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Bernard C. Gavit
Indiana University School of Law

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WHERE DO WE GO FROM HERE IN LEGAL EDUCATION?

BERNARD C. GAVIT*

I choose to talk about the public-supported law schools, when we get around to (as we more or less apparently have) a little discussion of where we are and where we are going in the business of legal education. I, most certainly, have no quarrel with any school, and in particular with any privately-supported school, which operates a program involving very restrictive admission requirements, or which departs substantially from the orthodox and proposes to train a new kind of lawyer. It is clear to me that those schools can embrace objectives and adopt standards which those of us in the state-supported institutions may well find unacceptable, either as a matter of sound educational objective or of public relations. Anyone who thinks that a state institution can ignore that latter factor is very unrealistic. Democracy, at its best, is a system of compromise. It is not a weakness—it is a source of real strength.

I do not mean to say that those of us in the business of public education cannot operate a law school program on a high plane; I propose only to say that our functions and objectives cannot be determined without regard to the framework of our environment. The members of the bar in a given state have a genuine and meritorious interest in legal education in that state, and it cannot be ignored. The least acceptance of a democratic philosophy concedes merit to the opinions and desires of Mr. John Q. Public; and we must constantly accept Will Rogers' dictum that, "It takes a wise guy to differ with me."

I doubt that we are confronted with a crisis in legal education, but I think it is a fair appraisal of the situation to suggest that we are at least on the fringe of a new era. Many of you already know that two months ago the American Bar Association adopted a minimum standard of six years of preparation for graduation from an approved law school and for admission to the bar, either on a 3-3 or 2-4 basis, effective in September 1952. It is a safe prediction that, almost without exception, the approved schools, now operating on a five year program, will conform, and that a substantial number of others will follow suit.

That does not solve the problem of state standards for admission,

*Dean of the School of Law, University of Indiana.

which are fixed by the various legislatures and supreme courts, and which are not subject to the direct control of any accrediting agency. I think, however, we may well be surprised at the results in that field. The new requirement makes sense and is genuinely meritorious. The five year requirement did not make sense. It will in fact be easier to sell the new requirement than it was to sell the old one.

I am fully cognizant of the difficulties involved. I rest my case on a very simple proposition—if Indiana can do it, which it has, then anyone can do it.

There is evidence of a determination finally to make a frontal attack on the problem; the control of the state bar associations and the organizations responsible for admission standards is passing into the hands of the younger groups who are not so sold on the traditions involved; and the vested interests in the proprietary law schools will soon become not so vested. They are rapidly becoming unprofitable ventures. If and when we set and maintain a standard of competition which is obviously superior and rational, they will not be able to compete. "Up 'til yet" we have been content to compete with them on their own terms. Competition in the business of legal education is no different from competition in any other business. Only when you offer for sale a superior product do you make real progress.

I am sure we can anticipate a substantial reduction in the number of law schools in this country during the next decade, and a fairly complete acceptance of the American Bar Association standards. It will not be an unmixed blessing to the approved schools because they will be confronted with new pressures and obligations.

I am not at all alarmed, but I see increasing evidence of a growing conviction among some members of the bar in favor of a quota system. There is substantial alarm over the asserted excessive number of law school students and the resulting asserted over-crowding of the bar; and to some the obvious solution is a quota system of admissions, or, at least, a severe increase in the admission and graduation standards of the approved schools.

Of itself the elimination of non-approved schools is not going to have a substantial effect on law school population. Most of the students concerned will do whatever is necessary, by way of preparation, for admission to an approved school. The ambition to become a lawyer is not easily discouraged or thwarted, and at times, at least, it seems to be developed in an inverse ratio to the real ability and prospects of the one involved.

Minimum standards we most certainly must have. I am only concerned that they be democratic and realistic and not arbitrary, and that they concede something to the humanitarian aspect of the problem.

Furthermore, admission standards, graduation standards, and the end product of legal education are inseparable. One can organize and operate a law school which admits high school graduates and which grants them a law degree at the end of 1, 2 or 3 years. It would be a different kind of an institution, and its products would be quite different as compared with what we accept as a first class institution and law school product.

Necessarily, the planning of a law school program starts with a determination as to the kind of graduate we want to produce. Like most objectives it may be possible to state the concept only in rather broad and somewhat idealistic terms. I suggest simply that the job starts with a realistic appraisal of what has happened to those who have graduated in the past, and how they can be improved. I am convinced of one thing and that is that we underestimate the abilities and capacities of our law school student bodies. We operate on the assumption that students spend at least three hours in preparation for each hour of classwork, and "it ain't so." Some do, but many do not. There are means and methods of meeting that difficulty, but they require additional faculty manpower and some considerable repudiation of tradition.

I suggest further that admission standards must be in terms of adequate preparation for the law school program and standards for law school success agreed upon. One of the substantial arguments in favor of the new three year requirement was the fact that only 26% of the students entering the approved law school last fall had less than three years of pre-law preparation; 74% entered with at least three years of college work. Law school instruction is necessarily pitched to one or the other of those levels with real harm to the other group.

On the other hand, the best student body is cosmopolitan both in its subject-matter, backgrounds and in ability. In a way, it must be nice to be a law school professor in a school where one deals more or less exclusively with a student body made up of Phi Beta Kappas, but there are many rewards and satisfactions to those who struggle with a student body selected on a broader base. Indeed, I'd be inclined to think the product of such a system might well be better off because of the experiences involved.

Previous studies point to the inevitable conclusion that there is no significant correlation between pre-law subject-matter preparation and law school success. The reasons are obvious. Law is as broad as life itself. Anything one learns in his pre-law career is of some value. All students enter law school with varying handicaps. If we required perfect preparation the pre-law curriculum could not be less than 6 or 7 years. Law school instruction being what it is the varying deficiencies are overcome, and the end products are not substantially different. I am very firmly of the opinion that any attempt to straight-jacket pre-law education with exclusive subject-matter requirements would be a serious mistake.

Fixing the quality standard yields to no pat formula. One can, in the light of experience, determine a point above which no first-year student will involuntarily fail. Similarly one can find a point below which no one will pass. I am sure we can fix a credit-average requirement some place above the normal bare C average minimum, and it is important to do so. Such a requirement is a real stimulus to a fair number of pre-law students, and there results a better prepared applicant in some cases than could otherwise be expected. But some flexibility is necessary. Grading standards differ from college to college and equal treatment takes cognizance of that factor.

Beyond that it is important that the chancellor be permitted to intervene. If the evidence sustained the proposition, which it does not, that all students with mediocre college records were hopeless and the college records were infallible guides to actual ability, we could hew to an inflexible line and let the chips fall where they will. I suppose the question can be simply put—can we afford to forgive the young man who was overly impressed with the business of having a good time and with the business of campus politics? I am not so concerned with the public relations aspect of the problem as I am with the humanitarian aspect of it. I have seen so many risky candidates make the grade, not only in law school but in the practice, that I cannot be sold on the proposition that we cannot afford to take some risks. True, some of them will fail, but it costs little or nothing to give them a chance. As the opportunities for admission elsewhere become more restricted, some leeway becomes more important.

The criteria to be used are not infallible, but the accepted testing devices furnish most that is needed. A good reading test is most decisive, and fortunately it discloses deficiencies which frequently can be corrected, even as to those who are admitted as a matter of course. The corrective results which a competent reading clinic can accomplish are sometimes nothing short of phenomenal. It is amazing how many

students can get through a good college minus any real ability to read and, therefore, to write.

I think we forget that the two are inseparable. We are all familiar with the common assertion that one who received a disastrously low grade on his blue book had a comprehensive and intelligent knowledge of the subject, but unfortunately he was unable to write what he knew. Usually that is not true. A fair appraisal of the situation brings forth the conclusion that the student in question had no difficulty in expressing in at least reasonably acceptable (and sometimes in very excellent) English his more or less complete lack of knowledge on the subject. Sometimes it is a fair conclusion that the standard of intellectual achievement involved is beyond his abilities. Sometimes investigation will disclose that the real difficulty was an inability to read, and, therefore, to learn, and, therefore, to write what he did not learn. I am sure that if I were subjected to a test involving the law of procedure, I'd do fairly well—unless Jerome Frank were grading the blue-book. But if the test involved the writing of an essay on the life and philosophy of Thomas Aquinas, an expert grader in that field would properly conclude that the blue-book was worth about zero, give or take one or two points. About all I know on that subject is that he has been resurrected by Dr. Hutchins, as aided and abetted by Dr. Adler.

It is for that reason that we must be very sanguine about teaching law through writing. If you set a law student to the task of writing a complicated will, and he starts from scratch, if and when he does an acceptable job he will first have mastered, either on his own or with the assistance of some instructor, the law of trusts, future interests, wills and taxation. It probably is true that what one learns by his own digging and the hard way he is unlikely to forget, but it certainly is a difficult and time-consuming process. I think the importance of the King's English can be taught by a less painful process.

I do not mean to say that law school instruction should not include the subject-matter of legal writing and drafting. The point is that it is at least simpler to proceed on the basis of an already acquired knowledge than it is to use it as a means of acquiring knowledge, although in part such a method has real value.

One thing is certain (and we should freely admit it) language is a lawyer's principle stock in trade. That is so true it cannot be funny, and the answer to those who think it is humorous and derogatory is to say, "Exactly so, and so what!" One can only learn about ideas (which is what law is) and he can only deal with them through the

medium of language. We have neglected emphasizing its importance, and its skillful and exact use, and certainly few matters are finally more important in the training of a lawyer.

We should at least repudiate the myth that there is such a thing as a legal mind, and the already exploded myth that the qualities of the human mind do not sometimes change for the better. By definition a legal mind is a mind trained in the law. The potential legal mind is no different from any other potential mind. There is such a thing as a good mind, a fair mind, an unusual mind and many variations. But the process of learning law (as an intellectual pursuit) is no different from the process of learning medicine, chemistry or mathematics. The same person, being equally interested, could on this score be a great scientist or a great lawyer.

We certainly can defend a reasonable minimum standard for admission which correlates with the assumed and product desired, but I do think we will be wise to provide also for some flexibility.

God must love the average law student because he made so many of them! I observe a tendency, particularly among the successful members of the bar, to think that only the top law school graduates are worth while. Not long ago a distinguished member of the bar told me that the problem of admissions would be solved if the law schools graduated only those with a B average. When I informed him that that would eliminate 90% of the graduating class at our school he appeared to think that perhaps the suggestion was a little drastic.

We forget that, by and large, the lawyer population of this country is a very select group intellectually. The percentage of citizens who have had six or seven years of college and professional training is very small, and few, including the Ph.D's and M.D.'s, have been subjected to the broad and rigorous mental discipline which is an incident of good law school training in this country. Even including those lawyers not so well prepared, your lawyer is a superior individual on this score in comparison with the other members of his community.

We forget sometimes, too, that someone has to train lawyers for placement in other than the large firms or in other positions where only the upper bracket qualify. I know so many young lawyers, who graduated from law school with a scholastic record which was far from impressive, who have carved for themselves a position of genuine success in the practice and as first-rate citizens, that I have the greatest respect for the average and even less than average law school graduate. In part the explanation is that many factors and some significant qual-

ties of character determine the measure of a success one achieves in the legal profession. In part we overlook the fact that if one considers only the third year record as against the three year record, the rather wide spread in scholastic averages in a given third year class is considerably narrowed. In part we also overlook the fact that one who may have some difficulty in mastering on a superior level a broad field of knowledge has no difficulty in very effectively mastering a small segment of it. Many, if not most, lawyers settle down into some specialty. They not only become good men in a limited field; very frequently they become real experts.

I have undertaken to appraise the experience of our graduates for the past 20 years. A limited number we have lost track of, but we have a rather intimate knowledge as to what has happened to most of them. I wish there were time to give you a very detailed report. What I have to say involves evaluations and judgments which are not infallible, but for the purpose of this occasion I pose as an expert on the subject. When I speak of success in the practice, I minimize financial success as such, and pay some attention to the public responsibilities of the legal profession. As I read the Canons of Professional Ethics and the speeches of lawyers, they loom rather large.

I find, of course, that those graduating in the upper third of the class in general have achieved outstanding or at least genuine success. However, at least one or two in each class quit the practice early in the game, or they have not done well. As to a few, the explanation is that the individual had or acquired personality traits which seriously affected his abilities to get and retain business. The balance came from a family background which places a high value on an academic degree, and in particular on a professional degree, for its own sake. It is a mark of social distinction of a high order. Those persons early succumbed to the much easier task of making an excellent living in the family business. Aside from those just discussed, this group includes only four judges, and beyond that no one who has become politically prominent or otherwise a public figure, except as a very successful lawyer.

Almost without exception the graduates in the middle third of their classes entered the practice and are still there. Some have achieved outstanding success, and in general their progress has been very satisfactory. Included in this group are a number who have made excellent judges, on all levels, and a number who have achieved state and national prominence, politically and otherwise.

Substantially that is also true as to the bottom one-third, although

a few more have quit the practice, or the active practice of law. In terms of income I would guess that there is an over-all differential which is significant, but the members of this group appear to be happy with their lot and they certainly constitute a group of first-class citizens. Not a single one has disgraced himself, his school, or his profession.

Some of these people in the bottom one-third were the recipients of a second chance. I think the results demonstrate that we can afford to temper justice with mercy and not condemn to execution the young man who discovers too late that getting through law school is a more serious business than he had assumed it to be. We can defend any sound standard on this subject, but I am convinced that a sound standard includes some flexibility. As the opportunity for admission elsewhere becomes more restricted, the matter will present a critical problem.

The very few younger, well-trained lawyers I have known, who have encountered difficulty with the law of ethics, came from the upper brackets. It is commonly asserted that too many lawyers make for vicious competition and encourage violations of the Canons of Professional Ethics. It is, therefore, proposed that the number be limited and, of course, one is to accomplish that by eliminating prospective candidates on a scholastic basis. The bad actors I have known would easily have survived that process. And I do not know what is wrong with competition. Inevitably some will or will not survive and some will compete on an unethical basis. The latter should be dealt with directly. If their competition is within the limits set for a good lawyer, their conduct cannot properly be condemned.

We must avoid any meritorious charge that the legal profession is a closed corporation. If that ever becomes an established fact, we are in for serious trouble. On this score the State of Indiana is still suffering from the Jacksonian revolution of the 1840's. Our Constitutional provision of 1851, which undertook to say that admission to the practice of law should be free and easy, was the direct result of a lay revolution against what was thought to be a bar composed of aristocrats. Democratic principles do not at all prohibit substantial standards for admission as a protection to the public interests involved, but they do not countenance standards aimed at a selfish protection of the members of the bar.

I do not know whether our experiences at Indiana University are typical. I doubt if our standards have departed substantially from those followed in the other mid-western state law schools. I do con-

clude that the human material we have worked with is very much worth while and that the results have not been disastrous.

More important, I am convinced that we can very substantially improve our product, with great profit to everyone concerned, now that the pressures of the past few years are disappearing and we have an opportunity to think about our problems and to plan for the future. We have been much too complacent with the traditions of legal education. It has been a program of mass education, whether our student body was large or small, exclusive or cosmopolitan. It has been operated on a basis designed to keep costs to a minimum. It has been, or is about to become, a graduate program. In comparison with its counterparts in the other fields of graduate and professional training the cost is ridiculously low. Graduate schools engaged in the business of training Ph.D's think nothing of the expense involved in classes containing a handful of students; of the expense of employing members of the faculty who do no teaching but devote all of their time to research, and in "beating back the frontiers of knowledge," frequently without apparent success; and who use substantial sums of money to employ assistants and to provide the necessary equipment, and of the expense of substantial subsidies for most of their students. Medical education costs at least several times what legal education has cost, or at its best, is likely to cost.

We should be bold enough to ask the question, and insist on an intelligent answer, as to whether those products are any more important to the public well-being than is an equally superbly trained lawyer. The fact is, we have been pikers of the most degenerate sort in our demands for adequate financial support of legal education. There is little wrong with legal education in this country which time and a barrel of money will not cure. We have had our sights much too low. There has been such high authority for the case method of mass instruction, carried to its bitter end, that we have been too slow in questioning its real validity as against the developments in the other fields of graduate and professional education.

One should not doubt that if one is dealing with a highly selected student body, upon which one imposes the burden of self-education with a vengeance, and competitively many are eliminated, the student who graduates is an intellectual specimen of some consequence. However, he is not much at home in the county-seat towns in Indiana, and he seldom shows up there.

Those of us who are engaged in the business of dealing with a cosmopolitan and varied group of students cannot afford to imitate

those methods when a sound program indicates substantial points of departure. Paradoxically what is involved is a more complete acceptance of the dogma that all education is self-education, but not on a sink or swim basis. The teaching function can be over-emphasized, but it is not over-emphasized if we impose substantial burdens upon the law school professor on an individual rather than a group basis. Experience will prove that it is nothing short of remarkable what an otherwise average law student will achieve if one undertakes to teach him to swim before he is thrown into the water, and if he has a chance, and under expert supervision is encouraged, to perform as an individual and not simply according to class ritual.

I refrain from outlining an ideal modern law school curriculum and program. It would most certainly include much which we now do, but it would propose a sectioning and re-sectioning of classes, a substantial amount of seminar work, and some training by doing. It would give to the law schools the same responsibility for research in the social science fields which are assumed to be necessary to our scientific and medical brethren.

Necessarily it cannot be undertaken without a substantial increase in faculty personnel and library facilities. The law school library and the teaching assistant are as important to legal education as the laboratory and the teaching assistant are to scientific education.

There is as much competition for the tax dollar, in which we are interested, as there is for the non-tax dollar, in which Dean Sturges is interested. I know of no solution of that problem other than for lawyers to take the selfish, but sound, position that whatever else may come second, legal education comes first. In the field of politics your competitors are neither unselfish, kind nor generous.

We must be hopeful that lawyers and the organized bar will become actively interested in our problems, the crucial one of which is going to be a financial one. Lawyers and law school alumni constitute the backbone of any public-supported university's campaign for appropriations. They loom large and important in any university organization. I do not minimize the obligation of those groups to promote the welfare of the entire educational system. I want only to emphasize for you the sound proposition that genuine equality in the fields of graduate and professional education demands a very substantial expansion of the program of legal education, and the further sound proposition for which there is very high authority, that charity begins at home.