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Lloyd K. Garrison

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IS THE BAR OVERCROWDED?*

LLOYD K. GARRISON**

The existence of an absolute oversupply of lawyers throughout the country seems to have been seriously asserted only within the last six years. Prior statements about overcrowding have related chiefly to local conditions, and have been so few and far between as to indicate that they were not generally credited.

From the national point of view, the first statement on the subject which I have been able to find appears in 1915, when Dean Wigmore declared that "the number of lawyers should be reduced by one-half." He was, however, speaking on behalf of the general adoption of a two-year college requirement for admission as "a rational, beneficent measure of reducing hereafter the spawning mass of promiscuous semi-intelligence which now enters the bar"; and it is evident that he was concerned more with the large numbers of poorly trained lawyers than with the conception of an absolute oversupply.¹ I can find no other statements about the size of the profession until 1928, although doubtless an examination of the bar association reports of other states would reveal isolated comments.

The great increase in law school enrollment from 1920 to 1928² occasioned the first³ of a series of assertions that the bar generally is overcrowded. Fresh assertions were made after the publication of the 1930 census, which showed that during the decade ending in 1930 the bar had increased more rapidly than the general population.⁴ As the depression made its effects felt upon the lawyers, who for the

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**A. B., Harvard University, 1919; LL.B., Harvard Law School, 1922; member, firm of Root, Clark, Buckner and Howland, 1922-1926; member, firm of Parker and Garrison, 1926-1932; Dean, University of Wisconsin Law School, 1932-

¹Wigmore, Should the Standard of Admission to the Bar be Based on Two Years or More of College Grade Education? It Should. 4 Am. L. School Rev. 30 (1915).

²The enrollment in 1920 was 24,503. In 1928 it was 48,942. The Carnegie Foundation, Annual Review of Legal Education (1933) 58.

³See Horack, Supply and Demand in Legal Profession (1928) 14 A.B.A.J. 567; Wormser, Fewer Lawyers and Better Ones (1929) 15 *id.* 206; Wallbank, The Function of Bar Examiners (1929) 7 Am. L. School Rev. 295; Kinnane, The Threatened Inundation of the Bar (1931) 17 A.B.A.J. 475; Wickser, Ideals and Problems for a National Conference of Bar Examiners (1931) 4 Am. L. School Rev. 286.

⁴See Report of the Subcommittee of the Section on Legal Education and Admissions to the Bar of the American Bar Association, October, 1932, contained in the Advance Program of the 1932 Annual Meeting of the Association, p. 25; Atwood, Responsibilities and Powers of Bench and Bar (1933) 17 J. Am. Jud. Soc. 101; Clark and Douglas, Trends in Legal Education and Bar Admission Requirements, (1933) 2 The Bar Examiner 247; Phillips, Building a Better Bar (1934) 8 Am. L. School Rev. 4.

first time began seriously to take stock of their position, the conviction that the bar had become overcrowded gained general currency.

This conviction is of more than academic importance. It is bound to have some effect upon the choice of careers by young men and women. It has already had some effect, whether conscious or unconscious, upon the attitude of bar examiners throughout the country. Whereas in 1927 about 41 per cent of those who took the bar examinations failed, in 1933 the figure had risen to 54 per cent, and this despite the fact that the applicants for examination in 1933 were somewhat less than those in 1927. About three-quarters of all the states, including most of the large states, failed a higher percentage in 1933 than in 1927, and in many of the states the difference between the 1927 percentage and the 1933 percentage was quite extreme⁵. I do not wish to press these statistics too far. Local changes in the personnel of examiners or in the content and type of examination undoubtedly account for some of the shifts in percentage. But the movement appears to be so general and to have taken place within so short a period that one may reasonably infer a conscious or unconscious determination to cut down the absolute number of those admitted to the bar.⁶

Prevalent ideas regarding the supply of lawyers are also likely, it seems to me, in the long run to affect appreciably the policies of law schools with respect to entrance requirements and the grading of examinations. Finally, belief in the existence of an over-supply of lawyers has stimulated proposals for artificially limiting the size of the bar by the adoption of fixed quotas, and at least one court has already established a quota for its particular county.⁷

From every point of view, therefore—from that of vocational guidance, bar examination grading, law school standards, and proposals for limiting admissions—it is important to ascertain by the most thorough possible study whether or not there is any clear evidence of overcrowding; and, if the evidence is wanting, to analyze the growth of the profession with reference to its opportunities in an en-

⁵In California, for example, the percentage jumped from 28% of failures to 64%; in Kentucky, from 12% to 51%; in Mississippi, from 53% to 71%; in Massachusetts, from 54% to 69%; in Missouri, from 34% to 73%; in Nebraska, from 19% to 44%; in Ohio from 14% to 28%; in Pennsylvania, from 44% to 60%, and in South Carolina, from 25% to 67%. The 1927 figures, which in certain instances include examinations given in 1926, have been compiled from tables in (1927) Vol. V., No. 2, *The Law Student* 3. For the 1933 figures, see (1934) 3 *The Bar Examiner* 133.

⁶"Obviously the bar examiners are applying some sort of quota now as they certainly should and must." Clark, *The Selective Process of Choosing Students and Lawyers*, (1933) 7 *Am. L. School Rev.* 913, 918.

⁷See: *Pennsylvania Considers Adoption of a Quota System* (1933) 2 *The Bar Examiner* 223, from which it appears that one of the Common Pleas courts in Pennsylvania has established a quota, and that others may follow suit. As to quota proposals generally, see the address by Judge William Clark of New Jersey in the proceedings of the Section on Legal Education of the American Bar Association (1932) 7 *Am. L. School Rev.* 614, 57 *A. B. A. Rep.* 685; and the address of Dean Clark before the National Conference of Bar Examiners (1933) 7 *Am. L. School Rev.* 913.

deavor at least to perceive the trends. As I have said, the current assertions of overcrowding were based, first, on the increase in law school enrollment from 1900 to 1928, and thereafter on the relative increase in the number of lawyers from 1920 to 1930, as compared with the increase in the general population. Dean Smith⁸ and others⁹ have shown that neither of these criteria justifies the conclusions which were first drawn from them.

It is true that from 1920 to 1930 the bar increased by 31 per cent against a 16 per cent population increase. On their face, these figures are somewhat alarming. But a number of factors were overlooked by those who first sounded the alarm. During the decade 1900-1910 the general population increased about three times as rapidly as the lawyers, and during the decade 1910-1920, about twice as rapidly as the lawyers. As a result of this long decline in the relative number of lawyers, the ratio of lawyers to general population in 1920, namely 1 to 862, stood at the lowest point since the Civil War.¹⁰ Viewed in this background, and even without considering the demands of the post-war period for lawyers, the sharp increase in the bar from 1920 to 1930 seems scarcely perturbing. Furthermore, calculations have shown that even if the bar continued increasing from 1930 to 1940 at the same rate as during the previous decade, the ratio of lawyers to general population in 1940 would stand at 1 to 710, as compared with 1 to 694 at the turn of the century¹¹. In other words, even if the post-war increase were to continue uninterruptedly, we would have in 1940 a relatively smaller supply of lawyers than in 1900, when there was no talk of overcrowding and when the complexities of industry, finance and government, with their calls for legal service were not nearly as great as they are today or as they will be tomorrow.

But in fact the post-war increase in the number of lawyers has not been continuing. It began to decline in 1928 when the peak of the growing law school enrollment (nearly 49,000) was reached. From 1928 to 1933, inclusive, the law

⁸Smith, *The Overcrowding of the Bar and What Can Be Done About It* (1932) 7 Am. L. School Rev. 565, 57 A. B. A. Rep. 668.

⁹Rogers, *The Overcrowding of the Bar* (1932) 7 Am. L. School Rev. 572, 57 A.B.A. Rep. 679; Wickser, *Law Schools, Bar Examiners, and Bar Associations—Co-operation Versus Insulation* (1933) 7 Am. L. School Rev. 725, 2 The Bar Examiner 151, Handbk. Ass'n Am. L. Schools (1932) 46.

¹⁰For these ratios, beginning with 1880, I have throughout used the compilation in the Carnegie Foundation's *Annual Review of Legal Education* for 1933, p. 60. This compilation, based on the census figures, segregates abstractors, notaries and justices of the peace. The ratios I have used are those of the lawyers, judges and justices; the abstractors, notaries and justices of the peace are excluded. The latter, in any event, constitute but a small proportion of the total. The census figures from 1850 to 1880 will be found in Carnegie Foundation Bull. No. 15, *Training for the Public Profession of the Law*, 442.

¹¹See Wickser, *supra* note 9; see also Wallbank, *supra* note 3.

school enrollment dropped 21 per cent.¹² Since about 95 per cent of the lawyers have in recent years been recruited from the law schools,¹³ and apprenticeship training has virtually died out, the rapid decrease in law school enrollment from 1928 implies for practical purposes a similar decrease in the number of lawyers admitted since 1928.

The decrease has, however, a further significance. As Dean Smith has pointed out,¹⁴ the greatest drop in law school enrollment from 1928 was in the part-time and mixed law schools of Boston and of the metropolitan area of New York City, the regions in which, with the District of Columbia, the bulk of the increase in lawyers from 1920 to 1930 was concentrated. We seem to have here an example of the little appreciated adaptability of the size of the profession to the demands made upon it. During the boom, in which the promoters, corporations, and financial houses of the Atlantic seaboard required an unprecedented amount of legal services, and in which the larger urban law firms rapidly absorbed the output of the leading law schools, one may reasonably assume an increasing need of young law graduates to handle the more routine legal requirements of the community. This demand was swiftly answered by the large enrollment in the part-time and mixed schools, which fell off with equal swiftness as soon as the deflation set in. Another illustration of adaptability may be found in the fact that while the law school enrollments in Boston and New York were drastically falling off during the depression, the enrollment in the District of Columbia schools increased, a fact which can no doubt be explained by the increasing demand of governmental departments, not merely for lawyers, but for men with some legal background. At the very least, these figures indicate a rough but nevertheless very real adjustment of the number of lawyers in particular localities to the changing needs of those localities, and should cast at least some doubt upon the wisdom and workability of proposals for artificially restricting the size of the profession.

Not only does society furnish, however crudely, its own controls, but we have as yet no criteria upon which to base any assumptions as to what in a given time and place the proper number of lawyers should be. Thus far, the only standard of measurement has been the ratio of lawyer to population, but the standard is not a real one, for the ratio has varied sharply from decade to decade, now increasing and now decreasing. Which ratio shall we take? That of 1900? That of 1910? That of 1920? Nobody knows. And the ratio, which differs so markedly from decade to decade, taking the country as a whole, differs even more markedly from locality to locality at any given time. Take for example the census of 1910. You will find a ratio of 1 to 488 in California as compared with 1 to 1680 in North Carolina; 1

¹²The figures (compiled from the Carnegie Foundation's Annual Review of Legal Education) are as follows: (1928) 48,942, (1929) 46,736, (1930) 44,015, (1931) 40,847, (1932) 38,260, (1933) 39,000 (estimated).

¹³See Rogers, *supra* note 9.

¹⁴*Supra* note 8.

to 532 in New York as compared with 1 to 1443 in Alabama. Do these extremes imply overcrowding in the high ratio states and an undersupply in the low ratio states? Who knows? And why should the states of Washington and Oregon have ratios as high as 1 to 460 and 1 to 515, higher even than New York, with its ratio of 1 to 532? Why should Colorado have 1 to 489, whereas Pennsylvania had 1 to 1068? Similar divergences, inexplicable on the basis of population, exist between the ratios in different cities of substantially similar population. Kansas City, for example, in 1910 had 1 to 269 and Seattle 1 to 248, as compared with 1 to 651 in Rochester and 1 to 807 in Providence, all four being cities with about a quarter of a million inhabitants.

The point need be labored no further. The population ratio cannot possibly be used as a yardstick. Yet this conclusion must be emphasized because of the faith which is still placed in the population figures. Great significance, for instance, is attached by many commentators to the decrease in the medical profession relative to the population from 1920 to 1930, as compared with the increase in the legal profession during that period. There is in fact, or at least there has been until quite recent times, a fairly close correspondence between the number of physicians and the total population. The ratio was reasonably constant from 1850 to 1910, as compared with the extremely sharp fluctuations in the lawyer ratios.¹⁵ Beginning with 1910 and continuing through 1930, the number of physicians relative to the population fell off quite rapidly from the previous level of sixty years, a phenomenon which seems to have been chiefly due to the radically higher standards of education and admission adopted throughout the country¹⁶ during the last twenty years—standards far higher than those required of the legal profession.¹⁷ In any event it seems clear that, broadly speaking, there is about so much sickness to so many people,¹⁸ whereas the legal business is dependent not so much on the

¹⁵The ratios were as follows: *Physicians*: (1850) 1 to 568; (1860) 1 to 571; (1870) 1 to 617; (1880) 1 to 585; (1890) 1 to 598; (1900) 1 to 578; (1910) 1 to 581; (1920) 1 to 641; (1930) 1 to 716. *Lawyers*: (1850) 1 to 970; (1860) 1 to 901; (1870) 1 to 952; (1880) 1 to 783; (1890) 1 to 704; (1900) 1 to 662; (1910) 1 to 752; (1920) 1 to 800; (1930) 1 to 714. The census figures for physicians include surgeons and healers; the figures for the lawyers include abstractors, notaries, and justices of the peace, who cannot be segregated with any certainty prior to 1880 (see note 10 *supra*).

¹⁶See Bierring, *The Standards of Medical Education and Qualifications for Licensure* (1934) 8 *Am. L. School Rev.* 7; Gavit, *The Privilege of Re-examination in Professional Licensure* (1934) 3 *The Bar Examiner* 123.

¹⁷40 states require two years of college work preceding admission to a medical school; and 25 states require graduation from a class A medical school. Bierring, *supra* note 17, p. 11. Whereas only 24 states require two years of college work as a prerequisite to the practice of law; and only one state (New Mexico) requires graduation from an approved law school. Phillips, *supra* note 4, p. 4.

¹⁸Special factors such as hospital facilities, density and accessibility of population, etc. will of course affect the numbers of doctors in particular communities. See Bardeen, *Relation of the Number of Medical Graduates to the Public Need* (1934) 9 *J. Assoc. Am. Medical Colleges* 11.

number of people as on the ups and downs of business, the activities of governments, the liquidity of real estate, and so forth and so on.

In the realization that the population factor is an untrustworthy guide in calculating the needed number of lawyers, attempts have been made to use the per capita wealth figures of the various states, multiplied by the population per lawyer, as indicating which of the states are over-supplied with lawyers and which are under-supplied. But the per capita wealth factor, while of some importance, cannot be pressed very far. For much of the wealth, such as real estate, may be dormant in one locality and active elsewhere; factory wheels may be idle in one state and spinning in another; and mineral resources which may swell the per capita wealth of a particular state may be financed and controlled, and tended by lawyers, a thousand miles away. Moreover, the agricultural states because of their relatively small populations tend to show a higher per capita wealth than the densely populated, industrialized states, although the latter obviously furnish a more fertile field for lawyers. It is a striking fact that in 1930 the six states with the highest per capita wealth were, in order, Nevada, Wyoming, South Dakota, Iowa, Montana, and Nebraska. The per capita wealth of Nevada was almost exactly twice that of Illinois—a fact which in itself is sufficient to indicate the futility of using the per capita wealth as an indication of the quantity of lawyers suitable for a given state.

Madison, Wisconsin

Lloyd K. Garrison