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1970 Problems in Legal Education

(A Survey)

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[*Editor's Note:* Five problems in legal education, much discussed recently, were posed by the Editors of this Review to a number of administrative figures in the law school world.

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 concerned legal education administrators 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 some law school administrative "opinion makers" to difficult policy problems of legal education.]

I. Non-Profit Status as a Criterion for Approval of Law Schools.

The Problem: It has been proposed by some that, for a law school to gain ABA approval, it *must* demonstrate that it is non-profit in its organization and operation. However, there has been a court decision stating that profit making is not fatal to accreditation of colleges.

Question: Which view do you feel should prevail, and why?

Answers:

Assoc. Dean Bauman: I do not believe that profit making in the operation of the law school should be the test for determining accreditation.

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The test should be whether the school offers sound, well-developed, high-quality legal education.

Assoc. Dean Bice: Profit is not necessarily connected to qualities which ought to bear on accreditation.

Asst. Dean Brody: Non-profit. The profit motive may motivate directors to make sacrifices in quality of education in order to show a profit.

Dean Christopher: Non-profit.

Dean Cox: I do not think that the question whether a law school makes a profit should be made pertinent to its accreditation. For this view to prevail, it would be necessary to have objective, absolute standards of accreditation for all schools. This would greatly improve most of those now accredited.

Commandant Crawford: I feel that a school operated for profit would have to have a product to "sell." A law school can provide two salable things: (1) a diploma, and (2) coaching for a bar exam. A diploma mill definitely should not be accredited. A coaching school should be scrutinized. It should be accredited if its graduates have learned *law*, not a collection of black letter magic formulae which admits them to the bar but not to any real understanding.

Dean Cribbet: I favor the view that a law school seeking ABA approval should demonstrate that it is non-profit in its organization and operation. I feel that the needs of legal education are so great and their resources so slim that it makes little sense to have a law school operate as a money-making project for anyone. If the tuition proceeds are more than needed for the cost of education, the balance should be used to improve the quality of the program.

Dean Gaynor: Non-profit. Experience with proprietary law schools indicates that profit rather than academic standards tends to be the principal consideration.

Dean Heidenreich: No private individual should make money from the operation of any educational institution. Student tuition and fees should be used exclusively for the education of the students involved or those to follow them. This does not mean that a "non-profit" institution must spend all of its income every year; however, private financial gain by any individual undermines educational standards.

Dean Pedrick: Although, in theory, a profit-seeking law school might satisfy appropriate accreditation requirements, it is quite unlikely, in my opinion, that this would be so. If, however, the court decisions on the point require abandonment of the insistence on the non-profit character of the school, I am sure the accreditation authorities will accept the "law" in good grace.

Dean Pye: I am aware that there are some people who think that profit-making law schools should be eligible for accreditation. I have some sympathy with this view, but I think that in order to protect the standards of legal education, it would then be necessary to be considerably more specific about accreditation requirements concerning faculty salaries, libraries, financial aid, and similar matters. I am aware of no profit-making operation that spends as much of its resources as it should for these purposes.

Dean Sammis: I agree with the point of view which requires non-profit status as a criterion for approval of law schools. While there is absolutely nothing wrong with making a profit in the business field it does present one overwhelming danger when applied to educational institutions. When each student represents so many dollars in the bank it is difficult to resist the desire to take as many students as possible regardless of qualifications. Also, there is a corresponding temptation to retain students who have indicated their lack of ability. There are other reasons such as the temptation not to spend money on the library and on faculty salaries and the like, but I assume that the question concerns schools in which these criteria are properly met. I am not saying that all schools operated for profit yield to the temptations I have mentioned, but the temptation is there and I believe it to be detrimental.

Asst. to Dean, Shaneyfelt: I do not believe that non-profit status should be essential for ABA approval.

Dean Zacharias: To justify the name of an educational institution, particularly so if it enjoys any degree of tax exemption, a school should not be operated as a "commercial" enterprise for profit. I approve the ABA standard in this respect.

II. Classes of Standards for Admission to Law Schools.

The Problem: Hitherto, it uniformly has been said that law schools should maintain stringent admission requirements for all applicants, and also stiff graduation requirements. Recently, some people have advocated lower or different requirements for black or disadvantaged candidates, perhaps even leading to open admissions, but stringent graduation requirements. Others say that disadvantaged applicants should be helped through, and into bar membership, by any reasonably adequate rules.

Question: Which view do you favor, and why?

Answers:

Assoc. Dean Bauman: I am in the process of re-evaluating my views on this question. Perhaps we should develop different types of law schools;

some to maintain stringent admission requirements with stiff graduation standards to prepare students for legal practice demanding the highest qualifications; and others with lower standards and less stringent requirements to prepare students for a more pedestrian practice.

Assoc. Dean Bice: While admissions standards may take account of deficiencies in former education, law school graduation requirements ought to be the same for all students.

Asst. Dean Brody: I am opposed to lower admission requirements or graduation requirements based on racial or ethnic factors. Besides being discrimination in reverse, it tends to perpetuate feelings of "differentness" and incompetence of minority students. There are many minority students here who qualified for admission along with others. Some are doing quite well, some average, some not so well. But they are doing it on their own and are proud of it.

Dean Christopher: I favor a single standard of admission to the bar for all. I also favor special scholarships and tutoring help for disadvantaged students.

Dean Cox: I do not believe that either admission or graduation requirements should be stringent as I understand that term in its present use in this regard.

Commandant Crawford: The criterion for graduation from any law school should be: is the student sufficiently trained to be able to do a good job as a lawyer for his clients? In evaluating the entrance test results of black and other disadvantaged students, it is important to remember that these results are often depressed by (1) poor elementary and secondary education, and (2) the language and other cultural aspects of the tests themselves, which are designed for white, middle-class children. I believe the best approach is for a law school to admit its fair share of such disadvantaged students, and then provide them with enough special instruction and help to make them capable, on graduation, of performing acceptable legal work for their clients. It should be noted that the very things which handicap, for example, a black student in law school—his upbringing in a black community—may enable him to give much better service to clients in a black community after graduation. This should be considered in evaluating his law school record.

Dean Cribbet: I favor different requirements for Black and disadvantaged students in an effort to redress the obvious imbalance of the bar in regard to race. I do not feel that the standards necessarily need to be lower but they do need to be different and the Law School Admission Test score should probably be treated differently in relationship to the disadvantaged students. Other criteria such as leadership, letters of

recommendation, etc., can be used as a substitute for the normal standards. Once admitted, I feel the Blacks should be held to the same standards as the other students. I do not believe we should create two classes of degrees.

Dean Gaynor: A student should be considered as an individual, regardless of race, since a Bar examination may be taken. However, additional tutoring might be given to any disadvantaged student if it appears that it will be helpful and the student is sufficiently motivated.

Dean Heidenreich: Disadvantaged students should be helped to become qualified for law school. Programs like CLEO may help but the improvement of basic education is essential in the long run. A changing of admission standards does not help anyone. The "open admissions, high flunk-out" theory is unworkable.

Dean Pedrick: At the present juncture, I think the law schools need aggressively to recruit minority students into law school and, hopefully, on into the profession. Although it may be appropriate to provide some additional assistance by way of supplemental instruction to the special admittee, it seems to me quite unsatisfactory to have more than one standard of performance. Accordingly, I think that all students admitted must measure up to a minimum standard to be worthy of graduation and eventual entry into the profession.

Dean Pye: The question depends upon the level of admission standards in each school. Some schools have very high admission standards and may lower these standards for the disadvantaged and still have standards high enough to insure that the person admitted will be able to do the work required of him. Other schools have admission standards which are already so low that it is impossible to lower them any further without substantial danger to the quality of the student body. I do not worry about lowering the standards in good schools to pick up members of disadvantaged groups, although frequently what we are talking about is the use of alternative criteria rather than the lowering of standards. I have some sympathy with favoritism in grading in the first year when some minority students may experience a substantial difficulty in accommodating themselves to a strange situation. Ultimately, however, the grading standard must be the same. It performs no useful purpose to graduate someone from law school who cannot pass the bar, nor does it perform any useful purpose to admit someone to the bar who cannot provide the quality of services expected of a lawyer in our society.

Dean Sammis: I believe quite strongly that graduation requirements should be the same for all students. I am also of the firm belief that admitting a man to law school who obviously has no chance of success unless the academic standards of the school are reduced is wrong. However, we have discovered over the years that tests such as the LSAT

do not properly evaluate individuals who have a background substantially different from the normal white middle-class applicant. Every effort should be made to determine the potential of applicants and certainly no hard and fast series of tests or any specific approach need be used for this purpose. Personal interviews to determine motivation, college records as opposed to aptitude tests, and other approaches have proved more satisfactory with the disadvantaged candidates. Once the candidate has been admitted, to require less of him than is required of other students is simply to establish a second class degree which is detrimental both to the school and to the student. It is important that we increase the number of lawyers in the minority groups but it is equally important that these new lawyers be as well qualified or even better qualified than their white counterparts. A second-class lawyer is of no benefit to the ghetto.

Asst. to Dean, Shaneyfelt: I do not believe the standards should be lowered. Special assistance should be given in an effort to help these students meet the law school standard but the standard should be the same for all students.

Dean Zacharias: I would not lower standards, certainly not with respect to graduation from a professional school, regardless of the particular individual involved. I would favor effort, financial and otherwise, to assist disadvantaged persons aspire to professional study, but would do this by providing special programs, tutorials and the like, as a preliminary to admission to law school in order to bring disadvantaged persons up to a level where they might cope with professional study satisfactorily.

III. Theoretical vs. Practical Law Schooling.

The Problem: Many law schools, in addition to the regular courses in the curriculum, employ other means to train their students, such as law review, legal clinics, etc. Others say that law school time is the only opportunity for the learning of theory and analysis that students will have, and that they can get practical experience after law school.

Question: Which view do you prefer, and why?

Answers:

Assoc. Dean Bauman: I have never accepted the view that there is some clear-cut distinction between the theoretical and the practical. I believe a law school should emphasize legal analysis but I also believe that this training should be supplemented in the third year clinical type programs.

Assoc. Dean Bice: Clinical education is a valuable part of the law school.

Asst. Dean Brody: I would like to see more practical training of students. Learning by doing helps solidify the theoretical classroom training in the students' minds. There is a need for more training similar to the medical school model.

Dean Christopher: I favor some legal clinic work in third year.

Dean Cox: The only justifiable purpose for a law school is to train its students in theory and analysis. Practical programs are resorted to because there are not three years of theory and analysis. The curriculum should be reduced to two years, and clinical training forgotten. This is not to say that all practical instruction should be abandoned, however.

Commandant Crawford: The Army has found, as a general principle of education, that practical exercises are a valuable aid to learning. I believe that for most students a mixture of theory and practical work is best. Each reinforces and provides some variety for the other. At the Judge Advocate General's School, theory and practical problems are mixed in classroom teaching. In addition, certain classes go through a practical exercise in which an Army legal office is simulated and typical problems are presented to the students from their boss, over the telephone, and from walk-in clients. This exercise serves a triple purpose. The students learn some new law, they fix in their minds certain precepts already studied, and they gain enough orientation to land on their feet when they report to their first assignments.

Dean Cribbet: I prefer a mixed law school program which maintains the values of the case system and the learning of theory and analysis. I believe there should also be ample opportunity for work on the law review, clinical experience, seminars, and a wide variety of teaching techniques.

Dean Gaynor: Law review work, clinics, and other activities are most helpful as a supplement to regular law school work, but I do not believe a law student has time for studies during his law schooling which are not law-related.

Dean Heidenreich: Although there are many practical problems involved clinical experience can be and should be if possible part of the law school experience. Writing and drafting programs are essential for the development of the law student.

Dean Pedrick: It may well be possible to combine some exposure to the world of practical affairs and the intellectual approach that characterizes a good law school's program. In any case, we are committed for the present to exploring the possibilities associated with such matters as legal clinics, as well as the old standbys such as law review, moot court, etc. I certainly favor continued experimentation in an attempt to improve legal education.

Dean Pye: The regular courses in the curriculum are only devices for developing the skills, attitudes, approaches, and capacity for analysis which we wish in a lawyer. In my judgment, the law review is one of the great contributions of legal education to pedagogy. In some schools, legal clinics also perform a very valuable purpose.

I have some difficulty with the manner in which your question is worded. In my judgment, performance on a law review and work in a legal aid clinic contribute to theoretical understanding. Its purpose should not be an attempt to provide practical skills; it should provide a technique through which a student understands how the law operates. There is plenty of time to get practical experience after law school, but this does not mean that the quality of theoretical training may not be improved in law school by the use of these devices.

Dean Sammis: There is much to be said for both points of view and, actually, most law schools today combine both points of view. We do so through moot court programs, law review and an expanding legal clinic program. The state of California has recently taken a forward step in permitting students (under proper supervision) to actually handle clients' problems and, in a limited manner, to appear in court. Obviously such courses help to "bridge the gap" but they certainly do not close that gap. The young lawyer must still serve his internship as does the young medic; what we have been coming to is an approximation of the senior medical student who actually deals with patients under the direct supervision and control of his professors. As a law school dean I am getting somewhat tired of listening to the complaint from the bench and the bar that we do not turn out young Clarence Darrows ready to try a jury case the day following their admission to practice and on the other side of the fence the "new breed" of law instructor who believes that we should not devote any time to this sort of thing but should turn out legal sociologists and philosophers. We try to go down the middle (which I believe to be the right route) and are damned by everyone.

Asst. to Dean, Shaneyfelt: I prefer a combination of both with emphasis placed on regular courses. I do believe that a clinical program if properly supervised would be of great value to the overall program.

Dean Zacharias: A degree of balance is desirable in any form of activity. To the extent it is possible for a law school to train practitioners, recognizing that some skills can only be learned only by actual experience, it should prepare those who are going into practice with more than theoretical knowledge. The development of clinical programs for senior students is an effort in that direction.

IV. Faculty Competence.

The Problem: All agree that the faculty of a law school is the most important single element in the legal education structure. Also, they say that law school teaching is most effectively accomplished by teachers who devote substantially all their time to their responsibilities as teachers and scholars; their activity in practice, government, business, or other outside interests, while supposedly working as full-time law teachers, is criticized.

Question: Is it better for law professors to concentrate almost entirely on teaching and scholarship, or is outside practice, government service, business executive work, etc., equally (or more) desirable? Which should dominate, and why?

Answers:

Assoc. Dean Bauman: I believe that a law school should have most of its faculty as full-time teachers. The difficulty encountered with faculties composed of practitioners is that they frequently must subordinate their teaching responsibilities to the pressing demands of their practice, and consequently the education of the student suffers.

Assoc. Dean Bice: Top teaching requires a full time commitment.

Asst. Dean Brody: We have found that faculty with outside experience generally make better teachers because of understanding of practical aspects of law; provided that outside work does not interfere with teaching duties.

Dean Christopher: Limited outside activity may be useful.

Dean Cox: A law instructor should do nothing else but teach law, unless he is a part-time instructor, in which case he should be one of few.

Commandant Crawford: At the Judge Advocate General's School, the bulk of teaching is done by officers who have just returned from other assignments where they have gained practical experience. The "war stories" they can tell add salt and interest to their teaching. On the other hand, while here they teach full time. I feel this is the best arrangement. To carry on a full practice and teach, too, requires an exceptionally energetic person. Teachers should be able, though, to take leaves of absence in order to do government or consulting work; this will enrich their teaching.

Dean Cribbet: I believe the law professors should concentrate almost entirely on teaching, research, and public service. All three are important but the principal emphasis should be on teaching and scholarship. I feel that outside practice, government service, etc., should be used to enrich the teaching and research capabilities and should never be an end in itself.

Dean Gaynor: A full-time faculty member should devote substantially all of his time to his academic duties, but this does not mean that he should avoid public service of a limited nature.

Dean Heidenreich: Full-time law professors should have as their primary responsibility classroom teaching and scholarship. Outside experience which should always be subordinate to that responsibility should be permitted provided it is beneficial to the instructor in his continuing development as an individual and teacher and is of some benefit to the public and to the bar. The work of the full-time faculty should be supplemented by part-time teachers who are skilled teachers and who have experience or special interest in the fields in which they teach.

Dean Pedrick: Given a man of talent, legal education will be better served if a greater part of his energies go into law teaching—though some consulting and participation in public service may enrich his contribution to legal education.

Dean Pye: In my judgment, law school teaching is accomplished most effectively by teachers who devote substantially all of their time to responsibilities of teachers and scholars. Where possible they should be chosen after they have experience in practice, government, or business. Hopefully, they will be able to spend some of their time in public service activities, and some of their time in consulting, but they should not be running down to the law school to teach after they have finished a hard day in court. The law school should be the principal focus of their activities.

Dean Sammis: From my point of view it is desirable that all instructors have had a background of practice. However, once they have undertaken the teaching responsibilities on a full-time basis they should concentrate on teaching and on scholarship. I am speaking here of those who will be teaching the fundamental courses in the law school. As we broaden our curriculum and have to deal with matters such as Natural Resources and Environmental Law, to name only one area, the use of adjunct professors who are highly specialized in their field is helpful and even the full-time teacher should devote a considerable amount of time to contact with the practicing bar in his specialties.

Asst. to Dean, Shaneyfelt: I believe they should concentrate on teaching and scholarships. A small amount of outside work is fine but there is a tendency to overextend.

Dean Zacharias: A modicum of service at the bar would make a more effective law teacher than would be the case if one has no more than classroom experience. I do believe, however, that such service should

precede appointment to a faculty so far as a full-time teacher is concerned to avoid distraction from his primary responsibility after appointment. Wider experience can then be gained by participation in bar association and related activities within limits, all consonant with his principal duties. A law school faculty composed entirely of full-time teachers, however, would be something to deplore.

V. Student Participation in Academic and Administrative Direction.

The Problem: Increased student participation in both academic and administrative decision making in law schools has been urged by some, and opposed by others; while some say that student participation is appropriate only in certain administrative functions but not in all.

Question: To what extent, if any, should students participate, in an active and/or voting capacity, in law school academic and/or administrative decision making?

Answers:

Assoc. Dean Bauman: In the present situation in which universities find themselves, I think it desirable that students serve on faculty committees and that they attend faculty meetings. There should also be a systematic solicitation of student evaluations of teachers. I do not believe that students should participate or vote on faculty tenure decisions.

Assoc. Dean Bice: Students should be members of (and vote on) all faculty committees (save, perhaps appointments) and should vote at faculty meetings.

Asst. Dean Brody: Students can make valuable suggestions and serve in an advisory and voting capacity on committees such as Curriculum, Library, Grading and Advancement. I still feel, however, that they lack the perspective of more experienced persons such as faculty or administration to be given more responsibility than that.

Dean Christopher: I favor students participating in law school decisions. There are several ways to do this, but in any event, you get better decisions if the students are heard.

Dean Cox: Not at all.

Commandant Crawford: Of course the Judge Advocate General's School, being a military institution, is not a participatory democracy. But students here have an effective, though indirect, voice in academic matters through course critiques. Critiques provide a forum for a wide range of "gripes," from the performance of individual teachers to course content and teaching techniques.

Law schools vary so greatly in size, formality, and interest of students in decision-making, that I think it would be a mistake to state a general rule about student participation. Each school should work out its own system, whether formal—students actually sitting on committees and voting—or informal—the Dean gets the “word” that the Tasmanian Torts course is a dud. The important thing is that the students be considered and consulted. Otherwise, the school is not doing its job.

Dean Cribbet: I believe that students should participate on nearly all law school committees and probably should have a limited number of representatives attending faculty meetings. I favor giving the students votes on committees but not on the faculty itself. I think what is needed is student input and understanding, but the final decisions should be left to the faculty.

Dean Gaynor: It is difficult enough for an administrator to administer a law school, and the student who becomes deeply involved in administration dilutes the efforts which should go into the study of law. However, it is desirable for a law school administration to seek the views of the student body before innovations which vitally affect the students.

Dean Heidenreich: Student representation on faculty committees with the exception of committees on hiring, promotion, tenure, salary, etc. is effective and important; even in the area of hiring and promotion of faculty members students should have an opportunity to voice their views although not to participate in the decision as such.

Dean Pedrick: We are at the early end of our experience on the subject of student participation in the governance of educational institutions. It would seem that there are some administrative functions where the students' participation could be helpful, but there are some serious questions as to whether, from the standpoint of the individual student, the rewards are commensurate with the time and energy required to participate effectively on administrative matters.

Dean Pye: At Duke we think there should be law student participation in academic and administrative decision making. The question is in what areas and in what ways. In some areas such as faculty appointments, promotion, and tenure, students should be consulted. In other areas such as curriculum, they should serve as members of curriculum committees. In disciplinary matters, they should participate as equals or perhaps make the decisions themselves. In general, I think they should serve on committees which have an advisory function to the faculty, but the ultimate decision making should be vested exclusively to the faculty. These are matters for each school to decide for itself.

Dean Sammis: In answering this question I must admit that I belong to the wrong generation. I believe that students' suggestions and criticisms

should be given a great deal of weight and over the years I have received valuable help from students individually and as groups. I do not, however, believe that students are qualified to determine the course of a law school. An individual who has never practiced law is not qualified to revise the whole curriculum of a law school; such an individual is highly qualified to state the areas in which he and his fellows are interested to the end that an appropriate course can be inserted in the curriculum. An individual who knows nothing about the law school field is hardly qualified to judge the quality and ability of a law teacher who is being considered for an appointment in a particular school; he is eminently qualified to determine whether that individual has been a good teacher as far as he personally is concerned in a course which he has taken from him. In making this last comment I am assuming honest objectivity and not a condemnation based upon personality clashes.

Asst. to Dean, Shaneyfelt: Students should be allowed to sit as members of most committees, and should at the bare minimum have direct access to the administration.

Dean Zacharias: Consultation between students and faculty in academic and administrative matters could be desirable, but not to the point where students would have determinative power—by vote or otherwise—as there are areas where students would be lacking in adequate information to be able to decide intelligently. Inclusion of some students on faculty committees where the student viewpoint would possess value should be encouraged. In other areas, beyond student competence, student participation ought not be permitted.