

SYMPOSIUM REMARKS:

THE CHALLENGES FACING LEGAL EDUCATION

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In many ways, law schools are the same as when I began law school in the fall of 1975. In the first semester of my first year of law school, I took contracts, torts, civil procedure, and criminal law. I also had a legal writing class. My guess is most first-semester law students have courses like that today. We sat in tiered classrooms like the ones that continue to be used at all law schools. We had thick casebooks. In fact, I checked and some of the casebooks that I used as a 1L in 1975 are still being used today in later editions. In contracts, we used Fuller and Eisenberg. In civil procedure, we used Cound, Friedenthal, and Miller. There are new co-authors, but the books are more similar than they are different. For a long time, I thought that this was a weakness of legal education. I even sometimes spoke with derision of how little legal education has changed over a long period of time. I have to say, as the years have gone by, I have come to regard this as more of a strength of legal education. The reality is law schools do a pretty good job of preparing individuals to be lawyers. That's primarily what we exist for, and there haven't been radical changes precisely because law schools, overall, succeed. But we certainly can do much better.

Overall, legal education in 2023 is much better than it was in 1975. The challenge for all of us is how to make it even better in the coming years. I want to talk about the ways in which legal education has changed over the decades and to show how this frames the issues that legal education faces today and will continue to face in the years ahead. I want to talk about five of these changes.

The first change—and I put this first intentionally because I think it is the most important—is the increased diversity in legal education. The statistics for the University of Alabama are dramatic as to increases in both racial and gender diversity. These changes are paralleled across the country. To begin with women in legal education: in 1970 at Harvard Law School, 5% of the entering students were women. In 1975, when I began, 25% of the class was female. Nationally, over half of all law students are women. At my law school, Berkeley Law, 63% of our entering students are women.

We also see increases in diversity with regard to race and ethnicity, though unfortunately not quite as dramatic. Right now, nationally, about 31% of law students are self-identified as students of color. If you look at the class that

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entered in 2022, 28% of the students were African-American, and about 6% were Asian-American. About 13% were Hispanic, less than 1% were Native American, and about 4% identified as multiracial. If you compare this to, say, 1975, it's a dramatic increase. If you compare it to the population, where it should be, law schools still have a long way to go. That, of course, is the challenge for law schools, and it's become even more acute after the Supreme Court's decision in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*.¹ In a 6–3 decision with the majority opinion written by Chief Justice John Roberts, the Court emphatically said no, implicitly overruling forty-five years of precedent and leaving open many questions about what colleges and universities may do to achieve diversity.

Previously, the Court had upheld affirmative action programs, including by law schools. In *Grutter v. Bollinger*,² in a 5–4 decision with Justice Sandra Day O'Connor writing for the majority, the Court upheld the University of Michigan Law School's affirmative action program. The Court ruled that colleges and universities have a compelling interest in creating a diverse student body and that they may use race as one factor, among many, to benefit minorities and enhance diversity. The Court said that the “benefits [of diversity] are substantial” and diversity “promotes ‘cross-racial understanding,’ helps to break down racial stereotypes, and ‘enables [students] to better understand persons of different races.’”³

There likely will be an immediate detrimental effect on admission of students of color in law schools and in colleges and universities more generally. This was the experience in states like California and Michigan that had already abolished affirmative action by voter initiative. In 1996, California voters passed Proposition 209, which provides that governments in California cannot discriminate or give preference based on race or sex in education, contracting, or employment. Justice Sotomayor, in her dissent in *Students for Fair Admissions*, described the impact:

The decline was particularly devastating at California's most selective campuses, where the rates of admission of underrepresented groups “dropped by 50% or more.” At the University of California, Berkeley, a top public university not just in California but also nationally, the percentage of Black students in the freshman class dropped from 6.32% in 1995 to 3.37% in 1998. Latino representation similarly dropped from 15.57% to 7.28% during that period at Berkeley, even though Latinos represented 31% of California public high school graduates. . . . For example, as of 2019, the proportion of Black freshmen at Berkeley was 2.76%, well below the pre-constitutional amendment level in 1996, which was 6.32%. Latinos composed about 15% of

1. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023).

2. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

3. *Id.* at 330.

freshmen students at Berkeley in 2019, despite making up 52% of all California public high school graduates.⁴

It took UCLA until 2015, nineteen years after Proposition 209 was enacted, to achieve its pre-1996 levels of student diversity.

A great deal will depend on what colleges and universities will be able to do in order to achieve diversity. The Court held that colleges and universities cannot give preference based on race, but it did not keep them from pursuing diversity through race-neutral means. My fear is that some law schools will give up and treat the Supreme Court's decision as a basis for abandoning efforts at diversity. My hope is that schools will aggressively pursue ways of achieving diversity consistent with the Supreme Court's decision. But at least in the short term, the gains in racial diversity in law schools are in jeopardy.

A second change in legal education over the last decades concerns technology. There are superficial ways in which technology has changed legal education. Most students in most classes now take their notes by laptop rather than by hand. And I think that has some effect on the nature of the classroom. Students with laptops tend to be a bit more passive. They tend to focus more on taking down dictation and detailed notes. But as a professor, I've also changed my teaching over the years in response to that. And I know there are some professors who prohibit laptops in their classrooms. I have never done that and won't because I always believe that students should learn in the way that's best for them. But ultimately, I don't believe that students taking notes on laptops, rather than by hand, has changed legal education.

A lot of professors now use slides in PowerPoint. I read all of the student evaluations each semester and have done so since I became a dean. I don't find any difference in student evaluations for the professors who do use PowerPoints and those who don't use PowerPoint. As you can tell by this talk, I'm one of those who doesn't use PowerPoint. I've never had a student evaluation come in and say I should use PowerPoint or visual aids. I know I wouldn't be very good at it and have chosen not to, but I don't think having PowerPoints in the class changes the nature of education.

But there are ways in which technology has changed legal education. Legal research, for example, is dramatically different now than when I went to law school. Then, to do legal research, it was necessary to physically go to the law library, and it was essential to learn to use the digests and Shepard's and things like that. Now an enormous amount of legal research can be done online from anywhere. So many books and treatises are also now available online. It certainly has changed the role of the law library. The law library is as important today as it was decades ago, but it plays a different function. It's less important as a repository of books. Librarians play the crucial role of helping faculty and

4. *Students for Fair Admissions*, 600 U.S. at 378 (Sotomayor, J., dissenting) (citations omitted).

students navigate the enormous quantity of information that's now available because of the Internet and social media. I've discovered as a dean that the costs of law libraries have increased rather than decreased because the serials and subscription services are enormously expensive.

Technology certainly affects the curriculum. There are courses now offered that didn't use to exist. Many courses now touch on areas that relate to technology, and I think this is the challenge for law schools going forward. Technology continues to advance at an exponential rate. We need to have courses on artificial intelligence, the Internet and social media, and biotechnology. The question for law schools is going to be how we can enhance our curriculum to prepare our students for the technological world they'll be dealing with.

A third development concerns the increase in clinical education. Clinical legal education really began in the 1960s. It was still in its infancy in the 1970s when I went to law school. It's flourished in the years since. I believe that clinical education is an essential part of legal education. As I've often asked, could you imagine if medical schools trained doctors who had never seen patients while medical students? We would never want to be treated by such doctors. And yet, for most of American history, most law students never saw a client. I don't have statistics, but my guess is today there's still a very substantial number of law students who graduate never having done a clinic, never having represented a client under supervision while in law school.

This is an undesirable aspect of legal education. It is easily explained: it's about cost. The genius of the system of legal education that Dean Langdell created at Harvard Law School is that it is so cost-efficient for universities. I am teaching constitutional law this semester to two hundred students, which from an economic perspective is very desirable for the law school and the university. Very large classes are not ideal pedagogically, but they are economically efficient. The primary costs for law schools are faculty and staff salaries. At Berkeley Law, 69% of our budget is faculty and staff salaries and benefits, with another 20% being financial aid for students. There is also the cost of the facility, including the law library. But overall, the Langdell model for legal education is an economically effective way to provide legal education.

Clinical education doesn't fit into that mold. I've read that the best practice for clinics is about one clinical professor for every eight students. That's tremendously expensive, and the question is how we go about increasing clinics in light of their cost and in light of the budget issues confronting law schools that I'll talk about. There are other issues that confront clinical education in many law schools. Historically, clinical faculty have been second- or third-class citizens within law faculties, and there is the question of how to go about making sure that they're fully integrated members of the faculty. There's thankfully been a trend towards giving tenure to clinical professors.

If one looks overall at legal education over the last decades, the development of clinical education is one of the most important changes, and the challenge ahead is how to do even more with regard to clinical education and how to provide more students at every law school a clinical experience.

The fourth development with regard to law schools and legal education concerns interdisciplinary education. If we look at recent decades, there has been an increased recognition of the importance of interdisciplinary work. Law and economics, law and philosophy, law and sociology, law and psychology, and so on, have developed as academic fields. There is a recognition that law and legal doctrine benefit from the insights of these disciplines, and there's a recognition in these disciplines of what law has to contribute.

Again, I think that this is manifest in many ways in legal education. Some of it is courses specifically focused on these interdisciplinary topics. Perhaps more important is the way that these interdisciplinary perspectives have come to be integrated within the curriculum. First-year courses on contracts and property often will refer to material from law and economics. Courses in criminal law benefit from law and philosophy, law and sociology, law and psychology, and so on.

There are other ways in which the interdisciplinary nature of legal education has changed. Law schools over the last decades have hired many more individuals with Ph.D.s in other disciplines. Overall, this is a positive development; teaching and scholarship are enhanced by the knowledge of other disciplines. But I also worry law schools overall are hiring people with less practice experience. More people are coming to law teaching straight from Ph.D. programs. As a consequence, fewer law professors are engaged in law practice than were at the time that I went to law school. I can compare the faculties that I joined over forty years ago with faculties now, and then more of the faculty were actually engaged in representing clients, writing briefs, and arguing cases. Fewer are doing so today. I believe in a big-tent approach to legal education. I think it is wonderful to have people who are coming right from Ph.D. programs, but I also think we're training lawyers, and we need to make sure we have law faculty that have the practice experience to bring that into the classroom as well.

Also, I worry that law school hiring processes favor those with Ph.D.s because they are much further along as scholars. But this might have implications with regard to diversity in hiring.

The fifth and final development is the increased cost of legal education. This is an enormous concern to me as a dean. I also am the father of two children who went to law school, and I paid their tuition so I am very familiar with the costs. When I went to law school in 1975, the tuition was \$2,400 a year. It increased to \$2,800 my second year and to \$3,100 my third year. The students protested that. Now this year at the University of California, Berkeley School of Law, in-staters are paying over \$60,000 per year in tuition, and out-of-staters

are paying about \$70,000 a year in tuition. And we are the least expensive of the top ten law schools.

Why has there been this dramatic increase, far outstripping inflation, even in real dollars? To go from, say, \$3,100 in 1977 to \$70,000 in 2022 is phenomenal. Some of the answer is that all of higher education has dramatically increased in cost; it's not just law schools that have experienced this. When I went to Northwestern as a freshman in 1971, the tuition was \$1,800.

For public schools like my university, some of it is the dramatic decrease in state funding. And this is true of many public universities across the country to which the states have decreased their financial contribution. The budget I know best obviously is the University of California, Berkeley. This year of our budget, if you look at all of our revenue, only 7% is coming from public dollars. The other 93% is coming from tuition or other programs or money that we raise. But when you think of a public school, where just 7% of its dollars come from the State of California, you realize we're public in name only. Of course, it's not just California. The tuition at public law schools like the University of Virginia and the University of Michigan is quite similar.

Another contributing factor to the greater cost is the increased salaries of faculty. There's no doubt that faculty salaries have gone up significantly. As an example, my first year of teaching was in 1980, and my salary was \$26,000 a year. Entry-level salaries are much higher now, even accounting for inflation, and salaries for senior faculty at top law schools have increased disproportionately more.

There is also far more in the way of services that are provided. There are things that, thankfully, law schools are supplying now that we didn't use to provide. As an example, we have a full-time psychologist who works within the law school to help our students. Being attentive to the mental health needs of our students, we've just hired another part-time psychologist. We have a full-time staff member working with students who need accommodations for disabilities. We now have four full-time people working with students who want to pursue public interest careers in our career development office. I think that is a terrific development, but if you look at all of the increased staff across all of the departments of the law school, it helps explain the greater costs.

What are the implications of this tremendous increase in cost for legal education? One is the importance of law schools increasing scholarship aid and financial assistance for students. I'm the first in my family to ever go to college. I couldn't have gone to Northwestern without a scholarship. I couldn't have gone to law school without the loans to pay for it or the ability to work at jobs while I was a law student. I'm constantly aware that the tremendous increase in cost necessitates that schools provide a great increase in scholarships. I think maybe the thing I'm most proud of that I've done as dean at Berkeley Law is to almost double our scholarship budget from \$15 million when I arrived to \$28 million this year.

A second implication of increased cost in legal education is the crushing debt that our students graduate with. I regularly talk to students who are graduating from law school with combined college and law school debt of \$200,000 or \$300,000. This certainly affects their career choices. It then channels many students who might want to pursue other paths into large law firms. Here, I think it's essential that law schools have robust loan repayment assistance programs to help our students who want to pursue public service careers be able to do so.

The third aspect of the increased cost is a change in the environment of law schools. I'm so often asked by people about what is different today than when I started teaching in 1980. I think law students are much more talented and much more sophisticated than when I began teaching or when I was in law school. But I also think that students are much more consumerist as they approach legal education and, more generally, higher education. They expect far more in terms of services. And I don't blame them when they're paying \$60,000 or \$70,000 a year. They have every reason to want to get their money's worth. There are good implications of this. Overall law teaching is much better today than when I went to law school. I always felt that my law school professors wanted the school to bring the best students they could, but they wanted little to do with the students once they got there. I went through three years of law school without one teacher ever saying, "These are my office hours. Come visit me." That wouldn't be acceptable today. Students today just wouldn't put up with some of the kind of teaching that I experienced as a student, and that's a good thing. I am so impressed every semester when I read the teaching evaluations with the quality of my colleagues' teaching and their commitment to the classroom.

But there's also a downside, too, as students really do approach law school in a much more consumerist way. As dean, I get requests from students for tuition rebates when they don't get what they want. During COVID, the students demanded that we give them a tuition rebate because we were online for a year. But that was impossible because there were no funds to pay for this. We could not cut salaries or scholarships, and together, that is 90% of our budget. Just this week, a student who didn't get the classes that she wanted because some of them were oversubscribed demanded a refund of some of her tuition. Of course, the response was that we couldn't do that. I am finding that my students are increasingly demanding to get paid for work that they do for student organizations. Just a week ago, I met with the co-presidents of the student government, and they said they should be getting paid for being in this role. We have over 100 student organizations, and there's no way that we can possibly pay them for their service.

My response is that I hope that volunteering for student organizations brings enjoyment. I hope that it gives skills that prepare students to be lawyers. I hope they feel good about giving back to the community. I hope it gives them

résumé value. But if those aren't enough, no, we can't pay them for work on student organizations.

Finally, as we have realized the increased cost of legal education, we've got to recognize that law schools, like all higher education, are very dependent on the existence of student loans. If student loans dry up or availability becomes more restricted, it certainly will have a tremendous impact on access to law schools. I predict then that many law schools would have to close. And so we've got to be consciously aware of the importance of the loan market for our students to make sure that those who want to go to law school are able to do so.

I've spoken of these five developments as if they're universal among law schools. I also recognize when we talk about legal education that law schools are not homogeneous. There are differences among law schools that are quite important. Law schools do not all face the same challenges. I think that the Great Recession of a decade ago and the significant decrease in the number of applicants to law school heightened those differences among law schools. And so we've got to be careful. We can talk about legal education but also recognize it's not the same everywhere.

As I've mentioned to you, I've now been a law professor for forty-three years. I've been a dean for fifteen of those years. I've had the opportunity to be involved with legal education as the President of the Association of American Law Schools. My overall conclusion from this is that law schools in the United States are in good shape. Legal education overall is succeeding. But we certainly can and certainly must look for ways to make it better.