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# Building a Better Law School

J Timothy Philipps\*

## *I. Introduction*

For upwards of the last thirty years, I have been associated with law schools as a student and teacher. During that time, and especially during the last ten or so years, the thought has often occurred to me that things in law schools are run backwards. The most important things are those least rewarded and the least important things are those most rewarded. Of course, this depends upon one's views of what is and is not important. My views on this are simple: the primary goal of a law school is to serve its students by teaching them to be lawyers. The least important goal is the ego enhancement of professors through the publication of materials.

In law schools, those who excel at teaching (whom I will refer to as the teachers) are usually rewarded the least in terms of compensation, honors such as chaired professorships, and authority through membership on important committees. Those who excel at publishing (whom I will refer to as the publishers), by contrast, are usually showered with money, honors, and authority as long as they continue their output of published material, even if it largely repeats itself after the first article or two (after all, how many really new ideas does one have in a lifetime?) and is addressed to an audience largely consisting of other professors of similar ilk.

Is it any wonder that legal education has come to be dominated by the publishers? It does not take a law and economics guru to figure out that people will generally act in their own self interest. They will see who gets the rewards and will act accordingly. Under the present system, professors will put more effort into publication and all that goes with it. They will concomitantly put less effort into classroom teaching (aside from seminars and limited class enrollment courses that further their particular research interests), thereby limiting their availability to students. Anyone with half

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a brain can see this happening at law schools all over the country. Scrutiny of most any law school catalog will reveal that the curriculum is largely constructed for the benefit of the faculty's research interests and not the students' needs. Hence, "Law and \_\_\_\_" courses proliferate while courses such as the conflict of laws, corporate law, taxation, and other fundamental courses get short shrift by being consigned to extremely large classes. In that way, fewer professors "get stuck" with teaching these classes.

Students complain among themselves about poor classroom teaching, faculty inaccessibility, and huge classes in the basic courses, but rarely do much about it, largely because they are interested in getting their degrees and not rocking the boat. Students sometimes make an effort to counter the trend by instituting such things as teaching awards, but these rarely make a difference. In fact, receiving a teaching award can make a professor the subject of nasty comments from colleagues about being too easy.

The real reason for having a law school—to help students prepare to become competent, compassionate lawyers—gets lost in the process. This is exactly the way an institution that is run (perhaps even owned in a broad sense) by the very people who are its employees can be expected to operate. That is, the institution operates for the benefit of its "owners/employees," the faculty, not for the benefit of those for whom it was ostensibly created to serve, its students.

There are many in legal education (perhaps most) who think this is a perfectly desirable situation. I disagree and offer the following suggestions to build a better law school.

## *II. The Welfare of the Students Should Always Come First*

The best interests of the students should always be the prime consideration in the institutional decisionmaking of a law school. This seems self-evident. Unfortunately, it has mostly been more honored in the breach than the observance in the law school world. For example, the number of courses catering to the particular research or ideological interests of faculty members has proliferated over the past several years. Hence, we have courses on just about every esoteric subject in which some professor might take an interest. Can anyone really say that these are put into the curriculum for students?

Another example is the way professors circle the wagons when a student complains or questions professorial conduct (except of course for

complaints of political incorrectness, which are another matter entirely).<sup>1</sup> If a student complains of unfairness in grading or similar academic treatment, the general reaction is: "That could be me for God's sake; so let's cover our rears." I have witnessed this on several occasions over the course of my career and have even been guilty of it myself a few times (a sin for which I am truly contrite).

Seldom have I ever heard at a faculty meeting the argument that we ought to do something or refrain from doing something because that would be best for the students. In retrospect, this is astounding. Why else does a school exist, except for its students? What follows are a few ideas for building a better law school. In some respects they amount to mere random thoughts. Nevertheless, they do have a theme: to build a better law school, the top priority should be the welfare of students.

#### *A. Reverse the Primacy of Publication*

The primary function of a law school is to prepare students to be competent, compassionate lawyers. It follows that the primary function of a law professor is to develop and maintain expertise in the fields in which the professor teaches (scholarship) in order to impart that expertise to law students (teaching). Hence, scholarship is a means to the end of teaching. The means is subsidiary (albeit essential) to the end.

Scholarship encompasses all of the activities in which the professor engages for the purpose of maintaining and developing expertise. These activities can take various forms, e.g., research and writing for publication, developing teaching materials, monitoring current developments in the law, participating in professional activities, consulting for law firms, working in the field, or simply thinking. There is no single formula for the appropriate combination of these activities. Nevertheless, a professor must regularly engage in some of them in order to be an effective teacher. By definition then, an effective teacher is also an adequate scholar.

There is an unfortunate tendency in academe to give unwarranted primacy to one of these activities, namely publication. For example, it is a well-established practice to "reward" professors with time off from teaching in order to do research and publication. But it is unheard of to "reward" a professor with time off from publication to put extra effort into teaching. It may have been true in the past that a lack of publication indicated indolence on the part of a professor, but the pendulum has clearly

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1. See *infra* part II.E (discussing political correctness).

swung in the other direction. Many schools now require multiple publications for tenure consideration, but give short shrift to classroom teaching and the faculty member's relationships with students.

This unwarranted primacy of publication distorts the reward and incentive system in academe to the detriment of the primary function of a law school. It rewards the publishers and ignores the teachers. Consequently, one should resist and reverse this unwarranted primacy. None of this is meant to denigrate the importance of publication, but only to point out the unwarranted primacy of publication and its detrimental effects on legal education.

### *B. Require Professors to Have an Open Door Policy*

At many law schools, professors post "office hours" when they will be available to students. Typically these postings state that the professor will be available, for example, from 1:00 p.m. to 3:00 p.m. on a few days each week. These office hours postings really relay the professor's non-office hours, that is, all the other hours of the week when the professor is presumably not available to students. This issue relates closely to the publication issue. If a professor believes that career advancement depends mainly on publication, then most of that professor's efforts will go toward publishing articles. Time spent with students in effect becomes wasted time because it detracts from publication time.

If a school is really serious about putting students first, then the professors should be available to students most of the time during the normal work week. The professor's door should be open and the students should feel free to come by. If that detracts from publication time, so be it.

### *C. Pay Attention to Student Evaluations*

Most schools have formal programs of student evaluations. However, the influence that these evaluations have varies greatly from school to school. Less formal evaluations also exist, such as the number of students who sign up for particular classes.

Despite a widely held contrary notion among the professorate, students are actually fairly astute consumers of the educational product that they purchase with their tuition. Granted, there are always professors and courses that get good evaluations or have large enrollments because they are cake courses or because the professor is an exceptionally high grader. But these cases are the exception, not the rule. Students routinely fill difficult

technical classes with a low grade curve when they know the professor is a well prepared, competent teacher who will make an honest effort to teach them about the subject matter. After all, these are adults seeking a professional education, not a bunch of seventh graders. Blithely dismissing their preferences in classes and professors to juvenile self-interest sells the students short. Students as informed consumers do vote with their feet. A wise law school administration would do well to take note of how they are voting and incorporate this into the incentive system.

#### *D Overhaul the System of "Faculty Democracy"*

Various accrediting agencies such as the ABA and the AALS require that law schools be governed by the faculty. This generally results in decisionmaking authority initially being dispersed over a wide variety of faculty committees and ultimately to faculty meetings. The problem with this is that it ultimately makes everyone responsible for everything. And when everyone is responsible, no one is responsible.

The ideal of a democratic community of scholars rationally governing itself is a laudable one. Unfortunately, the ideal is seldom met and in fact may be impossible to achieve. Someone with authority must make decisions and be accountable for making those decisions. Faculty committees and faculty meetings do not fill this bill. First of all, the results of decisions out of these bodies often bear out the truth of the old saw that a camel is a horse made by a committee. There is no need to apprise the audience at which this essay is addressed of the utter silliness that often takes place in and comes out of such gatherings. Second, the element of accountability gets lost when decisions are made by faculty committees and faculty meetings. There is no one to point to and say, "That's the person who is responsible for this state of affairs."

Sometimes deans (who take credit when things go right) are the ones to whom fingers are pointed when things go wrong. But deans do not really have that much power, especially when faced with a recalcitrant faculty member or group. The answer is to give the dean the authority to make decisions about important matters such as curriculum and class size and to hold the dean strictly accountable for the results. This is not to say that there should be no input from faculty. Faculty members should be free to express whatever views they have about law school policy, and to do so in meetings convened to advise the dean of their views. But one person should hold the ultimate decisionmaking power and should be held strictly accountable for the results.

*E. Get off the Ideological Bandwagon*

Law schools have become considerably more ideological in the past ten years. Especially prominent has been the political correctness (PC) movement. It is difficult to define precisely what PC is because it manifests itself in various ways. However, its overriding characteristic is the attempt to force a left-wing ideological agenda on law schools. For example, professors may teach classes from a "feminist or racial perspective," insist that students use "gender neutral" language, or require students to read or take part in propagandistic materials and activities. Students who do not buy into the "race and gender" perspective may be cut off in class or be given lower grades. At the least, many students become intimidated from speaking their true thoughts on a subject for fear of being labeled "racist," or "sexist," or some other horrible form of "ist."

Interestingly, PC is the one area in which professors do not protect themselves by the "circle the wagons" attitude mentioned earlier. In fact, a professor accused of some PC-violating "ism" is likely to be left twisting slowly in the wind by other faculty fearful also of being so accused. This puts a chill on the full and free discussion of ideas, both from the students' and professors' standpoints.

Law students are adults capable of making their own value judgments. They do not need professors using their classrooms as forums for pushing such judgments on students. Professors should present and allow free expression of all sides of issues in the classroom and let the students make judgments for themselves. The amount of time spent on making sure that students and faculty adhere to a politically correct line is simply wasteful. Moreover, it violates basic tenets of academic freedom and free speech and abuses the professor's position of power over students.

A second aspect of the PC movement is the attempt to force quotas in hiring under the guise of promoting ethnic and gender "diversity." PC's proponents assert that only by such diversity can the institution attain its educational goals. Yet proponents offer no real proof that quotas enhance the educational program. Indeed, they may do just the opposite by causing the rejection of more qualified "non-diverse" candidates. Furthermore, the only diversity that really counts in the university is intellectual diversity, and the proponents of PC have absolutely no interest in that kind of diversity. Look at just about any law faculty in the country and one can count the number of ideological conservatives on the fingers of one hand, if there are any at all. Among law faculty, Reagan would have lost in a landslide.

Historically law schools, unlike graduate schools, have generally avoided the problem of becoming monolithically associated with particular ideologies. This assured a richly diverse spectrum of opinion at any given law school. The PC movement threatens to take this desirable attribute away, if it has not already done so. Students deserve better.

*F Make the Tenure Decision in the Third Year*

Over the past several years, law schools have stretched out the time for the tenure decision, so that it often comes in the fifth or sixth year of a faculty member's probationary term. The rationale apparently is that postponing the tenure decision gives more time to observe the tenure candidate's performance. The reality is that it makes it much harder to deny tenure after someone has been around for five or six years than if someone has been around for only a couple of years. Moreover, it is usually pretty obvious by the end of two years what kind of teacher a candidate will be.

Good teachers are for the most part born, not made, and while a few may become quite successful after a shaky first two years, that is the exception, not the rule. A three year time frame (which used to be fairly standard among law schools) gives ample time for a decision, while making it less difficult to say no to someone who has been around for a long time and has a lot of time and energy invested in the process and the institution, as is the case of the sixth year tenure candidate. The adoption of a three year process would actually result in a more rigorous examination of the professor's work because there would not be the same underlying feeling of estoppel that often takes place with the sixth year candidate—that is, we cannot deny tenure now because the candidate has too much invested in us and we in the candidate.

Along this same line, there should be a deemphasis on publication as the tenure criterion. Just how much does a young professor have to say, especially if that professor is adequately preparing for classes? One good publication in the first three years should be plenty. Nowadays professors are breaking their necks to publish multiple articles prior to tenure. The time taken for these articles has to come at the expense of something, most likely teaching. The contribution of these articles to the sum of human knowledge is often dubious to say the least, but they do fulfill the functions of filling law reviews and giving professors an excuse to give short shrift to students and teaching. The tenure decision should come in the third year

based mainly on teaching performance and the promise of future scholarly activity through the publication of one article.

### *G. Get Professors out into the World of Law Practice*

Professors spend their summers and sabbaticals mainly in academe's ivory tower writing the articles and books that will get them tenure and promotion. Meanwhile, many ignore the actual world of law practice. It would be a good idea for professors to take some of their summers and sabbaticals to work, for example, for a law firm, government, or a judge. This would enable the professor to bring the actual hands-on experience of law practice to the classroom. It would also break down some of the barriers that now exist between professors and practitioners. Such activity should be put on a par with publication as a criterion for tenure and promotion.

### *H. Place More Emphasis on Personality in Hiring Professors*

Just about every faculty candidate that I have ever interviewed has had the requisite brainpower to be a successful teacher. But many lacked the personality to be effective in the classroom. When I interview a candidate, I always ask myself how I would react to being in that person's class three times a week and how that candidate would fare in front of an audience of seventy-five or more students.

Unfortunately, the dull as a dishrag candidate who has a slew of publications or is of the politically correct ideological persuasion often gets the job over the more dynamic personality. Sometimes it seems that the people doing the hiring identify a dour countenance with brilliance and seriousness of purpose, while attributing the opposite characteristics to those with a more humorous and cheerful demeanor. But personality is a key factor to success in the classroom. When law schools ignore this factor, they end up with professors who really are not very effective classroom teachers, even though they may turn out a ton of publications. This hardly fits in with the idea of putting the students' welfare first.

### *I. Place Less Emphasis on the LSAT*

The Law School Admissions Test (LSAT) has assumed far too much importance in the admissions process. The reasons appear fairly clear. Law schools and rating services have used the median or average LSAT scores as surrogates for quality. It is not unusual, for example, for a law

school brochure to brag that its median LSAT score for accepted students is such and such. Ratings services such as *U.S. News and World Report's* survey also place a heavy emphasis on the LSAT

Yet the LSAT is an imprecise predictor of law school and later practice success. Admittedly, at the very highest and lowest ends of the bell curve, it can be a fairly accurate predictor of law school grades. Yet once one gets away from the high and low extremes of the bell curve, its accuracy as a predictor declines sharply

It is strange that the LSAT, which basically measures *aptitude*, has taken precedence over other factors such as grades and extra-curricular activities that measure *achievement*. Hence, an applicant who has slacked off during college but scores high on the LSAT may stand a better chance of admission than a student with higher grades who has taken part in extra-curricular activities or who has worked to pay college expenses. One possibility would be to make submission of an LSAT score optional in the law school's admissions process. This would at least give high achievers who do not fare well on standardized tests a better chance for admission. At the same time, the brilliant test-taker with a less than outstanding academic record would still be able to include a high LSAT in the application materials. The heavy emphasis on the LSAT certainly makes life easier for law school administrators and ratings services, but it is questionable whether it serves applicants fairly

### III. Conclusion

These are some random thoughts of a professor who has been in the business for upwards of thirty years at various kinds of law schools. These thoughts go contrary to the conventional wisdom in many areas, especially in their promotion of teaching over publication. I doubt that this essay will change many people's minds. It is basically written as an attempt to distill my experience over the years into several suggestions for building a better law school. Maybe someone out there will take some of the suggestions seriously

