads to the outnumbering of faculty by students and therefore to student control of the law school. He also points to the fact that the law school is not one community but many communities—faculty, graduate students, foreign students, students in first, second and third year classes, students in special programs, law review, legal aid societies, living groups—as reasons for rejecting the democratic principle. Each of these communities ought to have the power to decide its own affairs, and the various decisions ought to be reached democratically within each community. But together they do not make up a common community and therefore the democratic process is inappropriate in the amalgam of these communities—the law school.

These arguments are unacceptable. It is true that the one-man, one-vote principle would lead logically to student control of the law school, but no serious advocate of student participation has applied democratic theory with such literalness. After constructing and then demolishing this straw man, Professor Morris turns logic on its head by concluding that only a consultative and not a voting role is appropriate for students. This proves too much, for it fails to explore the possibility of other voting formulas which would give students a share of power. Finally, in

\textsuperscript{15} Lewy and Rothman, On Student Power, 56 AAUP Bulletin at 279, 280 (1970).

\textsuperscript{16} Morris, supra n. 4 at 139.
his second argument, Morris never defines the term “community” and therefore he can prove almost anything he wants by selecting examples of communities which only he can define. The point is not that the law school is not a community, but rather that it is a type of community which, because of its purpose, cannot be governed by literal application of the democratic model to it.

Another rationale similar to the democratic model is the idea that students ought to make those decisions that affect them, or a derivative formulation, that students should be given the widest possible latitude to regulate their own affairs. These views prove more rhetorical than helpful. They assume that one can easily identify subject areas of concern and assign them readily to respective jurisdictions within a school or university. Thus, it is argued, students should decide matters pertaining to student discipline, dormitories, and activities. What is forgotten is that the content of courses, degree requirements, grades, selection of faculty and salary scales of faculty, to name only a few, affect the students directly and are of more importance to their lives in an academic community than sponsoring a film festival or organizing a rock concert.

Morris misses the point in his refutation of this rationale. He argues that law school faculty, even though affected by decisions in other parts of the university to hire or give tenure to colleagues, appropriately should not have a vote in these decisions “because the decisions to hire or give tenure are rightly made by persons who are especially competent, by academic peers who through long study and experience are especially qualified in the discipline.” He ignores the fact that such personnel decisions may well be subject to approval by other university-wide committees or a Board of Trustees which may well include as members persons who would not be considered academic peers of the faculty member under consideration. Instead of conceding that distinct and separate areas of jurisdiction exist, he would be on safer ground to take the opposite tack proposed above and reject the “effect” rationale on the grounds that, since we are all affected by virtually everything that happens in a university, some other rationale for involvement in governance must be formulated.

The second model for student participation in governance is the aristocratic model. This model accepts many of the points made in opposition to the democratic model discussed above. Building on distribution of roles between faculty and students in the university community, it emphasizes the inherent inequality of the two roles. Morris, for example, has no doubt that “it is properly for the faculty and only for

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17 Foote, Mayer and Associates, The Culture of the University: Governance and Education, supra n. 7 at 79.
18 Morris, supra n. 4 at 139.
the faculty . . . to make decisions in academic affairs.” 19 Two reasons support this conclusion: (1) the faculty uniquely has the greater competence on academic questions; (2) the faculty has by state or university law certain institutional responsibilities which are incurred solely because of their status as faculty members and which cannot be shared or discharged.

Donald Cavers takes essentially the same position: “With respect to most questions, I do not think student participation, or observations of, meetings of the faculty or its committees would help the faculty in the discharge of its responsibilities.” 20 Other participants in this survey voice similar opinions. 21 Kelso would give students no controlling voice in management because of their short time in attendance at school. Pollak would not make students a part of a decision-making process since they have no responsibility for decision-making. Miller argues in the same vein that law schools are arms of the legal profession, of which students are not yet members.

But many of those subscribing to the aristocratic model are quick to make it a benevolent aristocracy by adding suggestions of greater or lesser intensity that students should be consulted and open communications between students and faculty be maintained. Few are as narrow as Mentschikoff, who maintains that student participation of any kind should be discouraged except for indications and suggestions as to areas of interest for course and seminar work. 22 Many take the position of Morris who opts for the principle of “consultation and accommodation” as a proper and sure guide when resolving problems attendant to admitting students to law school decision-making. 23 Thus students should be heard in academic areas such as curriculum, effective teaching, examinations and grading but faculty control must not be abandoned. He proposes detailed structures for admitting students to non-voting membership on certain committees and for holding open meetings with students. The idea is to “get together,” “to hear things out,” to “bridge the communications gap.”

D. Bruce Johnstone finds three major weaknesses in this model. 24 First, it is predicated upon a peculiarly American refusal to accept the existence of a permanent, fundamental disagreement among reasonable men. Conflict is viewed as essentially soluble if only the parties could get together, open their minds and act with reason, whereas in fact the conflict may be fundamental and insoluble. A second weakness is that

19 Id. at 140.
20 Cavers, supra n. 5.
21 Id.
22 Mentschikoff, supra n. 5 at 190.
23 Morris, supra n. 4 at 143.
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this consultative role may fail to convey to any but a handful of student leaders and political activists a true sense of participation and influence. The great acquiescent middle of the student body (the silent majority) is rarely heard. The third and most fundamental weakness is its ambivalence on matters of rights and authority. It is grounded on the noblesse of the faculty and administration and thus it is quickly exposed for what it is, symbolic power. Hendricks compares it to the earlier stages of the civil rights movement, when the nation accepted the movement as a means of altering the "system." Later, however, when blacks began to probe beneath the surface of white vested interests, the system could not, or would not, relinquish power in response to persuasion. The language of black protest then changed from persuasion to force, and distrust of any accommodation with established interests developed among black leaders. This might well be the outcome of the aristocratic model.

A derivative form of the aristocratic model, as Johnstone describes it, vests students "through some duly elected representative body with a quasi-legal veto power or even complete jurisdiction over certain matters—subject, of course, to the ultimate discretion of a governing body or a state legislature." At the law school level they may be elected in small numbers to certain committees as voting members, usually excepting faculty appointments and promotions committees. But, as Johnstone notes, the very nature of higher education precludes nearly all matters of academic policy from student authority. This exclusion has reasonable bases both in our traditional conception of the educational process and in the very nature of formal institutions. The first basis assumes that a student has not yet attained the cognitive, attitudinal or vocational goals for which education exists and therefore is not in a position to know the knowledge that is of most worth or the means by which this knowledge is to be gained. Thus the ultimate authority over what and how he is to learn must reside with those who are older and wiser. The second basis argues that the power to alter severely either the goals or procedures of an educational institution cannot be placed in the hands of students who would be immune from the consequences of that exercise of power and who might jeopardize the education of future students.

One solution to this dilemma has been to grant students virtual sovereignty within narrowly prescribed domains, which poses no threat either to the institution as a corporate person or to the members (as opposed to the clients) of the institution. Thus Morris sees no problem

26 Johnstone, supra n. 24 at 209.
27 Id.
in granting students decision-making power over matters concerning the students' own private life, such as dress and length of hair and parietal regulations.\textsuperscript{28} Nor does he object to application of the one-man, one-vote principle equally to students and faculty alike in matters of a non-academic nature affecting the entire law school community, such as parking. The usual vehicle for implementing student governance over such matters is a student government or student senate.

Often, however, student government becomes a "sandbox" activity of students playing with trivial matters.\textsuperscript{29} The planning of social functions or inviting speakers to the campus or chartering student organizations is not that type of student participation which students consider meaningful. Its effect is to exclude the student from the most basic sources of dissatisfaction: the content of the curriculum and the quality of the teaching. The result is to reinforce student powerlessness in academic matters which "may engender a tragic cynicism toward student government and even the democratic process."\textsuperscript{30}

Moreover, the award of one or two voting seats on an academic committee is not necessarily a solution. One may ask whether it constitutes meaningful student power or mere tokenism, and one may fear that it may polarize the students and faculty or administration into hostile camps.

The third model is the community or shared authority model. The university is viewed as a fellowship of autonomous human beings in which the members are taught how to seek truth.\textsuperscript{31} It rests on the assumption that its members are able to define and gradually to accept a system of values for themselves. Learning is not an isolated classroom experience but a sustained, continuous, public experience. The goal of a university is "the creation of a community in which students educate themselves and attain intellectual autonomy."\textsuperscript{32}

If the university environment values the student as an individual, Foote and Mayer argue, then it demonstrates this respect by soliciting his participation in significant policy-making for the community. They believe that students should share the responsibility for developing innovations in the curriculum, for evaluating the success of the entire program, and for devising the indices most appropriate for measuring and assessing a student's individual growth.

John Long, a student, described this same ideal to the AALS delegates:

\textsuperscript{28} Morris, \textit{supra} n. 4 at 142.
\textsuperscript{29} Hodgkinson, \textit{Students and as Intellectual Community}, 49 Educational Record at 398, 403 (1968).
\textsuperscript{30} Johnstone, \textit{supra} n. 24 at 211.
\textsuperscript{31} Foote, Mayer, and Associates, \textit{supra} n. 7 at 80-81; The Draft Statement on Student Participation of the AAUP, seems to rest on this model, \textit{supra} n. 2.
\textsuperscript{32} Id. at 84.
Students and teachers alike . . . are all in that building for the same reason, we are all attending those classes for the same reason, and . . . we are trying to prepare ourselves to do something to make the world a little bit better, by preparing ourselves to be the best attorneys.  

He saw full interaction of faculty and students in faculty committees and meetings and in the general governance of the law school as fostering "a true legal community, a common effort toward learning and knowledge."  

The community model is a philosophy or perhaps an attitude of mind rather than a program. Its two key concepts—the student as an individual who counts and the educational process as essentially self-motivating and self-executing—have a personalist, egalitarian quality which reflects the movement in society at large toward equality of opportunity and individuality amid mass conformity. Perhaps this is an ideal which has been lost in the modern university and needs to be restated and reformulated. But if the model be long on ideals, it is terribly short on practice. It fails to recognize that factionalism and power are major realities in contemporary higher education. Much effort and experimentation will be necessary to translate the ideal into a workable program which actually involves faculty and students in the governance of educational institutions.  

Each of these three models tends to be an overstatement or an exaggeration. It singles out one or two characteristics of the university or law school and constructs a theory of governance on those characteristics. But in pursuing these isolated features to their logical conclusions, it neglects other characteristics and the result is a distorted educational society or, what is worse, a discontented school.  

Perhaps the conclusion to be drawn from this discussion is that there is no single model or theoretical basis for student participation, and therefore the problem is best approached on pragmatic, experimental grounds. We shall attempt in the following pages to explore some of the practical implications of these various approaches.  

Scope and Structure of Student Participation  

The literature on the topic of student participation is filled with discussions about the distinction between academic and non-academic policy. Examples such as course content on the one hand, and visiting

33 Long, supra n. 6 at 54.  
34 Id. at 56.  
36 Cowen, Student Participation in Law School Administration, 13 J. Legal Ed. at 214 (1960) for an example of a highly traditional approach to the question based on the academic-non-academic distinction.
speaker programs on the other, are given to illustrate how various aspects of governance can be categorized and then parceled out to the respective jurisdictions of faculty or students.

This neat distinction oversimplifies the nature of many college activities. It implies a judgment that many of these activities are trivial or irrelevant to the primary educational mission of the school but are tolerated as necessary adjuncts of student life and because students happen to be interested in them. Implicit is the judgment that such matters have little or no educational value and therefore can be safely left to the students. This view thus tends to confine the educational or academic work of an institution to the classroom and thereby to overlook the educational impact which many out-of-classroom activities have on students. Student organizations, law reviews, and visiting speaker programs, to name the obvious examples, form an important, though admittedly secondary part of the total education provided by a law school. We believe, therefore, that the distinction between academic and non-academic matters is, for the most part, worthless. We suggest instead that virtually all law school-sponsored programs be considered as academic in nature but with varying degrees of academic content.

If everything that happens in a law school is academic, then the problem becomes one of outlining the scope and dimensions of joint faculty and student involvement in all these activities. It is with this principle in mind that we shall explore the implications of the three models described above.

The democratic model, taken literally, leads to some form of proportional representation on all committees and governing bodies in the law school, but students would constitute the majority membership of all such bodies. The aristocratic model, on the other hand, would confine student participation to some mixture of token voting membership on some committees, non-voting representation on others, and no membership on a few.

The community model would appear to offer the greatest potential for providing meaningful participation for all. Its obvious implication is that all areas of law school governance should be open to all members of the law school community. Students would be admitted as equals to curriculum and personnel committees and even to faculty meetings. But this is not to say that they should be present as a majority or in equal numbers with the faculty. There are varying degrees of expertise, interest, continuity, and stake in the outcome which different members of this "community" bring to these bodies. Experienced faculty, for example, bring a far richer background to curriculum matters than do students, and therefore faculty might well constitute a substantial majority of a curriculum committee. But students can also contribute significantly to this committee's deliberations as the consumers of the product delivered
in the classroom and as citizens and future attorneys concerned about the values latent in the law school curriculum. Students might bring to such a committee a sensitivity to societal problems, such as the poor or the environment or the cities, instead of the more traditional law school concerns about power and wealth in society.\footnote{Taylor, Wealth, Poverty and Social Change: A Suggestion for a Balanced Curriculum, 22 J. Legal Ed. 227 (1969).}

This line of thought demands a role for students in faculty personnel committees with jurisdiction over appointment, promotion, and tenure. Most institutions have drawn the line here, however, and have refused to admit students to a membership role on this committee. Interests strongly conflict here. On the one hand, students have a definite stake in personnel decisions. They are the beneficiaries of the faculty member's teaching efforts. They are perhaps the most qualified members of the law school community to evaluate him in this respect because of their regular exposure to him in the classroom, particularly when one considers the traditional reluctance of faculty colleagues to audit another colleague's classes. Schwartz states the case in this fashion:

Dull lectures, perfunctory examinations, papers graded without substantive comment, lack of classroom discussion, inaccessibility of the professor, all these rank much higher on a list of student gripes than complaints that an English professor chose to teach Hamlet rather than King Lear in a Shakespeare course, or that a political scientist was a behavioralist rather than a traditionalist. Student Course and Teacher Evaluations are more critiques for teaching than they are proposals for curricular revision. The medium outweighs the message.\footnote{Schwartz, Student Power—In Response to the Questions, as cited in “The Future Academic Community,” at 62 (1969).}

But other factors must be considered. Students are usually not in a position to judge a professor's scholarly or professional activities outside the classroom. Moreover, the appointments process is highly sensitive. Professor Dick Howard sees student involvement in it as raising problems of academic freedom, politicization of the appointment system and material hindrances to recruitment of faculty.\footnote{Howard, supra n. 35 at 914-5.} One might also ask whether students will maintain the confidentiality of information about the faculty.

Howard's solution to this dilemma is for a law school to find informal rather than institutionalized means for obtaining student opinion on teaching ability of faculty. The effectiveness of such an approach, however, is open to question. Informal methods may provide insufficient, or what is worse, misleading information about a professor, and erroneous judgments may result from reliance upon it. Such methods also have less "visibility" in student eyes than more formal procedures and...
may therefore be treated as gestures by the faculty and of no significant consequence in the evaluative process.

The question of confidentiality is not easily answered. One may argue that law students are as capable of keeping secrets as other adults, and yet one may envisage enormous social pressures on elected student representatives to justify their actions by disclosure of confidential information.

Some experimentation with a formal role for students, such as committee membership, appears to be desirable.

As for activities or committees with a strong student orientation, the same principles indicate that faculty should participate but to a lesser extent than students. The mix of need for continuity of policy, stake in the outcome and expertise is different and therefore a different ratio of faculty-student collaboration is called for. But, as long as these activities can be called educational at all, we believe faculty ought to be involved in them to some extent.

What has been said regarding the role of students in committees extends equally to student participation in general faculty meetings. The community concept of the law school appears to require a significant student part in the general meeting. The irony is that, in some universities, students are voting members of the university senate but are not permitted even to attend the law school's faculty meeting. Many schools have sidestepped the issue by establishing a student senate with jurisdiction over "student affairs." The illusion is hopefully created that the student senate has parallel jurisdiction with the faculty assembly and thus a bicameral system has been produced. The reality, however, is only another form of the aristocratic model described above and is subject to the same criticisms. It certainly does not deceive the students.

Howard describes some of the arrangements which law schools are now trying:

A common system is to allow students who are members of a joint faculty-student committee to attend faculty meetings to participate in, but not vote in, discussions of reports or recommendations coming out of the committee on which they sit. Another approach is to allow certain students, ex officio or selected on some other basis, to attend meetings regularly, but again without vote. Whatever the arrangement, one invariable qualification is the reservation by the law faculty of the right to call executive sessions.40

Howard's chief concern about admitting students to faculty meetings is the broad range of topics treated at such meetings and the need for candid and confidential discussion of them. He contrasts the law school meeting, where personnel matters are discussed, with meetings of undergraduate faculties which typically treat of curriculum and academic

40 Id. at 918.
standards and leave personnel matters to departments and deans, where presumably students are kept out. One may question Howard's impressions of the undergraduate faculty's decision-making process and the student's role in it. One might also ask why students should be excluded from anything but a consultative role over all matters at law school faculty meetings if only personnel matters are the real concern. This position says, in effect, that students may share in the formulation of recommendations at the committee level in certain areas, but they cannot play a significant part in the decision-making process, the vote at a faculty meeting.

We have tried to avoid fixing numbers or ratios for membership on faculty and students on various bodies. The twin extremes of token representation at the one end or a representation exceeding potential contribution to the body's work at the other end are to be avoided. Nor do we advocate equal representation of faculty and students as the proper solution. Howard's reminders to "keep it simple" and avoid a preoccupation with governance are well taken. Each institution will have to work out its own formula in the light of its own traditions, resources, interests and responsibilities.

Some Practical Problems

There are many practical problems associated with implementing these principles.

The initial problem is representation. Two operative principles might be considered in devising a program in this area: (1) as many different students as possible ought to be involved in the decision-making process; (2) their constituency, the student body, ought to sense that it has the power to choose its representatives. Thus Howard argues that students themselves ought to determine the method of selection. He would not permit a direct, popular election, however, since this method tends to politicize the selection process and thereby detract from the objectives of a law school.

This raises the question of the "representativeness" of the representatives. Lewy and Rothman believe that students with special emotional needs or a particular axe to grind come to control student government. Dolan, on the other hand, believes this is a non-issue, or at least an irrelevant one. For him it smacks of political talk about the "silent majority," although he is not clear which of the several possible inferences he is drawing from this remark. In any event, he argues that "the

41 Id. at 910-11.
42 Id. at 917-18.
43 Lewy and Rothman, supra n. 15 at 281.
44 Dolan, supra n. 6 at 78-79.
vanguard of social change hardly ever comes about through the majority of representative people."

But the question of "representativeness" should not be rejected so lightly. Perhaps the answer is to challenge the assumptions of those who raise it by a student referendum on the issue of student participation in governance. An affirmative vote would certainly strengthen the case for an important student role at the particular institution, while a negative vote might well call for only consultation as the appropriate part for students there.

A related question is that of student apathy. To a certain extent this issue may be a "chicken or egg" problem. Foote and Mayer thus describe the dilemma: 

\[\text{[student] participation is a necessary spark for educational reinvigoration, but meaningful participation can hardly take place without such reinvigoration.}\]

Lewy and Rothman note that,

in most universities, whether in the United States or abroad, only a very limited segment of the student body votes regularly. In a recent hotly contested election at the University of Texas less than one third of the eligible students turned out to vote and the story is the same elsewhere.

But the story is not always the same elsewhere. Approximately 70 per cent of the students at Columbia Law School voted in the Fall, 1970, election for a student senator. Different conclusions, however, may be drawn from these facts. Lewy and Rothman argue that the student majority's failure to participate where the opportunity is offered means that there should be no student representation in governance, while Foote and Mayer reason to the contrary that "the indifference of a majority should (not) serve as an excuse for excluding from the decision-making process the ideas and talents of those who are civic-minded enough to want to offer them."

Bloc voting of student representatives is also raised as a problem. This may be a phenomenon in the early phases of student participation or on certain issues, but maturity in and experience with a role in governance will diminish this tendency. This spectre of a student faction also fails to realize that many issues do not break down very easily into pro-student or pro-faculty sides and therefore blocs simply do not emerge.

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45 Foote, Mayer, and Associates, supra n. 7 at 92.
46 Lewy and Rothman, supra n. 15 at 281.
48 Lewy and Rothman, supra n. 15 at 281.
49 Foote, Mayer, and Associates, supra n. 7 at 92.
50 Dolan, supra n. 6 at 80.
Dolan raises the question of student cowardice:

Will the students that sit on the committee having the advantages of information not brought to the attention of the majority, and if they find out that their preconceived notion does not accord with the facts, will students vote against what is perhaps a clamoring popular issue in the law school if they are convinced of the merits, or will they succumb to the majority prejudice on the particular issue and their peer group status pressures? 51

He sees this as a problem not peculiar to students and one in which the electorate, as in other contexts, will provide the counter pressure of questioning and publicity.

Foote and Mayer's advice is appropriate here:

1. It will be very difficult to devise methods for getting those students who are concerned onto appropriate committees.

2. Only long-term evaluation of the results of participatory experiments will have much significance, for no matter what selection methods are devised there will be repeated instances in which student committees or the students placed in joint committee roles will be uninterested, or awed into silence, or truant, or ignorantly bellicose. (Similarly, there will be instances in which students will find their faculty counterparts uninterested, or overawed into silence, or truant, or obdurantly complacent.)

3. The only course of action that holds out some hope of mitigating these problems is to open up genuine channels for students, to encourage development of student skills, and to persevere with patience when the results do not measure up to expectations. Self-government has never been justified on grounds of its superior efficiency or because it is foolproof. 52

Conclusion

Student participation in the governance of the law school, regardless of its rationale or scope, is an idea whose day has arrived. Like most new ideas with practical applications, its full dimensions will be perceived only through experimentation and adaptation to the circumstances of each institution. What is probably needed most at this stage in the development of the principle is to avoid the doctrinaire approach which emphasizes quotas and structure but which may easily stifle the natural growth of the concept. Both faculty and students will best help it grow to maturity by doing it with as little self-consciousness as possible rather than merely talking about it.

51 Id.
52 Foote, Mayer, and Associates, supra n. 7 at 93-4.