

The Dangers of the Graduate School Model

Paul D. Carrington

Roger Cramton has asked for my comments on his article for the reason that I have been the only voice on the Executive Committee of the Association of American Law Schools to question the creation of a faculty-edited scholarly journal of the Association.

My position is not entrenched. It rests not at all on admiration of the traditions of the student-run journal. While many such publications have seen many good days, one can reasonably doubt that it is important to preserve them in their traditional modes. If they cannot survive fair competition, so be it.

My different concerns are based on the same factual assumptions that Cramton advances in support of faculty editing. He and I agree that fashions in legal scholarship and teaching have changed as law schools have become more academic, more deeply and more intricately involved with other disciplines and with the universities of which most law schools are a part. Our difference lies in our assessments of the degree to which this evolution is inevitable or benign in all its aspects.

To be sure, I do not regret the affair of law with social science or of law with economics, or the revival of interest in legal history, in jurisprudence, nor even of the effort to apply the insights of contemporary literary criticism to law. All these developments unquestionably have been beneficial to the quality of law study; all have helped to lift us from an intellectual environment that was for too long too sterile.

But, just as the clinical studies movement has mistakenly perceived medical education as a proper model for making legal education more practical, so we may now be in danger of mistaking graduate schools as the model for elevating legal education intellectually. Perhaps it was inevitable that these obvious models be placed before us, but it is my continuing hope that we may be wise enough to resist both models, to develop patterns of professional education in law which are more intellectually liberal than clinical medicine, and more functional than contemporary graduate training. Such an independent course will require, I acknowledge, greater imagination than legal educators have been accustomed to apply to the problems confronting us. I fear that the attraction of the juried journal is, at least in part, an impulse to adhere to the model of the graduate school faculty.

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I am not allowed space, nor am I now prepared, to identify all the benefits or all the costs of the ongoing process of the academization (or graduatization) of law schools. But one risk lies in the tendency of legal scholarship to address ever smaller audiences of ever narrower experts. One need not demean the worth of such highly elevated or advanced efforts in order to suggest concern for the efficacy of institutions whose scholarship is of little or no interest to their alumni. It is helpful to remember that the graduate school model rests on the assumption that the students are training to do what the professors do; in such a context, the deepening probe into a narrowing horizon may be a necessary and desirable process, beneficial to teachers and students alike. But a professional faculty that has lost interest in most of the work of its alumni has also lost interest in its students, and forfeited the legitimacy of its claim for their support.

One concern for the juried journal is that it will lead us precisely over that brink. Tenure and professional advancement even now are heavily dependent on the way in which the candidate's work is appraised by a narrowing audience of fellow academics, and diminishing value is assigned to work that might be useful to students and lawyers. I would not wish to return to a time when advancement depended not at all on scholarly attainments as appraised by one's peers, but perhaps enough of a good thing may be enough, even in this sphere. If one could advance only with the approval of specialized jurors selecting works to be published in faculty journals, we may jeopardize what little systemic incentive remains for legal academics to engage their minds on matters of importance to their students and alumni. There is an unfortunate tension between the consequential and the intellectually gratifying in legal scholarship; academic jurors seem likely to proclaim the worth of intellectual novelty and to deny recognition to work that may be more significant to the benign development of the law.

Also a concern is the equally ineffable effect of a system of specialist-jurors on the quality of academic freedom in law schools. It is well in considering this matter to recognize the highly political nature of almost everything in which law professors are rightly concerned. Even those matters that do not engage traditional political dichotomies are laden with debatable assumptions about the nature of law, the appropriate fashion in legal scholarship, and the role of intellect in professional life. One strength of contemporary American law schools is the degree to which some have come to shelter widely divergent views on questions such as, for example, whether medical schools or graduate schools are proper models. Although I am not prepared to cite examples in other fields where the juried journals are entrenched, there is at least a risk that, over time, a system of juried journals will rigidify by imposing generally accepted standards of scholarship that will exclude some divergent views or fashions. Most at risk, I have suggested, are those who would be inclined to write for professional audiences or on current issues of law reform, but there is no reason to suppose that the risk is limited to such groups. While the present structure tends to impose upon us the unwelcome requirement that we try to make ourselves understandable by students and lawyers, that regulation may be a more harmless orthodoxy than others we might impose upon ourselves.

All this is assuredly speculation. Maybe it would be as well for law to become a graduate school discipline, with the universities abandoning professional education to the profession itself, in the manner prevalent in every country outside North America. Whether so is a very large question, one which I am unprepared to answer. Acknowledging such doubts, I am too diffident even to vote against the faculty-edited journal. I am content to rest here with the always reassuring thought that a member of some future generation may say, he told them so.