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What the Bar Examiners Should Know About the Law Schools

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[Address delivered at the meeting of the National Conference of Bar Examiners in Philadelphia, September 10, 1940.]

ONE could not wish for a broader one character and examine the graduates of law schools on a quite different basis. It would seem that accepted concepts of fair trial and hearing call for a very direct correlation between the law school and bar examining programs. If any serious variance now exists or later develops, a clear duty is imposed upon the bar examiners and law schools to effect some satisfactory compromise on the point. The burden of proceeding first would seem clearly to be on the bar examiners, due to the fact that they are the ones who are in the position of official and final authority.

ONE text than the one which has been assigned to me. It would seem that the answer was axiomatic: The bar examiners should know everything about the law schools. I assume, however, that it would be a waste of time for me to try to illuminate such a general proposition and that I might better undertake to tell you what in my own humble judgment is distinctly good; what is an established commonplace; and what is distinctly bad about the law schools to the end that as the Irish preacher said, "If you git these three points into your head you'll have it all in a nutshell"—and be in a position to act accordingly.

The principle of cooperation between the law schools and bar examining boards I assume to be firmly established. Obviously preparation for admission to the bar and tests for admission cannot in fairness to the applicant be at serious variance. Public authorities cannot properly sanction law school training of

I have always been convinced of the validity of the bar examination program. From the standpoint of the courts and the public interests which they represent there must be some regulation of legal education. If left alone in some quarters it will succumb to commercialism and the level of a trade education. For the time being at least it seems preferable that that regulation be indirect

in form and accomplished through the medium of standards and tests for admission to the bar, administered by public authorities. The alternative of direct supervision does not seem feasible or desirable. It seems worth while to emphasize the proposition that the bar examining set-up rests upon governmental authority and that while in terms it is a means of determining the qualifications of applicants for admission to the bar, it is intended to be and is in fact an indirect regulation of the business of legal education. What bar examining boards do actually affects law school programs, with the result that nothing ought to be done by them without full consideration of its effect on legal education.

From the standpoint of the schools the bar examination program should constitute a very significant check on law school objectives, methods, and accomplishments. What public officers think about a proper preparation for admission to the bar is a fact of life, which in a democracy cannot properly be ignored (although it may be opposed), even in the upper hierarchy of legal education.

From the standpoint of the student the bar examinations are beneficial. The mere fact that there is presented an additional standard to be met, that there is set up another barrier which constitutes also a challenge to one's ability and perseverance, is of some value. As a standard and a barrier the bar examination tends to discourage some of those who ought to be discouraged, and is an incentive toward serious effort and achievement to those who are finally successful. And of infinitely greater importance,—insofar as the examination constitutes a *fair comprehensive* examination which compels additional study and understanding it is of great value in the final completion of the applicant's legal education.

Bar examiners should know all about the law schools to the end that the bar examination will constitute a fair comprehensive examination. "Fair" from the viewpoint of all concerned. From the point of view of the student and the

school it is *prima facie* unfair if (1) it assumes a standard of achievement beyond that set by the schools, or (2) it is based upon a field of knowledge to which the student has not been exposed, or a technic to which he is not accustomed. On the other hand, it is *prima facie* unfair to the public interests in a competent administration of our judicial machinery if it correlates with law school standards, methods and curricula if those standards, methods and curricula are inadequate. "Fairness" here involves a standard which should only be defined after due consideration of all pertinent factors; and clearly it cannot be determined on a national basis, except in a most general form.

The number and variety of schools involved assures a conflict. Of itself this is not cause for alarm and indeed may be cause for congratulation. Everything which is done in the name of legal education does not by that fact itself guarantee that it is properly done. Of course, the converse is also true. The mere fact that a bar examining board behaves in a certain manner does not guarantee that the behavior is all that can be desired. One point, however, seems clear, and that is that where a conflict develops it cannot properly be ignored and ought to be resolved after fair discussion and intelligent consideration of the problem.

The best test of the validity of an examining program is the result. When it is discovered that applicants, who according to accepted standards have had an adequate training, fail a bar examination in significant numbers, there is made out a *prima facie* case against the validity of the examination. On the other hand, it is also true that if applicants, who according to accepted standards have not had an adequate preparation, pass the bar examination in significant numbers a *prima facie* case is again made out against the validity of the examination.

One need not be too concerned about the failures among the group of applicants who on the face of it have not been adequately prepared. It is a fact

that a large number of law schools still operate and purport to operate only on a minimum basis. Certainly an applicant who has demonstrated his intention of undertaking to meet the barest minimum requirements for admission compels no sympathy and deserves no particular consideration from examining boards. Bar examiners owe a clear duty to the cause of decent legal education and to the profession, courts, and public to insist upon a standard of achievement and a program of legal education some place beyond a very mediocre standard. Bar examining boards will do a significant service to legal education if they frame their examinations to a standard which will encourage and compel the sub-standard and marginal schools to advance their programs to a higher plane, or retreat from the field of legal education. My own conviction is that the individual student involved is seldom, if ever, imposed upon by those schools. Almost without exception he has consciously chosen the short-cut and he knows he is gambling with failure. Human nature being what it is when he loses on his gamble he is likely to "squeal"; he will blame the bar examiners and not himself; he will talk about favoritism and politics; all of which the honest bar examiner must be prepared to "take" as a part of his job. Every decent law school administration has the same difficulty.

My first principal point is that bar examiners, in dealing with the law school problem, must give recognition to the proposition that a great deal of inferior and mediocre work is done in the name of legal education. The minimum standards set by the Section on Legal Education of the American Bar Association are what they purport to be, and the supervision which that organization undertakes or effects is, for understandable reasons, not all that could be wished for. While it is patent that bar examiners owe some duty to accept the work of a marginal school, it is likewise true that they also have a right to insist upon some progress in standards and work done beyond that which now prevails as

the minima. One must hasten to admit that when we talk about standards of admission and achievement in the field of education we are dealing with matters of judgment about which there may be dissension, reasonable and otherwise. The fact is, however, that the propriety of some standards in this field is so well established as a matter of law and fact that the only proper controversy is as to the fair limits of minimum standards.

Circumstances will vary but on the whole it would seem to be fairly within the province of bar examining boards to first encourage and then to insist upon a progressively higher standard in legal education. The present standards have now been in effect for some years and some distinct and significant advancement is due if not overdue.

In view of the fact that the calibre of work done and the standards of student achievement which the law schools can insist upon effectively depends in no small measure on the amount, substance and calibre of the student body's pre-legal training, the time has come when we can insist upon three years of pre-legal training rather than two. There is considerable evidence and significant respectable opinion to sustain the proposition that the high school and junior college training of today does not have the substance to it, nor do they produce the results of knowledge, discipline and understanding which they had and did when the present standards were adopted. My own experience convinces me without doubt that a law school student with nothing more than junior college training is not prepared for law school work on a decent plane, and with due respect to exceptional cases, is seriously handicapped in a desirable future development as a member of bar, even although he may occasionally finish law school with a very creditable grade average.

I would warn against the simple requirement of an additional year of college work. It can do more harm than good. An added thirty semester hours of work, which may be done on the junior college level, and on a bare pass-

ing basis, adds little to the student's knowledge or understanding and is discipline in reverse. It requires little effort, and encourages habits of physical and mental laziness which may never be overcome. It tends to insure failure rather than success. Any added requirement in this field must be in terms of senior college work of substance, accomplished on something more than a minimum passing grade.

I am sure that you would find few, if any, law school men who have thought about and dealt with the problem who would disagree on those matters. I trust that you will be concerned about our present situation and active in undertaking to correct it. It seems plain that bar examiners owe some duty to the schools involved to consult with them and to seek by persuasion, and in a spirit of co-operation, to win their support to any program which you deem desirable. If efforts along those lines fail I am equally convinced that you owe a duty to the bar and the public to maintain your examinations on an advanced plane without regard to their disagreement.

I see little difficulty in your appraisal of schools. Competent and disinterested persons in the field of legal education can be found whose judgment could be accepted without much question. I would share your distrust in accepting without question the opinion of any expert. But I think it should be agreed that there is a presumption in favor of the validity of the objectives and methods of those schools and the judgments of those school men who are commonly accepted as superior. I think they would agree substantially on the pertinent factors to be used in evaluating a law school.

Any educational institution is judged:

First, by the achievements and reputation of its faculty personnel in the field of scholarship. Teaching ability is important but distinctly secondary. It may even be a detriment. Superior pedagogical ability, not based on sound scholarship, is education in reverse. The acquisition of knowledge which is

"wrong" is no benefit to a student—it is a handicap to him. Many students, particularly those from the commercial and marginal schools, have trouble on the bar examinations because they have been taught, all too effectively, much that "ain't so", or that which is only partially or uncritically so.

Second, by the standards of student achievement which the school (the faculty) insists upon as satisfactory. If an investigation discloses that few, if any, students fail and that they can do creditable work without serious and sustained effort the school must be rated as below average.

Third, by the standards of admission. If any one who meets the barest minimum of formal requirements can get in, the standards are again below average. It must be pointed out that if admission requirements are above average or usually high few, if any, students will fail even although standards for graduation are above average or high.

Fourth, by the substance of its curriculum. Subject-matters which have become relatively unimportant must be *supplanted* by those of modern significance. One cannot simply add to a curriculum and reach the right results. There must be some real surgery used on it.

Fifth, by its teaching methods and technics. It is commonly agreed in law school circles that the case-method of instruction is basically sound in most fields of legal knowledge. During the first half of the student's career it is clearly an essential method to his proper training. After that my conviction is that it is still an effective way of imparting and acquiring knowledge, but increasing emphasis should be placed on the initiative of the student, to the full extent of his individual capacity. A lawyer is no real lawyer unless he is at least something of a scholar, and he can be no scholar as a result of his legal education unless he has been trained in the tools, methods and standards of scholarship.

Experience has demonstrated to me that the usual classroom work and ex-

amination system come far from developing the student in any completeness, and that those procedures of themselves come far from indicating the real abilities of students. The average, and often the mediocre student, as determined by those standards, is frequently developed into a superior one if he is encouraged to do investigative work and to use his critical faculties.

It seems certain to me that no school can properly at this time rest its program on little more than three years of case-book instruction.

When one talks about curriculum and teaching methods he is in deep water. Teachers have deep, and sometimes loud, convictions on those matters. I am stating simply my own convictions and you will find many who will disagree. However, the matter is one upon which bar examiners must pass judgment.

You would expect that there are those in the field of legal education who concede too much to tradition, the *status quo* and their own vested interests and likewise those who would change things about in order to be disturbing, or without fair chance of improvement. As usual, some place between those two extremes we might find a decent compromise.

There has been a very distinct trend away from the curriculum and methods of ten years ago. There is an increasing conviction that legal education is open to the criticism of ultra-professional or trade training if the emphasis and purpose is to develop lawyers essentially as private practitioners. If it is to be upon a university plane it must most certainly be geared to a higher level.

This means, I believe, that (a) more emphasis must be placed on the field of public law as such, (b) more emphasis must be placed upon the legislative process and its proper relationship to the common law process, (c) more emphasis must be placed upon legal history and legal philosophy, to the end that there be some understanding of law as such and its function in society, (d) more emphasis must be placed on a broader phi-

losophy as to the relationships between law and the other social sciences.

Those matters cannot be dealt with in a three year curriculum without the elimination of some of the things which have previously been included.

That they must be included at all cost seems clear. Much is said about the decline of the legal profession in the field of public leadership. Finally leadership in the long run depends on superiority which is real and not assumed. Not so many generations ago the lawyer was a much more select individual, and the discrepancies between his preparation for public life and his mental attainments and those of his competitors were very marked. Today that is not so true, due partly to the increase in educational attainments generally, and due in part to the decline of legal and college education to a common level. The only thing which will guarantee a high place of leadership to the members of the legal profession is the development of legal education to the end that its products will truly be superior, not merely in a technical knowledge of law as such, but an understanding of it in relation to its social, economic, and political implications.

I am somewhat convinced that there need not be any increase in the time devoted to law school work. The schools have never been able in three years' time to cover more than a small portion of the legal field. The use to which those three years ought to be put is a problem of choosing between competing subjects, technics and purposes or values. It is of course clear that if courses in the Legislative Process, Legal History, Comparative Law, and Jurisprudence, be included in the undergraduate curriculum, and more emphasis is placed on Public Law, those courses must be substituted for older courses.

I see no real difficulty on this score. Teachers are prone to over-emphasize the value of classroom instruction. The fact is that a law school has three principal objectives. The matter has never been better expressed than by Dean James Parker Hall in an address before

the American Bar Association thirty-five years ago. He said: "The most valuable possession a student can carry away from a law school is that ability to analyze complicated facts, to perceive sound analogies, to reduce instances to principles, and to temper logic with social experience, which we call the power of legal reasoning. Superficial study is fatal to the acquisition of this power which alone makes truly effective any amount of legal information."

In other words, a student must acquire, first a knowledge of law, which means he must become familiar with what has been thought, said and done about law; second, he must acquire a mastery of the common law and legislative processes; and third, some understanding about law and government and their relationships to society. I am convinced that the second can be effectively acquired, if standards of achievement are what they should be in the first two years of law school by an intensive and skillful use of the case system of instruction. As to the first, the law school can simply give a fair beginning. Many teachers labor under the illusion that on this score they are doing more than teaching the history (past and current) of the law. But after all what the student learns is only what has been said and thought and done in the name of law. It is true that he is trained also in a formal criticism of that body of knowledge, based upon the logical processes, and an assumed social, economic, and political philosophy. A two year curriculum if wisely arranged can give him a fair knowledge of the basic subject-matters and a real competence in the field of logical criticism. There is no guarantee that additional knowledge in specialized fields will ever be of any direct value to him. Suppose he takes a course in Insurance Law, which is a further development of the law of Contracts and Public Utilities; it may well be that in his practice he will never have occasion to use that knowledge. He may practice rather extensively in the field of Landlord and Tenant, but without having had a formal course in that subject,

in a reasonably short time he can himself acquire a complete mastery of the subject. If he has had the basic courses in contract and property law he is only slightly behind a student who has devoted some precious law school time to a specialized course in that field.

I am sure you will find a trend in the direction I have indicated. My concern is not so much what law examiners might do to further that movement, but rather that they place no serious impediments in the path of its progress. If we continue to examine applicants in the more specialized fields of the law, law school training will tend to conform. The most serious objection to the existing bar examining program is that it tends to restrain valid experimentation in the field of legal education. One cannot properly condemn (although he may disagree with) any departure in curriculum and methods which competent law school men undertake. It must finally be judged by its results, after a fair trial.

There is an observable reluctance on the part of law schools to include in their curricula significant work in the field of the legislative process, and to emphasize public law. My own judgment is that bar examiners would be quite justified in undertaking to insist on those matters, particularly the first, because I think the second will come in the normal course of events. But Blackstone's attitude toward legislation is still prevalent, even although it would seem patent that the practice of law today requires significant training in that field.

At least bar examiners should be concerned about an undesirable hindrance to all of those developments. My own judgment is that the problem can best be met by limiting the bar examinations to those subjects which are commonly regarded as basic. It would seem that an applicant who demonstrates a fair amount of knowledge in those fields, and an ability to deal with problems in those fields, is an acceptable beginning lawyer. Attainments which go beyond that are difficult of measurement and somewhat outside of the purpose of minimum

standards for admission to the bar, whose function is the immediate protection of the public against incompetent practitioners as such.

The alternative seems to be a broader examination on an optional basis. The Indiana Board experimented for several years with that system, and this past year abandoned it in favor of a more limited examination in those fields which seemed basic. While no detailed study of the results under the optional system was made, the experience did seem to demonstrate that it was not wholly satisfactory. I have the impression that it was distinctly advantageous to the superior student, but something of a handicap to the marginal student. At least I was convinced that the shorter examination on the basic courses is much better.

There is some difficulty in agreeing upon what they are, but it occurs to me that it would be entirely feasible to reach a national agreement on the subject.

In conclusion: Without being unduly egotistical it would seem that this organization can quite properly exercise, directly and indirectly, some supervisory power over the law schools, including those which are good, bad and indiffer-

ent. Since its organization it has been largely concerned with your own immediate improvement. It occurs to me that the time has come when the horizon can be set back some. It seems to me that in cooperation with the Section on Legal Education and the Association of American Law Schools you should concern yourselves with an improvement of legal education. You occupy the official position and it might well be said that the primary responsibility is on your shoulders.

Three objectives appear to be desirable: (1) an immediate raising of the standards for admission to a six year requirement; (2) in many quarters an immediate readjustment of the examination program to correlate with a higher standard of law school achievement; (3) immediate consideration of a joint program of preparation and examination which will permit, encourage and indeed require a broader and a deeper base for legal education.

That which is mysterious about legal education you need not try to master. Personally I have every confidence that you are capable of finally choosing between what is good and what is bad about the law schools.