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THE MULTISTATE BAR EXAM AS A THEORY OF LAW†

Daniel J. Solove*

THE MBE (MULTISTATE BAR EXAMINATION): SAMPLE MBE III: JULY 1998. By *Anonymous Legal Philosophers*. Madison, Wisconsin: National Conference of Bar Examiners. 2002. Pp. 1, 101. \$15.

What is the most widely read work of jurisprudence by those in the legal system? Is it H.L.A. Hart's *The Concept of Law*? Ronald Dworkin's *Law's Empire*? No. It is actually the *Multistate Bar Exam* ("Bar Exam").

Perhaps no other work on law has been so widely read by those in the legal profession. Although the precise text of the Bar Exam is different every year, it presents a jurisprudence that transcends the specific language of its text. Each year, thousands of lawyers-to-be ponder over it, learning its profound teachings on the meaning of the law. They study it for months, devoting more time to it than practically any other jurisprudential text. It therefore comes as a great surprise that such a widely read and studied work has barely received scholarly attention. In fact, legal scholars readily dismiss the Bar Exam. Despite the fact that the Bar Exam purports to present the valid law in the United States, scholars do not cite to it as legal authority. Nor do judges. The Bar Exam gets little mention in treatises either. It is time to rectify this situation and put the Bar Exam in its place as the great work of jurisprudence that it is. But what is its theory of law?

I got my hands on the *July 1998 Multistate Bar Exam*, which is made available to Bar Exam takers as a sample practice test. To truly understand the Bar Exam, one must read through all its physical manifestations, but reading through more than one Bar Exam was more than this author could bear, notwithstanding the great insights that it would have clearly produced.¹ I therefore leave further work on other Bar Exams for future scholars in this young, yet hopefully growing, new field of study.

The first thing to note is that this Bar Exam comes on beautiful, thick, acid-free paper designed for indelibility. This, I believe, is a testament to its

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1. I chose the *July 1998 Multistate Bar Exam* because it was the most recent one offered for sale on the bar examiners' website. Another reason I did not undertake a more systematic study of other bar exams was because each sample exam costs \$15, and I was doubtful that my dean would offer me the funding for such promising research. Indeed, it is a sad setback in the history of legal thought, but I remain hopeful for a brighter future.

anonymous authors' intent that the Bar Exam be kept as a treasured centerpiece of any legal scholarly collection.

I am also struck by how the Bar Exam is a Protean work of jurisprudence. It exists in many different forms, and mutates frequently, but I believe its overarching teachings are the same. Although it changes twice each year, it is still referred to singularly as the *Multistate Bar Exam*. It is therefore, paradoxically, both one and many. Few if any other works of jurisprudence come in such a pluralistic form.

On to more conventional jurisprudential observations. The Bar Exam draws heavily from Ronald Dworkin, who argues that there are indeed answers to even the thorniest legal issues.² Departing from H.L.A. Hart's open texture of law,³ where there are pockets of uncertainty, for Dworkin, there is an answer to nearly all legal questions.⁴ And so, too, on the Bar Exam—every question has an answer.

The Bar Exam states that one is to choose the *best* answer (p. 2), and thus it at least recognizes that right-versus-wrong is too simplistic a way to understand the law. But what does "best answer" mean? The Bar Exam states that all questions should be answered "according to the generally accepted view, except where otherwise noted" (p. 2). This statement brings us back to Hart again, with a kind of rule-of-recognition for the rules on the Bar Exam: the best answer is the generally accepted view.⁵ But among whom? Lawyers? Judges? Academics? The public? The Bar Exam does not tell us.

The Bar Exam draws heavily from legal realism as well as from jurists exploring the relationship between law and narrative. As Toni Massaro contends: "Empathy, human stories, and different voices should be woven into the tapestry of legal scholarship, legal training, law formulation, legal counseling and advocacy, and law application and enforcement."⁶ The Bar Exam answers her call. It presents itself as two hundred stories about the law. We learn the plight of those subjected to the law and how the law affects them. This is not a top-down theory of the law, but a bottom-up illustration of the

2. See generally RONALD DWORKIN, *LAW'S EMPIRE* (1986) [hereinafter DWORKIN, *LAW'S EMPIRE*]; RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1978) [hereinafter DWORKIN, *TAKING RIGHTS SERIOUSLY*].

3. H.L.A. HART, *THE CONCEPT OF LAW* 124 (1961) ("Whichever device, precedent or legislation, is chosen for the communication of standards of behaviour, these, however smoothly they work over the great mass of ordinary cases, will, at some point where their application is in question, prove indeterminate; they will have what has been termed an *open texture*.").

4. DWORKIN, *LAW'S EMPIRE*, *supra* note 2, at viii–ix ("[I]n most hard cases there are right answers to be hunted by reason and imagination.").

5. See HART, *supra* note 3, at 100 ("To say that a given rule is valid is to recognize it as passing all the tests provided by the rule of recognition and so as a rule of the system.").

6. Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 MICH. L. REV. 2099, 2101 (1989); see also Symposium, *Legal Storytelling*, 87 MICH. L. REV. 2073 (1989). One might question the Bar Exam's selection of whose stories it tells. For example, it focuses heavily on the travails of wealthy property owners, who own such luxurious estates as Blackacre.

way the law touches the lives of real individuals. According to Justice Benjamin Cardozo: “The common law does not work from pre-established truths of universal and inflexible validity to conclusions derived from them deductively. Its method is inductive, and it draws its generalizations from particulars.”⁷ As Karl Llewellyn observed:

We have discovered that rules *alone*, mere forms of words, are worthless. We have learned that the concrete instance, the heaping up of concrete instances, the present, vital memory of a multitude of concrete instances, is necessary in order to make any general proposition, be it rule of law or any other, *mean* anything at all.⁸

Despite the Bar Exam’s commitment to the concrete, it diverges from legal realism in its view of the relationship between fact and law. In a sharp departure from realist ideas, the law on the Bar Exam is self-executing. Consider Question 101 (Criminal Law), which discusses how Dirk forcefully enters John and Marsha’s apartment, binds and gags John, and steals a diamond necklace from a safe. John, in an attempt to unbind himself, suffers a heart attack and dies. The question then asks:

Dirk is guilty of

- (A) burglary, robbery, and murder.
- (B) robbery and murder only.
- (C) burglary and robbery only.
- (D) robbery only

(p. 50)

The Bar Exam’s Answer Key says that the correct answer is A (p. 98). But how can Dirk be guilty without a jury trial? Isn’t Dirk supposed to be innocent before being proven guilty? What about Dirk’s constitutional rights?

This attitude toward facts and juries pervades throughout the Bar Exam. Question 192 (Torts) asks: “If Actor sues Vineyard to recover damages as a result of Vineyard’s use of the photograph, will Actor prevail?” (p. 93). How can one really say for sure? So much for the judges and juries that must apply the law—they are viewed as irrelevant by the Bar Exam. This view repudiates Judge John Noonan’s observation that “the law lives in persons. Rules of law are formed by human beings to shape the attitude and conduct of human beings and applied by human beings to human beings.”⁹ In contrast, the Bar

7. BENJAMIN NATHAN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921), *reprinted in* *SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO* 107, 114 (Margaret E. Hall ed., 1947) (footnote omitted).

8. K.N. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* 12 (2d prtg. 1965).

9. JOHN T. NOONAN, JR., *PERSONS AND MASKS OF THE LAW* 4 (1976).

Exam tells us that the human element—the discretion of prosecutors, lawyers, judges, and juries—is immaterial to the law.

But yet, one should avoid hastily concluding that the Bar Exam's vision of the law is not humanistic. Its conception of the law is far more complex. The Bar Exam is, in fact, a very humanistic document. The reader hears harrowing stories of great loss and terrible wrongdoing. The reader witnesses horrible crimes, bungled contracts, corporate malfeasance, and wretched accidents. Each story involves people who have real lives, who experience love or heartbreak, triumph or devastation. Unlike abstract theories of jurisprudence, the Bar Exam focuses on how the law affects particular people. Ah, the humanity!

When one examines the substance of these stories, the Bar Exam actually paints a powerful and telling picture of the legal system. One notable dimension of the Bar Exam's depiction of the law is that many really good people get screwed in the legal system. There are injured little-old-ladies who don't get to collect tort damages. Dastardly criminals go free because their burglaries occurred during the daytime rather than at night.¹⁰ Why do so many good people lose in the legal system? Why is there such grave injustice in this jurisprudential vision of the law? Here, the Bar Exam is teaching the reader the legal positivist notion that law is separate from morality. Despite rejecting Hart's open texture of the law in favor of Dworkin, the Bar Exam eagerly embraces Hart's strict separation between law and morality.¹¹

In the end, the Bar Exam doesn't proffer a theory about how the law makes sense or why it is just or unjust or even how it should be made more coherent. Instead, the Bar Exam simply tells us that the law *is*. This is a stark, almost existential view. The Bar Exam seems to be saying: "Here's the law. It helps some people. It helps other people. And that's it." Questions such as whether the rules are just or whether or not they should be changed don't matter. According to the Bar Exam, the law *is*, and there's nothing else worth saying.

Thus, the Bar Exam is a rich and complex theory of law, one that requires further study. I have only begun to scratch the surface of this great jurisprudential work. And since it will continue to evolve, twice each year—once in February and once in July—it is constantly being updated. It's a work of jurisprudence that just keeps on giving. All of us should be very thankful indeed for the great efforts of the anonymous legal philosophers who continue to toil on this evolving jurisprudential masterpiece.

10. Indeed, the requirement that burglaries must take place at night is based on archaic common law definitions of crimes, which although having long been supplanted with statutory law, remain alive-and-well on the Bar Exam. Ironically, if one practiced the criminal law on the Bar Exam, one might be disbarred.

11. See H.L.A. HART, *Positivism and the Separation of Law and Morals* (1958), reprinted in *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 49 (1983).