THE UNIQUE ROLE OF THE AMERICAN LAW SCHOOL DEAN: ACADEMIC LEADER OR EMBATTLED JUGGLER?

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It must be remembered that there is nothing more difficult to plan, more doubtful of success, nor more dangerous to manage, than the creation of a new system. For the initiator has the enmity of all who would profit by the preservation of the old institutions and merely lukewarm defenders in those who would gain by the new ones.
Niccolo Machiavelli[1]

I. INTRODUCTION

MACHIAVELLI'S advice is sobering to anyone who takes a deanship with the expectation that she can immediately be an engine for change or reform. Reform and change can be initiated, but one should not underestimate the obstacles.

First, the obvious, the role played by the American law school dean is markedly different than that played by deans at law schools elsewhere in the world. American deans generally serve longer, have more power—particularly on finances—and have a larger and more diverse constituent base they must serve. There are a number of reasons for this expanded decanal role in America. Only in the United States and Canada is law a graduate discipline, generally requiring a four-year undergraduate degree prior to admission. As a graduate level discipline, law schools can control the quality of the candidates they admit—unlike schools elsewhere in the world where law is an "undergraduate major" and the quality of the candidates admitted for law study is not in the hands of the law school. Furthermore, law graduates serve in highly visible roles in government and business as well as law. Powerful alumni organizations remain financially supportive of and highly interested in the progress of their own law school. The judiciary, the bar examiner, and the organized bar look to the law schools as "gatekeepers" responsible for the quality of those entering the profession. Law deans are also active fundraisers, as well as academic leaders. Thus, the position of the law dean in the American higher educational system is a lofty one.

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1. NICCOLO MACHIAVELLI, THE PRINCE 15 (Thomas G. Bergin ed. & trans., Harlan Davidson 1947).

While the "average" length of service of an American law dean is three years and a few months, that figure is misleading. Sometimes faculty members, promoted to a deanship, find themselves unhappy and ill-suited to the frantic pace of the job and leave after a year or two. The truth is that if one survives the first and second year, it is common for deans to serve five, six, or more years. Furthermore, it is as common for a dean to be appointed from "outside" a particular law faculty, as to be appointed from within. There are a growing number of experienced deans now serving in their second, or in some cases, their third deanship. Perhaps a new class of professional deans is emerging.

II. A HISTORICAL PROSPECTIVE

It is true that the days of the great iron deans in American legal education are over. There are no more Griswolds, Wigmores, Keetons, or McCormicks. Those great deans, who had so much to do with shaping modern American legal education, have gone the way of the dinosaur. And, while they are little lamented, legal education may be worse for their passing. As the quotation from Machiavelli (who, as a jaded five-time dean, I may read too often) indicates, change is an extremely difficult and risky process for any leader, however powerful. For those great iron deans, it was tough enough. Today, in an environment of shared governance with multiple constituencies on even the minutest decisions, any dean who desires to initiate major change faces almost insurmountable odds. Unfortunately, modern American legal education finds itself in a time that cries for massive change. The costs of legal education continue to rise; for example, tuition has continued to increase far beyond the national inflation rate. Students are borrowing far too much. Loan defaults are increasing, jeopardizing private loan sources, at a time when law schools are absolutely dependent on the ability of their students to borrow large sums. The profession is demanding major costly changes in the curriculum. The universities want increasingly more of law schools' revenue. And faculties, drastically in need of new blood and fresh ideas, are increasingly static because of the federal removal of retirement ages, coupled with hidebound tenure policies. Massive changes are needed. But—and here is the rub—the logical person to initiate those changes, the dean, despite the lofty position held in American legal education, has slowly devolved from the classic stereotype of a benign autocrat to, in too many cases, little more than an embattled, dispirited juggler trying to accommodate increasingly fractious constituencies.

In short, more responsibilities than ever are being conferred upon the dean. At the same time, however, almost all the powers necessary to carry out these increasing responsibilities have to be shared with multiple constituencies. True to the human condition, those constituencies who share power generally accept no responsibility for the result, but they frequently want to dictate or control the decision making process.

About the time of the Vietnam era, when wrenching societal changes were made, revolutionary changes in governance came into the American academy. Many of the changes were long overdue and have been beneficial. Many have not.

III. THE PRESENT CONDITION

Even with American deans who have considerably more power and stature within their universities than deans elsewhere in the world, who serve in the "department chair" role, the task of an American dean remains daunting. The following is a discussion of the American dean's relationship with a law school's various constituencies in this new era.

A. The Faculty

Prior to the Vietnam era, law deans typically operated with small staffs and little faculty participation in governance. Faculties were essentially small and the panoply of present administrative support units did not exist. Deans generally came from their own faculties, understood the mores and traditions of their particular schools, and made almost all the decisions. They hired faculty members, fired faculty members, and they made most educational decisions. In short, they had vast responsibility, but they also had vast powers. The deans reflected their faculties. Almost all faculty members were white males, trained at the same "elite" law schools, and the deans selected mirrored the make-up of their faculties. Since the Kent State-Cambodia years, faculties have diversified extensively and so have deans. Furthermore, the modern faculty member, reflecting different generational experiences, demands participation in all basic academic governance decisions. The lines between what has traditionally been thought to be decanal powers and what has been thought to be faculty academic powers have blurred. Faculty members, more and more, want to be consulted about everything. Faculty appointment committees dominate the hiring structure. Faculty promotion and tenure committees dominate the promotion and tenure structure. Faculty curriculum committees organize and control the curriculum. Faculties set standards, and more faculties want "executive committees" or "advisory committees" to the dean on what has been traditionally considered decanal powers, i.e., control over the purse, control over course assignments to faculty members, etc.

Tenure policies, which result in the promotion to full professor with tenure after six years at most law schools, have created faculties that are over 85% tenured in many schools. Tenure has become so hidebound and rigid that it is, in reality, legal education's sacred cow. Criticize tenure only at your own peril. It is a stark but true fact that tenure has made it impossible to remove the slothful or the incompetent colleague. There have been no more than a handful of tenure removal cases in legal education over the last five years—and then only for acts of gross malfeasance. My personal observation is that almost all law faculties have two, three or more full professors who have retired in place. They teach the same course, with the same yellowed notes, publish little or nothing, do no more than 20-25 hours of work a week, and command a full salary with all benefits. Worse yet, non-mandatory retirement ages, coupled with tenure, make it almost impossible to deal with the growing problem of faculty "deadwood." The result is almost no movement into the profession of bright, young people. As a result, faculty members have become more

resistant to change, more protective of prerogative, and more micro-managing in governance than ever before at many law schools.

Despite the above comments, faculty governance is important. I personally believe a faculty should collectively set and enforce standards; should make basic curricular decisions; and, should participate and be informed about decisions involving the law school. Nevertheless, candor requires one to state the obvious. The rigidity of tenure policies, the near impossibility of removing any faculty member's tenure except for the most egregious conduct, and the lifting of mandatory retirement age is stifling mobility in legal education. This is an area that requires major rethinking and then major reform.

In summary, tenure needs to be redefined to protect academic freedom. It should not be a refuge for incompetence or sloth. With the present tenure structure, coupled with faculty demands for participation in all phases of governance, many modern deans believe change is nearly impossible. They assert that faculty members protect each other, they protect tenure at all costs, and resist any meaningful change. Thus, it is said that any dean who desires to deal with these basic structural issues faces an almost insurmountable task. Machiavelli understates the problem.

It is true that the most important constituency with which a dean must deal is the faculty. And, it is true that faculty structural issues make it almost impossible for any dean to come to grips with the basic changes that need to be faced by legal education. Therefore, too often, the result is that the dean is destined to become impotent after a period. If so, other forces at work will come into play. Increasingly shrill demands from the profession are but the early indications that society will no longer endure legal education's failure to come to grips with its structural issues. Therefore, change will come. If not from inside the law school, then the change is likely to be forced by outsiders, who know little about the academy and even less about legal education. These outsiders are likely not to be sympathetic to the traditions and mores that have made American legal education great. Boards of trustees, legislatures, and alumni are ill equipped to make the kind of informed decisions that need to be made. But, their growing frustration with the present situation, and their frustration with deans who cannot initiate or carry out change, bodes ill for the academy in the future.

B. The Students

Students view the dean as the boss. They expect, for example, that when poor teaching occurs and complaints are made to the dean, the next day they should find a new teacher in the classroom doing a better job. They want instant response to complaints, they are less tolerant of poor teaching, and they want a reward system where they work in a less competitive environment, avoiding stress at all costs. They also want to participate in all decisions that affect them. They want a say about the grading system. They want substantial input into policies that govern admissions, placement, and basic functions of the school. They want representation on key faculty committees. However, they are not anxious to share any of the responsibility in carrying out those decisions. They expect the dean to respond almost immediately to their concerns, and failure to respond labels the dean as ineffective or worse.

C. *The Alumni*

More alumni are becoming convinced that law schools are not responding to the needs of the profession. There are escalating demands for more "clinical" skills training, with no apparent appreciation for the enormous changes that have already occurred in this area. There is little understanding of the cost for that type of education or its complexity. There is more a feeling that the profession knows what is best for law schools, and less tolerance of the views of those who are more familiar with the problems, i.e., deans and faculty. Those feelings are exacerbated when too often deans and faculties appear to be totally non-responsive to alumni concerns. While most alumni organizations are loyal and supportive, the views of alumni are affected by the shrill voices heard at large in the bar. Deans realize that law schools depend heavily on their alumni base for external support, and that a failure to allow considerable alumni involvement or input in the law school can cut off a key source of support for the school.

D. *The Central Administration*

Despite the high stature of American law deans in the university, law schools have long been the bane of central administrators. They are viewed as demanding too much autonomy, of having too much political clout from outside, and of not being good soldiers. To the central administration, the dean too frequently appears to be little more than a middle manager whose duty is to carry out the commands of the central administration. Contrast this with the view of faculties that the dean is little more than a "managing partner" of their college, whose duty is to fight for the interests of the faculty, against the central administration.

E. *The Organized Bar*

More and more, issues involving legal education are debated at the organized bar level. More bar organizations are making demands about curriculum, admissions, policies, and the perceived inferior quality of recent graduates. Frequently, bar associations will pass resolutions or demand changes in accreditation rules without even considering the necessity for consulting those who know most what the problems are—the deans and faculties who run those law schools. The enmity between the professor and the organized bar may be growing. The dean, as always, is caught in the middle. The dean must deal diplomatically and intelligently with the bar; and, yet, the law school's faculty demands the dean be on the frontline battling what they perceive as the barbarians at the gate.

F. *Governmental Entities*

The disastrous Consent Decree, agreed to by the Board of Governors of the American Bar Association, was brought on by the Justice Department, which had little understanding of legal education. Demands were made on the accreditation process that made no sense from a public policy viewpoint. Nevertheless, the

Consent Decree is but the latest example of governmental interference in issues involving legal education. A growing number of state legislatures are cutting budgets, mandating minimum teaching loads, attacking tenure policies, etc. As always, the dean is on the point in trying to explain the position of legal education to increasingly hostile government regulators. Frequently, the government fights among itself. The Department of Education has regulations that demand less interference by the profession in the professional school. However, the Department of Justice seems to demand that the professions have more control over professional education. And the Americans with Disabilities Act, and its inclusion of "learning disabilities," is causing real headaches in legal education.

G. National Legal Education Organizations

These organizations are important. They represent another constituency that must be tended. The dean should participate in national professional organizations in order to voice the views of the dean's law school to those organizations. In American legal education, those organizations are splintered. The Association of American Law Schools has become the learned society for the law professorate. The American Bar Association's Section on Legal Education has been almost totally consumed by accreditation issues, and the task of enforcing accreditation requirements. The Law School Admissions Council, whose meetings are attended primarily by admissions professionals, is an organization with substantial resources that has been at the forefront of many reforms. There is always the risk that it may someday respond too much to the voices of admissions professionals rather than the larger interests of legal education. The same is true for the National Association of Law Placement. In all of these organizations, if the dean does not play a role, others will attempt to speak for the law school, sometimes not in its overall best interest.

In short, each of the above constituencies views the role of the dean through its own narrow prism, based on its own needs. Each constituency is largely unaware of, and frequently unsympathetic to, the needs of the competing constituencies. Rarely, do the constituencies ever talk to one another or attempt to understand each other's needs. Instead, each constituency talks through "the dean." Each constituency views the dean in a different way. As indicated, the faculty views the dean as "no more than a first among equals," or "managing partner" whose duty it is to carry out policy decisions of the faculty. University administrators, on the other hand, view the dean as a high-level middle manager who reports to them and has a primary duty of carrying out university policy. The students view the dean as the "boss," so why doesn't he solve all the problems immediately? Meanwhile, outside constituencies, such as the alumni, the practicing bar, and governmental entities, frequently intrude and demand that the law school take action on their pet concerns. They bring their demands to the dean, and the dean is expected to act on them.

So back to the theme, the American deanship has high status, but with the modern dean too frequently being a political broker among constituencies. The problem is simple and clear. The modern American law dean has too many responsibilities, but almost no undiluted power to carry out any of these responsibilities. All of the constituencies demand shared power, but no constituency will step forward to take

responsibility for the decisions once made. The dean is held accountable for the results of the decisions made, but has almost no power to make those decisions without extensive, shared governance.

IV. THE GLIMMER OF LIGHT

Does the above litany of woes mean that the job of the modern American law dean is simply impossible? Absolutely not. The modern American law deanship is one of the most challenging, exciting, and influential academic jobs available. The job of most law deans is much more akin to that of presidents of small colleges than to the deans of other disciplines. Far more than is the case with other academic colleges, the law dean has both external and internal constituencies with whom she must deal. Unlike other colleges, the dean does not have department chairs through which she can deal; therefore, the dean must deal directly with every faculty member. Furthermore, the management tasks of the modern deanship are immense and most challenging. The dean must settle internal faculty disputes and manage staff. Because of evolving governmental requirements in a number of areas, the staff needs of the modern law school have increased. There are admissions professionals, financial aid professionals, placement professionals, and others, all of whom must be organized and managed.

Despite shared governance everywhere, any dean who is not a visionary will not survive. The dean must be the focal point for articulating the school's vision in order to coax most of the constituencies into moving in the same direction a majority of the time.

Lastly, the dean must provide the resources to run the school. The dean is in a constant battle to retain a fair share of the law school's revenue from a rapacious central administration constantly in need of funds of its own. Furthermore, the dean must operate in the outside world in a fundraising capacity. Finally, the dean is viewed as the leader of that school by outside constituencies at both the state bar and national levels.

Indeed, the modern law dean might be viewed as "the embattled juggler." The dean has to juggle multiple constituencies all viewing the role of the dean in different ways, without dropping too many of the balls at one time. The task is daunting, but also extremely challenging and satisfying when done well. As Machiavelli indicated, change is difficult under the best of circumstances. Changes in the modern law school world are exceedingly difficult. However, changes are necessary. New methods of financing legal education must be found. The rapid increase in tuition over the rate of inflation must be curbed. Revitalization of the law school faculty must occur despite the impediments of tenure and the removal of retirement policies. Through it all, with an intelligent communication to each of the constituencies, and with an attempt to keep each constituency informed and acquainted with the views of other constituencies, deans, in fact, can lead.

V. MANAGING CHANGE

Change can be initiated. For example, too long have we shielded our faculties from the hard truths about the financing of American legal education. For the past

five years, public schools have faced massive budget cuts and have had to raise tuition very rapidly. Private law schools have been increasing tuition far too rapidly, and the private universities with which they are affiliated have been far too quick to take far too much of the revenue from the law school to support central administration functions. It is time that the modern law dean leveled with her own faculty about the monetary stresses facing legal education. Faculties must come to grips with the fact that they have to change. Blind defense of present tenure policies, for example, without a realization of outside financial forces is foolhardy. The modern dean has the opportunity to inform her constituencies, pull them together, and move legal education forward.

VI. RESOURCE PROVIDER VS. ACADEMIC INITIATOR

The major tension in the modern deanship is between the role of a resource provider versus academic leader. The qualities that produce success in one area are not necessarily the qualities required in others. A good resource provider may not be a good academic leader and vice versa. A truly successful dean has to be talented in both areas. If you drop the resource ball, you will fail, even if the faculty that hired you told you they wanted you to be an academic leader. Or, if you drop the academic leader role with the faculty, despite the fact you bring in buckets of money, you will fail, even though you may have been hired by an administration that told you they wanted a fundraiser. The modern American dean must do both and must do both well. It is a challenge. Overriding it all is the need to be the visionary leader that can convince all the constituencies to understand the need to move in the same direction at the same time. The dirty little secret for most law deans is that 95% of the dean's problems are not "what we ought to do," but rather "how do we keep all of those divergent souls moving generally in the same direction toward common goals"?

It ought to be obvious by now that no human being can do it all. So what is the answer? Do we give up? The answer again is "no." I am an optimist, and I am also a realist. I think that most good deans do most of the functions well enough most of the time to be successful. There are some truths that have emerged. A good dean cannot delegate the bulk of external duties. Most of those external constituencies will deal only with the dean. It is also true that the law school cannot raise large outside gifts, or even conduct an annual campaign, without direct and constant involvement by the dean. Any large donor will only give if the dean asks, despite the presence of a very good fundraising staff. It is also true that the dean must keep a substantial hand on the inside. While many of the inside duties can be delegated to a good associate dean, the confidence of the faculty will diminish if the dean does not pay some direct attention to faculty morale. Furthermore, the dean must take a personal interest in the scholarly productivity and teaching quality of the faculty. Faculty non-productivity cannot be ignored for long, or productive faculty will begin to resent their non-productive colleagues.

Thus, the dean has a time allocation problem. It is true when one says the dean should spend at least the bulk of her time on inside duties. It is also true when one says the dean should spend the bulk of her time on outside duties. Since it is obvious that the dean cannot spend the bulk of her time on both, balancing time

commitments is important. Therefore, developing skill in the art of delegation is absolutely critical. The dean must appoint good administrators, delegate to them, trust them, and try to stay focused on the big picture.

VII. SUMMARY

Machiavelli was right. Change is difficult. However, a dean is dealing, for the most part, with intelligent faculty colleagues who, if informed, can both understand the problems and the need for change. Central administrators can be made to understand that too much direction from the central administration, and too big a diversion of tuition revenue from the law school, will lead to disaster for the law school. Students are impatient, but students can also be made to understand the traditions of the academy. If a strong central vision can be articulated and most decisions are consistent with that vision, deans can succeed even in a time when the powers of the dean have been diluted. The old iron dean is no more, and it is true that the modern dean is an embattled juggler. But the dean also can be a visionary, an effective administrator, an academic leader, and resource provider if the dean can delegate, articulate, and motivate.

There was a wonderful ad that appeared in the *Minneapolis Star Tribune* on Sunday, June 5, 1994. The ad read as follows: "Lost. Black and white cat. Blind in left eye. Lame. Recently castrated. Answers to the name of Lucky." That ad could describe the modern American dean, if one is too cynical. The job of the American law dean is difficult, but it is not impossible despite all the impediments. All law school constituencies need to be made aware that these are times when changes are necessary. While change is difficult, it is not impossible. It can be done. And, many good deans have done it. Legal education will be the poorer if we do not understand the burdens placed on the modern dean, and with the goodwill of all constituencies, help that dean carry those burdens.