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PERSPECTIVE

Dean reacts to Scalia on law school

By Stephen C. Ferruolo

In his commencement speech at William & Mary Law School in May, Justice Antonin Scalia rejected the increasingly popular view (at least outside of the legal academy) that law school should be cut to two years and spoke eloquently about the legal profession (the "learned in the law") but contributed little of substance to the debate of what should, and realistically can, be done to improve legal education.

Although I have been the dean of a law school for three years, my perspective on what is wrong with, and should be done about, legal education is informed by the more than 20 years I spent in practice as a business attorney and partner in major national law firms. This experience of the business and economics of legal practice gives me a perspective different from legal academics or, with due deference, the justice (or, for that matter, the president, the lead advocate for reducing law school to two years).

While I agree with Scalia's dissent from what he calls "the law-school-in-two-years proposal," I reject two dichotomies that underlie his argument: law as a "profession" versus law as a "trade" and "legal learning" versus "skills-based experience." My case for retaining the third year of law school rests on the fact that law is both a profession and a trade and that a law school education must provide both legal knowledge and practical expertise. Eliminating these false dichotomies about lawyers and the purpose of legal education makes Scalia's important point about tuition costs even more problematical: The system is not sustainable in its present form because law schools need to do more to prepare students for successful careers at a time when that education is already far too expensive.

Scalia proposes cutting costs by shrinking faculties, increasing teaching loads and reducing faculty salaries. These are not the easy fixes they may seem to be. And I say so as a business lawyer who spent years helping to manage national law firms, not as someone who has a vested interest in preserving academic privileges. Let me address them in reverse order.

Law professors' salaries may be high relative to those of other academics (except maybe professors of medicine) and federal district judges (as Scalia points out), but even at the high end for senior professors at top law schools, salaries are typically less than what even first-year equity partners make at most AmLaw 200 law firms. Further, if law schools want to continue to recruit entry-level faculty with top credentials and significant law firm experience (which we need to have more of on our faculties), the salaries we offer, at least initially, need to be competitive with those in private practice. Increasing teaching loads will do little good if applied indiscriminatively and may penalize the many highly productive legal scholars who are often our greatest teachers, while not sufficiently motivating the few who will need to update their skills to effectively teach either the core courses required to become "learned in the law" or the specialized courses needed for practice. Might it also be the case that the proliferation of the narrow elective (even nonlegal) courses criticized by Scalia is a result of law schools needing to find ways to utilize the talents of some long-tenured faculty?

Associated Press

Justice Antonin Scalia at the Supreme Court in Washington, July 26, 2012.

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Scalia states that smaller law school faculties "would be no huge disaster"; but because of tenure and the lack of mandatory retirement, these shrunken faculties will likely be older, have less recent and relevant practice experience or expertise in new and expanding legal fields (e.g., privacy, health and IP law), and become generationally (and technologically) ever more distant from the law students in our classrooms. The limited advances that have been recently achieved in law school faculty diversity are also likely to be adversely affected. This shrinkage of faculties might be heralded as a great opportunity to reduce costs by hiring more practicing lawyers and jurists as part-time adjunct faculty (as has been recommended by the Task Force on Admission Regulation Reform of the California Bar Association), but doing so would put law schools at the risk running afoul of the regulations of the American Bar Association and the Association of American Law Schools, which give full value only to "full-time teachers on tenure track or its equivalent."

Unfortunately, Scalia does not address the impact of excessive regulation on the legal education system, as one might expect. Although he chides the January 2014 report of the ABA Task Force on the Future of Legal Education for its passing reference to the law-school-in-two-years proposal, he does not comment on any of the actual recommendations made by the Task Force to reform legal education and lower its costs. These recommendations include a welcome call for the repeal or substantial moderation of the restrictive accreditation standards, like those related to faculty status, that "increase costs without conferring commensurate benefits." Without such reforms, shrinking law school faculties might well become a disaster for the quality and relevance of legal education, as well as for efforts to expand access legal education and increase the diversity of the legal profession.

The time, costs and debt incurred to attend law school can only be justified if we prepare law graduates for professional success in the highly competitive and increasingly specialized legal marketplace. Like Scalia, I believe that fundamental to this training is the necessity of a solid foundation in the doctrinal core curriculum; we need to strengthen that core and restore its primacy as the common, shared experience of every law student. That core knowledge of the law is essential to becoming valued and valuable legal professionals. But it is not sufficient. No one who has practiced for any significant amount of time in the last 30 years would deny that legal practice has become increasingly specialized and that, regardless of the prestige of the law schools from which they graduate, students are less and less likely to get the jobs that they want (and need to pay for their legal educations) if they have not taken specialized courses in at least one field of expertise and have not gained relevant, structured skills-based experience.

Where will law graduates get that structured skills-based experience? Not in law firms, as Scalia rightly observes (and something that I can certainly corroborate from my years in practice and law firm management). But this observation leads Scalia, seemingly either to want to dismiss the value of those practical skills or to question whether law schools can effectively teach them, to make a curious statement: "Legal learning is what only law schools can effectively convey." Though correct and characteristically clever, Scalia here seems to be missing what I see as the critical point. Law schools can no longer convey only legal learning. Sustaining the legal education system requires that we do a better job preparing our students for their careers by ensuring that they graduate with structured skills-based experience, as well as legal learning. Figuring out how we can do both, equally effectively as well as more efficiently (i.e., without further increases tuition), will give us the best (and likely the only) case that can be made for what Scalia prescribes: "the necessity of soaking in the law for three years."

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