

Can you think of any greater educational tragedy that can come to the serious and well-prepared student than to be held over for a year before commencing the practice of a profession toward which he has pointed his every endeavor—held over because the last hurdle to be surmounted was one arbitrarily set up and which had but little to do with the proper preparation for what he had hoped was his life-time calling? Perhaps there is one greater

tragedy, that of the man not fitted for a profession who is led to believe by the bar examiners that he is prepared for it, and is given a license to practice it.

Many problems must be worked out before a National Board of Law Examiners can properly function, but these problems will not work themselves out merely by the passage of time.

BAR ADMISSIONS AND THE LAW SCHOOLS

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In responding to the invitation of the editor of the Review that I express some thoughts and conclusions with reference to the subject of bar admissions in relation to the law schools, I desire to say at the outset that I have no thought of indulging in any wholesale condemnation of bar examination practices throughout the country. I do not feel they deserve such condemnation. As a matter of fact, I believe the bar examining committees as a whole are entitled to full and deserved credit for the definite, far-reaching, and striking improvement in standards for admission to the profession which has occurred in recent years. In the light of the innate conservatism of the bar, not to speak of the public, the progress appears truly remarkable, far beyond, as I venture to believe, what most of us expected in 1921, when

the American Bar Association first took up its campaign for admission requirements.¹ An atmosphere has been created and is now fostered which makes for the acceptance generally of high standards of capacity and character for the future lawyer. Such an atmosphere is a necessary prerequisite to any successful program of advancing standards. Since it exists, it is now possible to look forward to other steps designed to effectuate the objectives in view. Moreover, the integrity, loyalty, and persistent effort of the various state committees of bar examiners are things in which our profession can take justifiable pride. Their devotion to the ideal we have had in mind has been extraordinary. These facts we must recognize, even if we may believe the time to be now ripe for replacing many of the large and unwieldy committees of

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¹ It should be recalled that the Association of American Law Schools worked from 1900 to

1921 before the support of the American Bar Association was obtained; the definite advance in state standards only begins after the latter date.

practicing lawyers with small compact boards of salaried professionals and for other important innovations now to be considered.

It is this background of idealization of professional standards which makes it possible now to call for measures aimed at more complete attainment of the stated objectives. For it must be admitted that accomplishment to date has been more in the way of producing a climate of opinion, wherein the public, the profession, and the prospective candidate all accept a requirement of a certain minimum of capacity and training as a necessary condition of the right to practice, rather than in strict enforcement of the stated requirement. A candidate who has completed the required number of years of preliminary study is not likely to be denied admission to the practice, even though he may fail at his first examination, if he has the persistence to keep on trying. It seems fair to say of the present system that it accomplishes its objective only partially and incompletely, because in final analysis it operates in the main by way of threat and not by exclusion. Hence it is widely felt, and I believe with justice, that it is not protecting the profession and the public from an ill-equipped bar and from the various struggles attending a competitive business which is prevented from realization of its professional ideals by

the desperate economic situation of its members.² An important corollary to this is the fact that the present methods exercise a deadening influence on legal education by forcing the law schools into a mold set by the bar examinations and by making the prospective candidates for admission timid before experimentation or new ideas in law teaching. This latter defect perhaps could be tolerated in spite of its cost if adequate public protection were being achieved. When, however, the two defects co-exist it seems time to consider changes and improvements.

That the bar examinations do not really exclude those who come to the point of being admitted to them—that exclusion is limited to whatever may be accomplished by enforcing preliminary standards of study—has been clear to examiners for some time. The able and efficient secretary of the New York State Board of Law Examiners has quoted statistics from that examination, respected for its high standards, which show that only two per cent seem definitely excluded.³ I do not think it is claimed by anybody that the examinations really shut out the repeaters. I have tried to test my memory in an experience of twenty years of law teaching, and to check it by such records as are available at my school, to see if I can think of any persons permanently excluded from bar exam-

² This statement seems a fair deduction from the various bar surveys summarized in *The Economics of the Legal Profession*, published by the A.B.A. for its Special Committee on the Economic Condition of the Bar, in 1938. It is not inconsistent with the indications from some of the surveys that there exists a considerable amount of untapped legal business. [Garrison, *A Survey of the Wisconsin Bar* (1935) 10 Wis.

L. Rev. 131; Clark and Corstvet, *The Lawyer and the Public: An A.A.L.S. Survey* (1938), 47 *Yale L. J.* 1272.] Pressure for admission is so great that it seems certain the supply of lawyers will be more than is needed to keep up with our rather halting attempts to develop such business.

³ Wickser, *Bar Examinations* (1930) 16 *A.B.A.J.* 733, 738.

inations, and I cannot think of a single one. I do not mean that some persons may not have been discouraged by the necessity of making repeated attempts to secure admission, though even these seem very few in number. I do mean that on the records persistence seems to bring its ultimate reward. In some few jurisdictions now a candidate is restricted in the number of attempts he may make to pass the examination. But these restrictions do not seem to be stringent enough to have much effect upon the results. Indeed, one may doubt whether examinations *at the close* of a long period of preliminary preparation will ever be enforced with the harshness and arbitrary disregard of consequences necessary to make exclusion by that means and at that time a major factor in admission practice.

The dead hand placed upon the law schools by the bar examinations has often been recognized. "It is apparent that significant experiments and advancements in legal education are handicapped by a system of bar examinations predicated on a standard of legal education which is too narrow and inflexible."⁴ It is a sad commentary on the present system, that the more active and sincere a committee of bar examiners is, the more likely it is to make its authority weigh the heavier upon the law schools. For the more exacting bar examiners will naturally scrutinize closely the preliminary education of the candidate. Since boards of bar examiners cannot be expected to be in the vanguard of legal education, and are likely to be a decade or two behind, or in fact back in the

era when they graduated from law schools, and since formal rules usually lag behind the views of individual examiners, it is perhaps fair to say that the general run of bar examinations is adjusted to the legal education of a quarter of a century ago.

Moreover, some of the stricter committees go to the point of requiring examinations in specific listed subjects, usually twenty or twenty-five in number. The out of date character of the examination is thus made to appear more clearly, for the emphasis will be upon such matters as bailments and carriers, domestic relations, and the like, with no attention to taxation, administrative law, or public law generally, except as those topics may be included in a very general reference to constitutional law. Some examiners, though happily of decreasing number, even go so far as to require certificates from law schools that candidates have taken specific courses built along these old-fashioned lines. Any one who has attempted to build curricula devoted to the law which present-day law school students are to practice knows how difficult is his problem when faced with this handicap from the bar committees. The students themselves, having to face the immediate prospect of passing the examinations, naturally shy away from the courses they really need to these which are thought to be an aid to attaining this immediate objective. Private cram courses naturally flourish, for they provide an eminently practical means of surmounting this hurdle and

⁴ Report of Committee on Curriculum, Handbook of Association of American Law Schools (1937) p. 236.

also of making it safe for the student to take a moderate number of modern courses in his law school.

But the system operates at cross purposes with the schools. Many of us believe that the main objective of a law school education is to develop the student's initiative in meeting and facing his own legal problems. The bar requirements, however, tend to force action directly in the opposite direction. Why should a student busy himself in working out some of the difficult modern problems of taxation when he needs to be cramming on the old law of bailments if he is to pass his examination? Even if no more drastic steps are taken, the examiners ought to give up once and for all any requirement of study of specific detailed courses, for such requirement will be out of date almost as soon as written. Graduation from a law school which deserves approval by proper standardizing agencies should be a guaranty of the details of the study; while examinations should be given, not in narrow areas, but in general fields of the law, such as property, procedure, torts, and contracts.⁵ And there should be a sufficient number of alternative questions or choices so as to give a fair test of the candidate's ability and thinking power, not of mere cramming for a particular examination.

All this, however, it is submitted, is the wrong way of approach. It is trying to close the door after the horse has forced his way out. Exclusion is at-

tempted at too late a time to be really effective. A better plan, it is suggested, is to make the time of elimination of at least most of the candidates at the beginning of law study, not at the end, when several years have been devoted to preparing for this particular profession and when every incentive is to persist in securing the admission which is the probable reward of persistence. If the candidate is excluded at an earlier date he is saved the great waste involved to him and to the community in educating him for a profession from which it is hoped he may then be excluded. He avoids the stigma of having tried and failed or—probably more often—nearly failed. Exclusion then becomes an actuality, not a hope or a threat. Experience over some years in the testing of students for legal study has shown me, as it has shown others who have been called upon for like administrative tasks, that legal aptitude can be ascertained in advance of law study.⁶ In fact, testing is likely to be better done then, because one does not have the emotional pull to protect a man who has spent several years, perhaps under great difficulties, in working for his chosen profession.

In the present state of development of forms of testing, therefore, there is no doubt that a fair and reasonable choice can be made at the beginning of law study, provided there is public authority to do so. Since any exclusion must be an exercise of state judicial

⁵ I have expressed my views elsewhere on this matter. See *A Suggested Revision of Bar Examination Subjects* (1938) 7 *Bar Examiner* 24. Recently the Connecticut Examiners have revised their procedure along these lines. (1939) 8 *Bar Examiner* 55-57.

⁶ Clark, *Making Selective Admission to the Bar Practicable* (1934) 8 *Am. L. School Rev.* 13-15; Clark, *The Selective System of Choosing Law Students and Lawyers* (1933) 2 *Bar Examiner* 274.

power, there would undoubtedly have to be provided means of demonstrating the entire fairness of the testing, with presumably provisions for review by the court, and the like. While my present personal belief is that such testing should be made at the beginning of law study to be most effective and satisfactory, perhaps, however, as a concession to those who still fear the restrictive process in a democracy, the testing might be postponed, without too vital a loss, until the close of the first year of law study. Then a rechecking of the candidate should be made at various periods in his law study, as well as at its end, to see that no affirmative mistake has occurred, as well as to see that his initial promise is maintained.

As a matter of fact, the possibilities afforded by this rechecking process are one of the greatest advantages of the proposed system. Candidates may be assigned to representatives of the committee, who can keep in touch with them throughout their law school course, with the result of providing complete and fully detailed information as to each candidate, not as a matter of a few hours' examination, but from his day-to-day living and work. Here would be a means of acquiring knowledge of the candidate's moral qualifications for practice, a knowledge which, under present conditions and in spite of all the demand for it, it is impossible to obtain. There may be, too, the further result of bringing the examiners and the law schools into more intimate contact with each other in their joint effort to prepare men for the bar. The increasingly

higher fees charged applicants could be diverted, with perhaps additions from the bar associations and the state, to providing subsidies or scholarships to needy and deserving students. The plan, it is submitted, is one which cannot fail to be of great value, whether viewed from the standpoint of the candidate or of legal education or of the welfare of the community generally.

Once the general principle here advocated—that of making eliminations before or at the end of the first year of the candidate's law study—is accepted, it will then be necessary to settle various details to carry that principle into effect. Such details should be decided upon only after careful consideration and exploration of possible alternatives. Choice should be made along lines which will seem at once effective and satisfactory to the profession and the community. I shall not try here to elaborate upon the details, for I should wish to hear further discussion before making such a choice. Perhaps, however, I ought to make some reference to one matter, since it has already aroused interest and some division of view and since I believe my position as to it has been misunderstood. I refer to the so-called quota, that is, the establishment, in advance of a test or examination, of the number or the approximate number to be chosen by such examination. This is, of course, a normal process in testing for public service generally under civil service rules, but as applied to prospective lawyers it seems to have aroused fears, which I can only feel are an echo of the old arguments against standards in the profession as being

undemocratic and likely to exclude prospective Abraham Lincolns, who have lacked certain advantages of preliminary education.

It is to be noted that the quota is purely a detail of the testing process, not an end in itself, but a means to an end, and a matter which perhaps has already been overemphasized. It is a problem in point as to all examinations, and not a necessary or exclusive feature of the system I have outlined above. I regard it not so much as an absolutely necessary device, but as normally a convenient adjunct to an honest and thorough system of examinations. Hence I have been concerned at what seemed to me attempts to rule it out of consideration in advance of discussion of its uses or indeed of discussion of further improvements of the bar admission process. That is the extent to which any statements of mine have gone, as a reference to my concurring memoranda filed with the last two reports of the Committee on Cooperation With the Bench and Bar of the Association of American Law Schools will show.⁷

The latest report of that committee provoked a discussion of the matter at the meeting of the Association in December, 1938. Although I was not present at that meeting I find from a transcript of the discussion⁸ that some speakers assumed I was taking a more strenuous attitude than this. It was suggested that I had not "faced the real problem of quotas" and that I had indulged in "a somewhat light assump-

tion that quotas just have to come," while "choking off at the source the future supply of lawyers" was deplored. With deference I submit that these suggestions indicate a distortion of my memoranda. I was not affirmatively initiating any proposal or supplying the detailed arguments to support a position, but was merely repelling — as briefly as possible — the assumption, which I feared might be made from these reports, that the quota was a device to be frowned upon at once and without debate. I am pleased to see that even those who misconstrued me actually felt as I did, for, as a result of motions made by them, discussion of the matter is to be made an order of business upon report of a committee at the next annual meeting of the Association. This is all I should ever think of asking for at our present stage of information and knowledge.

Perhaps I should leave the matter at this point, since I do not want to foreclose even my own thinking, not to speak of that of others, on this subject before an adequate consideration of it is had. But the discussion referred to above impels me to make two or three other suggestions of a preliminary nature. It was urged that the suggestion of a quota confused two important and distinct problems — that of raising standards for admission to the bar, and that of limiting numbers of the profession. These are two problems, somewhat intertwined, but with somewhat different considerations involved. Nevertheless, bar examinations—and there-

⁷ Handbook of Association of American Law Schools (1937) p. 258; Program, Meeting Association of American Law Schools (1938) p. 82.

⁸ Handbook of Association of American Law Schools (1938) at 237-46.

fore the quota—are instruments used or usable in attempting solutions of both problems. It seems to me naive to assume that standards may be raised to the extent now thought socially desirable without some process of exclusion of applicants by test. And the quota is a device affecting a limited and subordinate part of the testing process, intended to make it more realistic and effective. Quotas are now applied regularly by bar examiners, only they are not admitted and are not carefully planned with consideration of all their consequences. One may test this statement by looking at the regularly published figures of state bar examination results and see how steadily the percentage of failures remains in or near a certain figure (one-half in several of the leading states). If the quota limitation is frankly faced and made express, not subconscious as now, there might well result a substantial gain in fair and impartial administration of the present testing system or any other which may be devised. And exclusion might then be the result of plan, not of chance.

Objection is properly made to “arbitrary quotas.” But a mere testing device is not of itself either arbitrary or otherwise, since it merely fulfills, perhaps more clearly and easily, purposes otherwise settled upon. So a quota need not and should not be unnecessarily arbitrary. It might well be established in terms of only maximum and minimum numbers, it should be set by public authority and after public hearing and discussion, with possible review on appeal, it should be reset at

least every year, its filling might come as a result of two or three different examinations, rather than a single one, and so on. Other devices adding to its flexibility can easily be conceived. It only requires the planning of the testing system in advance, rather than after the candidate has done his required stint.

In the discussion Professor Llewellyn had some very important things to say as to the danger that the bar as at present constituted might apply its exclusionary process to protect its more successful members who are least in need of such protection. I recognize the problem and certainly would not minimize it in any way. Further discussion is to be welcomed as bringing all such dangers into the open. Yet here, too, the quota seems merely a subordinate device which does not of itself either accentuate or lessen the problem. It may possibly assist somewhat in the solution by forcing clearer consideration of the issues involved. In truth, the evils suggested by Professor Llewellyn appear manifold in our present system of admissions, even if we do not concede their presence. The present system is expensive and wasteful; the burdens and penalties for the weak students (and their parents) who lack financial resources are heavy and unfair; and the rewards of admission through persistence go naturally to those who can afford to continue the struggle. I think discussion of these important matters may well cast doubt upon the validity of our present admission system; it will necessarily cut

deeper than condemnation of mere testing devices.

One conclusion might be drawn from Professor Llewellyn's remarks which, I feel sure, he does not intend. It is that careful and adequate governmental supervision of admission to a profession is dangerous, because the agencies to enforce it may not apply it properly or fairly. That, of course, is a general argument made continually against all governmental regulation.⁹ We cannot admit its validity without condemning our civilization, for regulation has been abundantly shown to be a necessity of the modern great society. I do not minimize at all the difficulties of adequate and fair administration of an important power such as we are here considering. But we have that problem of administration already. It came once we started to press for higher admission standards. We cannot turn back from that step now, and hence we should press forward for improvement of the system.

May I emphasize again, however, my desire to promote discussion of the major proposal here contained, before warfare develops as to subordinate details? The elimination of undesirable candidates for the bar at an early time of their candidacy seems so important a general policy as to deserve consideration apart from the ways and means needed to carry it into effect. And if my law school colleagues can develop ways and means of enforcing such a policy without planning on the number and extent of the eliminations

to be had, I shall not object beyond urging them to make sure they do not reject practical devices for attaining their objectives upon theoretical grounds.

ADDENDUM

Since preparing the above I have examined Dean Horack's contribution to this symposium, as well as Dean Shea's article in the *Columbia Law Review*.¹⁰ Although I have not seen the other articles, it seems likely that these are fairly illustrative of the differing viewpoints which this symposium will produce. At any rate I have been stimulated by them to request space for a brief addendum, for it seems to me that we law teachers may be caught in the meshes of a dilemma—a serious, but, in my judgment, not insoluble, one—which may unfortunately divide friends and unite enemies. That dilemma is occasioned by the necessity of adjusting our hope for a truly democratic and representative bar with our general agreement upon the need of high intellectual standards for admission to the profession. Its resolution is pretty sure to be in terms of an insistence upon standards based upon nothing other than intellectual capacity accompanied by a like insistence upon measures to insure equality of opportunity for all applicants alike. In other words, our divergence is going to be on ways and means, on devices and methods, rather than on ultimate objectives. I think that should be kept clear, lest our seem-

⁹ Compare Dean Landis' spirited defense of administrative justice in his lectures on *The Administrative Process* (1938).

¹⁰ *An Overcrowded Bar?—The Price of Certain Remedies* (1939) 39 *Col. L. Rev.* 191.

ing disputes give too much aid and comfort to those who would press the democratic ideal to the point of leveling all standards and who thus, wittingly or unwittingly, make of bar preparation a profitable commercial venture.¹¹ Moreover, we should not let differences as to details overshadow our agreement on another, and an immediately practical, objective, namely, that bar examiners should be persuaded to adopt methods that will not hamper originality and experimentation in legal education. And so I write this note to express my hope that disagreement as to details be not stressed to the point of concealing agreement on objectives.

I am led to say this largely because of my reaction to Dean Shea's fine and eloquent defense of a democratic bar. Dean Shea may very likely feel that I should be counted in opposition to his point of view. At least his discussion at the recent Chicago meeting of the A. A. L. S. seemed to indicate as much. But for myself I refuse to accept his nomination. I am just as anxious as he not to allow the profession to develop into a guild of gentlemen only, uninterested in the vital social issues for which the bar must furnish leadership, and without a conscience sensitive to the dire needs of the underprivileged. But it does seem to me that his emotion has blinded him to the definite hiatus between the two parts of his article—the earlier part devoted to his plea for a truly cosmopolitan bar, and the later part to his own construc-

tive program. The logical limit of his plea would be an elimination of the standards, particularly as to the law schools to be supported, which are the backbone of his program. He must eventually reconcile his democratic faith with his admitted belief in high standards. In so doing he will inevitably be forced to decide what concessions he must make to either his faith or his belief and what are, after all, his major objectives.

I am convinced the result he will reach is not different from that of most of us in the law schools. Indeed, such a result has been the stated, i.e., *hoped for*, objective of the A. A. L. S. from the beginning, and of the A. B. A. since 1921. It is in effect that democracy, while demanding equality of opportunity for admission, does not require a levelling off of standards of capacity. Such standards are justified both because of the necessity of protection to the public, who are the innocent victims of a lack thereof, and also because of the need in a democracy for the development of political leaders, for which the legal profession ought to be a fertile source of supply. True, this does involve some sacrifice of the dogma of pure democracy where even leadership should not be tolerated and all should be equal, but it is a sacrifice which, I believe, we are prepared to regard as necessary.

In a practical sense, the only restriction which is likely to give us pause is that involved in the financial handicap to a poor boy or girl imposed by the

¹¹ Cf. S. 1610, 76th Cong. 1st Sess. (1939), which, in so many words, would prevent the setting of standards of college or accredited law

school training for appointment to Government service.

requirement of a long and perhaps costly preliminary education. That is the point where Dean Shea's argument moves me. It is true now that much is done for the financially impecunious student of ability, and a good tradition is being built up to the effect that he must be assisted. I am perfectly willing to concede, however, that we have not done nearly all we can or should do. Perhaps this need is not stressed enough in my article. I am glad to emphasize it here. There is no reason, however, why it should not be met, and that, too, by increased public aid, and not so wholly by private donation as now. We have become accustomed to the aid given deserving students by the National Youth Administration, which has been real and effective. There is no reason why, with the present fees charged for admission to the bar, as well as those likely to be charged in the future, public assistance to needy students cannot be increased. Such use of the fees collected is better than their expenditure for further elaboration of the bar examinations as now given. Nor need the selecting system be necessarily self-supporting, for I think it can properly be considered an obligation of the state. Certainly it is important enough to stand its place in competition with, say, good roads and public works. This, too, is a matter for consideration and planning. I state here no final scheme, but merely the general objective.

Such a system, however, seems to me all the more to call for the initial selection which I have urged. Time and money should not be wasted on train-

ing a horde of people for the bar with the hope of eliminating a good share of them after they have been trained so far as they can be. One great reason for preliminary selection should be that greater aid can be given to those whose capabilities are found to deserve it.

I heartily agree, too, with Dean Shea's view that capacity only should be the test, and that examinations for character can easily degenerate into examinations for good manners. In fact I had thought one of the tenets of our program was an insistence upon testing of capacity not only for itself, but because it was a practical way of choosing as lawyers those who could survive the struggle, and thus avoid that economic pressure which is a prime cause of dereliction.

A final point may be mentioned. Both Dean Shea and Professor Llewellyn seemed to feel that what appeared to me essentially fair methods of selection, including perhaps the quota system, are dangerous because they are sure to be misused for anti-democratic purposes by bar examiners. As I have previously said, I do not believe that a sound argument against reform, in itself worth while, can be based upon the possibility of its misuse, unless, indeed, it rises to a probability so strong as to outweigh all possible benefits. I do not see how that probability can be fairly asserted at the present time. Whatever one may believe to be the faults of bar examiners, certainly to date they have been not actively motivated by any desire to exclude the poor and the unfortunate.¹² It seems to me, too, that

¹²Dean Horack's intimation that the quota