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CAN INDIANA CONSTITUTIONALLY IMPOSE EDUCATIONAL PREREQUISITES FOR ADMISSION TO THE STATE BAR EXAMINATIONS?

BY BERNARD C. GAVIT.*

I shall not keep you in suspense for half an hour or more—the answer to the question is YES.

I am not going to rehash my arguments¹ previously presented to establish the constitutional validity of some regulation on the subject of admissions to the bar in this state. Assuming that our constitutional provision on the subject of admissions has not been stricken from the constitution by amendment it is still clear to me that that specific provision offers no obstacle to the present set-up. The reasons can briefly be summarized.

In the first place earlier decisions and statutes are in conflict with the assumptions which rest upon the last two cases. It certainly was decided in the first case on the subject that the constitutional provision in question set only a minimum standard or gave only a privilege of applying for admission under reasonable regulations, for in that case² it was decided that a statute which prohibited a recorder from practicing law was valid. In the next case³ a woman, not a voter, was held to be entitled to admission. In 1881 the Legislature passed an act⁴ authorizing circuit courts to enquire into the learning of applicants. One can not reconcile those cases and that statute with the assumptions resting upon the Denny⁵ and Boswell⁶ cases, nor were they mentioned in those decisions.⁷ Certainly then the question

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¹ 16 Am. B. A. J. 595, 743; 6 Ind. L. J. 67; 7 Ind. L. J. 209, 226.

² McCracken v. State, 27 Ind. 491 (1867).

³ In re Petition of Leach, 134 Ind. 665 (1893).

⁴ Acts 1881, Sec. 831; Sec. 1033 Burns' Ann. Ind. Stat. 1926.

⁵ In re Denny, 156 Ind. 104 (1901).

⁶ In re Boswell, 179 Ind. 292 (1913).

⁷ The cases dealt solely with the interpretation of the word "elector" as used in the constitutional provision as to the amendment of the Constitution. There is thus really no conflict between them and the earlier cases.

is not foreclosed and it is still incumbent on our Supreme Court to make a conscious choice on the subject. When the matter is properly presented the earlier decisions will be found to rest on a substantial basis and to be the present law on the subject.

In the second place it is in any event true that the phrase "good moral character" in the constitution does not forbid reasonable regulations on the subject of admissions to the bar, but indeed invites them. How is the constitutional provision in question to be administered unless some extended enquiry is made into a candidate's qualifications and history? I know of no way of appraising a man's character other than by an enquiry into his attainments; no way of predicting how one will act in the practice of law other than by knowing in the most complete detail what he has done in the past, what his attitude toward social existence has been. I do not wish to reiterate the arguments I have previously presented to prove that "good moral character" as a *constitutional* concept is meaningless unless it be accepted in its broadest common meaning. Good character of moral fibre is in very truth a concept which may well include much more than the most advanced thought of today imagines. I am quite willing to predict that twenty years from now people will be amazed at the narrowness of our concept of professional character at its best.

Those who are willing to accept an inadequate concept of good moral character today in this connection labor under two distinct illusions. They apparently believe that the constitution is an existing thing and that in some way or other its framers buried in it a dead idea; that the judicial process here is simply to apply that existing, but dead, thing to the present situation.

But no error has been more emphatically and consistently denied. Courts have ceaselessly reiterated the obvious proposition that the purpose of a constitution is not to bury a dead idea but to vitalize a general concept, or principle, or doctrine because of its permanent value, both for the present and the future.^{7a} Its purpose is not to tie future generations to the narrowness of the present, but to wed them to a deep sustaining

The cases, on the point they did decide, are undoubtedly unsound. They have been re-examined by Mr. Frank Richman and his conclusions will appear soon in an article in the Indiana Law Journal.

^{7a}The most effective reiteration of this obvious principle of constitutional law is to be found in the recent Minnesota moratorium case. *Home Building & Loan Assn. v. Blaisdell*, — U. S. —, 54 S. Ct. 231 (1934).

values admitted by all to be a safe guide and to lead along a path of progressive attainment. There is nothing to indicate that the constitutional convention of 1851 did not frame the provision in question on that high plane so that there is every reason and all precedent to sustain its construction on that basis.

Indeed the framers of the constitution are entitled to the presumption that they did not in one clause of the constitution give the courts complete power over admissions and in another clause repudiate the gift. Nothing is more firmly established today than the proposition that the constitutional separation of powers allocates to the courts the power over admissions to the bar. It is almost uniformly regarded as an essential element of the constitutional judicial power.⁸ Certain it is then that a subsequent contradiction of that grant of power by the clause in question is to be avoided by a reasonable interpretation of it under accepted rules of constitutional interpretation. If any additional reason were needed to give to the phrase "good moral character" a liberal interpretation it is certainly present.

The second illusion in this connection is that good moral character in an attorney (and certainly the constitution is talking of nothing less than that and the cases so decide⁹) is a rather meagre concept. Those people make a conspicuous error as to the real significance of the lawyer's place in American society and the obvious necessity of a decent concept and standard as to professional character and conduct in an attorney.

The answer to this error is the answer to the principal question. The matter must be settled on the substantive merits. I am not going to indulge in any legalistic argument to prove my point, but I am going to point out the simple self-evident practical considerations which sustain it. The question really is, Does public policy sanction educational prerequisites for admission to the bar? One has only to accept common facts and a half decent concept of the lawyer's place in society to secure an affirmative answer.

The training and resultant character of lawyers so far as they affect individual interests have been sufficiently stressed to need

⁸ See, In the Matter of Paul Richards, — Mo. —, 63 S. W. (2d) 672 (1933); State v. Cannon, 206 Wis. 374, 240 N. W. 441 (1932); People v. People's Stockyards State Bank, 344 Ill. 462, 176 N. E. 901 (1931); In re Opinion of the Justices, 279 Mass. 607, 180 N. E. 725 (1932); Brydomjack v. State Bar, 208 Cal. 437, 281 P. 1018 (1929); and note, 66 A. L. R. 1512.

⁹ See, for example, Ex parte Walls, 73 Ind. 95 (1880).

no additional emphasis at this time. But even lawyers, however, forget apparently that we have a government of judges.

It is perfectly obvious that in no strict sense can we have a government of law and not of men. Government must be run by men until our machine age reaches the delightful millennium when iron and steel can be endowed with brains and all of our problems solved without effort on our part.

The idea sought to be conveyed by that common dogma is that the men who run the government shall be guided not by their own peculiar notions of propriety, experience and justice but by the accumulated experience of the past and the best thought and vision of the present as it is embodied in constitutional utterances, accepted and published principles of law, and a judicious extension of them to meet changing needs. Ultimately under any governmental system there is government by men. That they should submit to restraints is obvious but that there should finally be a superior tribunal with power to enforce the intended restraints is peculiarly and uniquely an invention of the American Constitutional system of Government.

There is a vast distinction between our system and most others. (In some of the newer republics our system has been copied). In most governments there is the same division of governmental functions as in ours as between the executive, the legislature and the judiciary. There are also constitutional restrictions on the exercise of governmental power in each field. But only under the American system is it established that there is one of the three departments of government which is finally superior to the others. Only under our system is it established that the final determination of private and public interests rests in the courts. For example were Parliament and the Crown in England to set up a National Recovery Administration the only possible attacks upon it would be either revolution, or repeal. Under such a system the majority is always right.

It is a curious paradox, therefore, that in a so-called Democracy we concede to our judiciary the power of thwarting even the majority. There is a review of all legislative and executive action in the calmness,—the objectiveness,—the quiet of a judicial tribunal before "trained" men. It has been thought, at least by the judges and lawyers, that if final review on legislative, executive and judicial action is to be given to anyone it could most properly be given to the judges. And being in a position to decide the matter they have so decided. The privilege of

making a mistake is thus arrogated to the courts to the exclusion of the legislature and the executive. It is not a facetious statement but a provable truism that the judicial function is the power to make mistakes—to finally decide a matter, rightly or wrongly. We are entitled therefore to take any action which will reasonably tend to minimize the mistakes.

There is no logical and probably no practical compulsion to the doctrine of the supremacy of the judges. (Witness the number of governments which get on well enough without it). This doctrine has arisen out of the lawyer's acceptance at its face value of his belief in or opinion as to his own superiority. The matter which is continuously on trial is not the supremacy of the courts—that is established—but it is the superiority of the legal profession. Finally the former must rest on the latter, and it is just as valid, theoretically and practically, as the latter proves from day to day to be.

Those who are concerned with the maintenance of our present system of constitutional government are in the last analysis really concerned with the training and character of our lawyers. Even if one were to wish a change until the change can be accomplished he has too an immediate interest in those matters.

When a citizen employs an attorney he wants one who is intelligent, learned and honest. But if he is honest within the bonds of common decency unfortunately the primary concern on that phase of his character ends. As an advocate for individual interests the client might reasonably and properly wish that the attorney leave the adversary's interests to his attorney and the judge.

But when the attorney becomes a legislator and executive and finally judge the concept of honesty and professional character broadens and properly he considers not only individual interests but those of the adversary and society as a whole as well. He must not only be honest with the individual; he must be honest with his opponent and the general public. The judging process is one of the noblest and certainly the most difficult of human occupations and it is perfectly apparent that under our constitutional set-up everyone has a direct and immediate interest in the learning and the character of lawyers. The ultimate success or failure of our experiment in Democracy depends upon him to a very large extent. In government there is no substitute for learning, intelligence and tolerance. Unless lawyers possess

those characteristics we shall fail, and to the extent that they do not have them we do fail.

One of the accepted powers of government is the power to perpetuate its existence on a high plane. Certainly no one can, therefore, successfully deny the immediate social interest in the training and character of lawyers. If any business is affected with a public interest certainly the law business is. Calling it a profession is after all simply another way of expressing that truth. It is the social element in the legal profession which must sanction any regulation in the field of admissions to the bar. All that is necessary is that there be found a reasonable basis for it in present and past experience and a reasonable expectation that it will serve the purpose intended.

II

Experience demonstrates that a bar examination, of itself, is insufficient. One need not minimize its obvious usefulness in order to point out its ineffectiveness for all purposes, and particularly its ineffectiveness in promoting the broadest character training in prospective lawyers. The latter is not a formal thing so that the bar examination covering simply the applicant's knowledge of formal law does not, and can not meet the entire problem. All that the bar examination can do is to insure that the candidate has a minimum amount of formal knowledge, which, however essential it may be (and I do not intend to minimize it in the least) is not the whole of professional character. Certainly it is but part of it.

This is established by the experience of the law examining boards in this country. Statistics for the country show that whereas an average of 55% of all applicants (first-timers and repeaters) fail at each examination, finally about 90% of all applicants succeed in passing before they are barred from further examinations or become discouraged. In New York the final average has been 92-95%; in Pennsylvania, 88-93%; in Illinois, 86%; and in California, where they have made a particular drive against repeaters, 70-83%. In this state our board has not been operating long enough so that any applicant has had an opportunity to fail the five examinations permitted, but it is apparent that our final record on this score will be in keeping with the common experience in other states. This demonstrates that the minimum of a formal legal education required by the

best of bar examinations is indeed a minimum, for it can be acquired successfully by almost anyone regardless of his scholastic and social background, if he be persistent. A school boy can learn rules of law just as he learns mathematics, however little he understands either. Despite the lawyer's pride in what he is pleased to call his acquisition of the power of "legal reasoning" it is apparent that, at least as tested by the present bar examination "legal reasoning" seems to be composed of a rather narrow formal knowledge plus a mediocre system of logic. It is therefore but a proper beginning.

It thus becomes increasingly clear that the best of bar examinations can not be an exclusive tool in solving the problem of admissions to the bar. Any *ex post facto* determination of a candidate's fitness in any event is unjust to the candidate; any strictly formal examination is unjust to the public and the bar. Professional character can not be developed or measured but slightly in any such haphazard way. When we realize that professional character consists of a broad and deep learning plus a socialized point of view it is clear that it can not be left to chance. The problem must be passed on to the schools, as it has been in the medical world.

A comparison with the situation in the medical profession is illuminating, and humiliating.

The medical profession has succeeded in eliminating to all practical purposes, the commercial medical school. But in 1932 there were 185 organized law schools in this country, and in the neighborhood of 55% of those schools must be classified as commercial or profit-making schools. They enroll about 55% of the law students. The American Bar Association over ten years ago established a minimum standard for admission to the bar of two years of college and three years of law school work. The Association of American Law Schools established the same standard thirty-two years ago. The dividing line between the schools meeting or bettering that very minimum standard and those which do not meet it is pretty much the line between the commercial and the non-commercial schools. At least ten new law schools (including several in this state) were organized during 1933,—all of them commercial, making no pretense of meeting any standards.

One of the more humiliating of the comparisons is that whereas with about half a dozen exceptions the doctors have succeeded in imposing a standard of two years of college work and gradu-

ation from an approved medical school as a pre-requisite for admission to the medical examination, lawyers and judges have not succeeded in establishing a similar standard in a single state!* (It is but fair to say, however, that several states do approximate this minimum standard, allowing law office training as a substitute for law school work.) In view of the fact that in practically all states the courts have the power to make the rules as to admission to the bar it is very apparent that lawyers have not strained themselves in their efforts on the subject.

The medical profession has something more than a vocal belief in its place in society and the professional character of its members. A minimum of learning and character development is actually accepted as an essential point of departure. On the other hand the bitter truth is that the legal profession is still given to talk. It is confused by the difficulty of actually choosing between its vocal standard which makes of the lawyer an aristocrat of learning and character, and the vicious American dogma of equality which makes every moron a potential lawyer. Standards for admission to the bar lose their vitality in the sentimental glamour of an unreal philosophy as to social existence and human nature. The only gain which is worth while now is an actual acceptance by the legal profession of its theory as to the superiority of lawyers, and a will to impose the necessary standards on applicants for admission to the bar. In a pioneer society the governmental and social structure could stand the strain of the self-made man. Many believe that our modern more complicated structure can not even stand the strain of the self-made business man. Common observation demonstrates that the self-made man is quite likely to be a rather crude product from a social point of view. It should be apparent to all that the superiority of lawyers is a relic of the past unless the modern race of lawyers is both theoretically and actually superior and that indeed social progress can not longer be asked to put up with mediocre lawyers. An insurance of a little knowledge is not enough, however valuable it is as a beginning.

Consider this additional fact. Law is exactly as broad and deep as life itself; it is the most comprehensive of all of the mental disciplines, being the only one which is all inclusive.

* Since this paper was written New Mexico has, by court rule, adopted the standards of the American Bar Association as prerequisites for admission to the state bar examination.

How can an illiterate person, no matter how adept he may be in memorizing rules, really know or understand law? It is simply physically impossible.

III

We must have lawyers who not only have a decent concept as to the demands of the legal profession, but some assurance, too, that in their everyday life they will actually choose professional conduct. The only possible distinction between a business and a profession is that the first is individualistic while the second is socially minded. A business man has only to look to his profits and let his competitors and all others look to their interests. A professional man measures his conduct not only by his own individual needs and ambitions but by the social consequences of his action. Professional men are constantly called upon to sacrifice personal interest for the common good.

Common disaster lies in the obvious difficulty of acting socially (professionally) in an individualistic society. A lawyer's ideals are in very truth at complete odds with his environment. Those who criticize him the most, who make the most of his frequent failures, are those who add to his already impossible situation by their own inconsistent demands that their own individual interests are beyond social control.

What appears to be an irreconcilable conflict, however, finally reduces itself to a battle which is won or lost only after the conflict has been actually met by the empirical test of action. There are many irreconcilable conflicts in nature, the one between free will and determinism being a most illuminating example. Both principles are in truth valid, although in the test of action one or the other must be a decisive force.

So it is here. The professional ideal is simply tested, and the battle won or lost in the field of everyday action. The character of lawyers is finally the determining factor as to whether or not the conflict is won or lost. Is superiority a fancy or a reality? Assuming that we are committed to a doctrine of law-*yer* supremacy what elements insure its practical success?

The start surely is with a decent concept of professional character. Then if the concept be sufficient the determining factor certainly is the successful development of professional character. Common decency and some intellectual attainment are assumed. But the additional requirements have not been so obvi-

ous. The principal requirement has indeed been overlooked if not even repudiated. Professional character really is the sum total of ordinary decent character plus a deep and broad learning, plus a scientific attitude, a social viewpoint. Only with that equipment can a lawyer maintain his superiority as the directing genius of our experiment in social Democracy. That is true even in the cases where on the face of it the attorney is dealing only with his client's interests. There can no longer be even in theory a clear cut dividing line between individual interests and public interests. Each is limited by the other.

The development of a professional character which will stand the test of action in modern life must obviously be delegated to the law schools. Practically all lawyers are trained in law schools of some kind. Character is set during the school period. If the school fails there is no second chance.

The kind of school, and the form and substance of legal education are of controlling importance. On the first score the commercial or profit-making law school is doomed. It is physically impossible to keep one's head and heart in the atmosphere of idealism and his hand in the cash register at the same time. The latter too often measures the former, and inevitably so.

Assuming a law school whose policies are not dictated by financial expediency there are immense problems left. The form of professional conduct is of relatively little importance. Little time need be given then to the teaching of "legal ethics" in the sense in which that phrase has previously been used. The form and substance of the instruction as to Law and the Judicial Process in their social aspects are the determining factors in the result. There must be a broad and deep training in a tolerant (scientific) spirit.

There is thus every reason to demand of applicants for admission to the bar some such training. The minimum standards accepted by the legal profession for ten years and by the standard law schools for over thirty years can not be said to be too high. We are already committed to the view that there should be a dividing line between those qualified and those not qualified to practice law, and pushing the line up to meet the actualities of present experience and settled opinion by the experts in the field is more than reasonable,—it is the only sane and sensible thing to do. Its constitutionality is thus obvious.

IV

One of the most persuasive arguments in favor of such a limitation is that it effectively places a barrier before the applicant who is so willing to get by on the barest minimum; who is so anxious and willing to offer the least in exchange for a license to practice. I can not escape the conclusion that the applicant for a public license as a member of a learned profession who is willing to apply for a license without the preparation which is commonly accepted as the minimum standard *ipso facto*, at least *prima facie*, demonstrates his unfitness for the license. He wishes the public authorities to certify that he is learned (in the best sense of that word); that his moral fibre is far above average; and that he has that capacity for disinterested social action which is the very essence of the concept of professional character! Again it's no good talking about law being a profession unless we mean by that that our ideals of conduct forsake the immediate personal gain for a social value. And unless we mean further that in the field of action the supposed professional man has at least an even chance of choosing the latter in preference to the former. There is no positive guarantee for that result, but that it is impossible of conception and attainment unless the foundations of character be deeply laid is more than obvious.

The applicant who wishes a certificate as to those qualities who has little or none of them condemns himself. He certainly demonstrates that it is questionable if he ever will, even under the best of conditions, measure up to any decent standard of professional conduct. My own observation is that the young men who are willing to give the most in exchange for a license to practice are the ones we are later to count on most, and that those who are willing to give the least at the start of their professional careers are likely to continue on the same plane throughout the balance of their lives.

The easiest task in the world is to fashion the ideals of a "rugged individualism"; the next easiest task is to attain those ideals in everyday life. But true professional ideals and conduct are quite different things. Experience amply demonstrates that the best indication of a man's future is his past and present; that professional ideals and conduct can not be left to chance; and that certainly they are not attained in the market places of a cheap and abbreviated education. The doctrine of "caveat emptor" has no place in legal education, nor in the standards for admission to practice.

I do not forget that a great many students are imposed upon by the sales talk of commercial schools. Indeed one of the most obvious justifications of a decent standard of educational prerequisites is the needed protection of the law student himself.

V

In the face of the facts legal authority is superfluous. It is, however, available. The truth is that Indiana is one of eight states¹⁰ which last year did not have some educational prerequisites for admission to the bar. Seldom have those requirements been questioned. Courts have found no difficulty in sustaining them.¹¹ The uniformly high standards for medical license give point to their factual and legal validity.¹²

In Indiana practically every other business and profession is licensed under stringent qualifications, including general education. Indeed a barber must have graduated from an approved barbering school and served as an apprentice for eighteen months before he is eligible to take the state examination for a license.¹³

No one can successfully point to any valid distinctions on this score between the legal and the medical professions. Yet the Indiana law for twenty-five years has been that two years of college work plus graduation from an approved medical school are prerequisites for admission to the state examination.

I know of no excuse except criminal neglect which will longer sanction that odious comparison. Isn't twenty-five years behind quite a safe distance, even for lawyers?

¹⁰ Arkansas, Florida, Georgia, Nevada, North Carolina, Utah and Virginia. This is as of June, 1933.

¹¹ See, for example, *In re Bergeron*, 220 Mass. 472, 107 N. E. 1007 (1915).

¹² See, for example, *Louisiana State Board v. Fife*, 162 La. 681, 111 So. 58, and note, 54 A. L. R. 594 and references there made (1926).

¹³ Sec. 4, 5, Chap. 48 Indiana Acts 1933.