A Question of Governance
There are different points of view from which one might phrase the question as to the role of students in the governance of law schools. There is one which, to me, seems particularly appropriate. It is this: How can student participation in the governance of law schools improve the quality of law schools and of legal education?

Starting from that point of view, I may as well begin with a forthright disclosure of my own benighted convictions, confident that I shall at least perform the humble service of providing a decent target for those who will follow me. I see little reason to hope that our current absorption with the formal modes of student involvement in the governance of law schools is a path toward the improvement of legal education. I think it is a dreary road that leads to a dead end, one that exacts a heavy toll in time, uses the least important talents of our students and faculty, and carries us toward an environment that is more stifling than invigorating.

This view, which may be shocking, is not based on antipathy toward students nor on mistrust of their objectives, although I know that it may be misunderstood. Nor, I think, does it reflect a lack of appreciation of the contribution that some of them can make in proper ways to a better perception of the aims and methods of legal education. My antipathy is not to students but to the idea of governance as a guiding principle in the enterprise of education. My concern is that preoccupation with the role of students leads inevitably to preoccupation with governance, and magnifies the role of governance in an endeavor that should have as little of it as possible.

Questions of student participation apart, it is unlikely that we would find ourselves today talking about problems of the governance of a law school. Some rather drab subjects have from time to time made their way into programs of this Association or into the pages of the *Journal of Legal Education* but happily the topic of governance has not been prominent among them. I suppose that until now most would have regarded it as a non-subject, and it is a significant but gloomy commentary on the state of affairs that we could muster this much of an audience to hear a discussion of it now.

The students who seek formal modes of exerting their influence on the character of a law school have a misconception about the nature of the enterprise and an illusion about how it in fact operates. What is true of universities is equally true of law schools, and I cannot put the point better than Harry Kalven has recently done in speaking of universities: "The heart of the activity—what one studies, thinks about, teaches, does research on—those activities which are the reason for his being at a university, are by a proud tradition placed virtually beyond the reach of governance. Ideal-

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*Statement by Phil C. Neal, Dean of the University of Chicago Law School, at a panel discussion of "The Role of Students in the Governance of Law Schools: at the American Association of Law Schools' Convention in San Francisco, December 28, 1969.*
ly, a university is a collection of anarchists, each being allowed to pursue truth in his own way. In a deep sense, the better the university the less there is to govern.” And the least interesting aspects of university life are those which are subject to governance. The organizational principle of the university . . . is anarchy—the right kind of anarchy.

This is not mere rhetoric designed to parry student ambitions and not a mere statement of an ideal. It is closer to a description of the reality than any table of organization would be.

How little there is of governance in the ongoing business of a law school is something soon learned by most faculty members and all deans. It will be said, and of course it is true, that there are committees on this and that, there are meetings, there are reports, and the faculty occasionally does something by vote. But ordinarily this is a fitful and desultory process. The issues of policy that get resolved by this process in ordinary times are surprisingly few. The number that are important is even smaller, and the number having to do with improving the quality of legal education is almost negligible.

We need to ask ourselves how it is that innovation and reform come about in law schools. It is not by governance. It is seldom by committees. And even where a significant committee report can be identified, I am confident that investigation would show that it was largely the work of one man. The reason is not obscure. Our problems are in the realm of ideas and, even more important, the elaboration and implementation of ideas. They have little to do with arriving at a common will, which is the business of governance. A committee may resolve that urban studies should be developed, or even that particular courses should be offered. Nothing will come of it, and indeed the idea itself is unlikely to be propounded, unless there is a particular individual who sees it as important to engage in the painful creative task of exploring the field, organizing its problems, and putting together a course. To take but one example, can one imagine that Henry Hart’s course on the Legal Process could have been born in committee? Where is the striking course or the important field of the law whose addition to the law school curriculum owes its genesis to the work of a committee or the deliberations of the faculty?

When one turns to other areas of the enterprise in which committees customarily function, such as admissions, administration of academic rules, and the appointment and promotion of faculty members, the problems are different but the same general question is appropriate: What reasons are there to believe that participation by students will improve the overall quality of the judgments that are made? Putting aside all other difficulties, how are the students to be found who will have the capacity, the sustained interest, and the desire to spend their time in such unproductive fashion, that will enable them to do a better job than the faculty members who presently carry out these generally unwelcome responsibilities?

The number of faculty members who function effectively on committees is itself small. It seems to me extraordinary to suppose that there are significant gains in the efficiency or quality of these activities to be found in any available procedure for choosing students or of using them in the short time they can serve. To the contrary, I am reasonably confident that the effort to do so involves substantial losses in the efficiency if not the quality of the process.

Such negative views do not imply that students have nothing to contribute to the policy of a school or to the direction in which legal education will move. The point is that there are abundant opportunities for that contribution to be made without obsession with the empty questions of structure and governance. We need ideas. We need to take account of the criticism and the special perspective that new generations of students bring to our problems. Those students who have something to say should find no difficulty in getting attention for compelling ideas. I cannot imagine a faculty that would not welcome or be influenced by a thoughtful and well-reasoned report of an individual
student or a group of students on any problem of legal education. Such reports being as rare as they are in the case of faculty members, the opportunity is in a sense very great.

One would think that law students especially would respond to this challenge if they are interested in the problems, since they have chosen a career that puts high value on the arts of reasoned analysis and persuasion. But this kind of contribution is one that not many students are able or willing to make. Hard work is involved. The stock of ideas that students can bring to old and difficult problems is understandably limited. The most capable students will recognize the difficulties and, for the most part, will rightly conclude that there are better and more interesting ways to use their time. The result is, I am afraid, that most efforts of students to become involved in these matters take the form of superficial proposals based on whatever happen to be the current clichés of reform that leap from one law school to another.

We should by all means encourage thoughtful consideration of the problems of legal education by students, and listen to what they have to say. I doubt very much that the process is going to be much advanced in the long run by institutional arrangements, whether in the form of joint committees, parallel committees, representation at faculty meetings, or whatever other devices a particular school may see fit to adopt. There seems little reason to believe that whatever contributions students can make cannot be made by them as students rather than as participants in governance. The elements that make for excellence in law schools are ideas, intellectual climate, and incentives. More governance will not improve these elements. In relation to the environment of a law school, governance is really a form of pollution. If we would preserve the vitality of our institutions, we must hope that we will recognize governance for what it is before it is too late. Perhaps it is already too late.

Logically to the economic literature on an obscure point of theoretical welfare economics, but he does not enlighten the reader as to the state of empirical research in the accident field. From a casual survey, it appears that the existing empirical work is almost exclusively concerned with the compensation aspect of the accident-control problem. And studies of the level, costs, and timing of the reparations received by accident victims do not illuminate what should be the central question of public policy in this area: whether the fault system is better at reducing the net costs of accidents than alternative systems. But it is possible to conceive of studies that would cast considerable light without immoderate length, cost, or complexity. Let me suggest three:

1. One could compare accident rates in jurisdictions having different accident-control schemes or rules (are pedestrians more careless in jurisdictions in which contributory negligence is no longer a defense?), and in the same jurisdiction before and after a change in tort law or other relevant institutional change.

2. As my colleague Harold Demsetz suggests, one could collect either instances where changes in technology altered the relative costs of accident avoidance and ask whether the rules of liability were changed to conform, or instances where the rules changed and ask whether the changes followed technological developments that affected the relative costs of accident avoidance.

3. One could ask how many of the doctrines of accident law currently in force can be deduced from the premise that the purpose of such law is to reduce the (net) costs of accidents.

Perhaps such projects would prove more difficult to undertake than I think. There is ground for optimism in the fact that accidents, unlike some other important subjects of interest to the student of legal institutions, such as collusion, are not covert. At all events, I see no other way of making substantial forward progress in the accident-control area; and perhaps this is a point with general application to legal scholarship.