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IS THE AMERICAN BAR *REALLY* OVERCROWDED?

Introduction.

It is a commonplace in the United States to lament the overcrowded condition of the legal profession. It is assumed quite naturally that since so many lawyers are unable to make a decent living and since it is more and more difficult for the newly admitted lawyer to find an entré and since the law schools are annually turning out more and more tyros that therefore the profession is overcrowded. As we might expect, this observation emanates from within the profession and has been fostered with such uniform persistency that scarcely anyone remains (so it seems) who questions its truth.¹ Most of the cerebration is being expended on what to do about the crowded condition, taking as confessed, the condition. It is my purpose here however, to take issue with the premise and attempt to demonstrate that its assumed truth is erroneous.

The Basis of Prediction.

Those who argue that the bar is overcrowded base their argument on numbers. It is an argument from statistics.² Let us consider the recent observations of Young B. Smith, Dean of the School of Law of Columbia University in New York City as set forth in his Annual Report³ to the President of his University. The opening paragraph of that report calls attention to "a grave problem (overcrowding) which has developed in the bar of the City of New York,"

¹ Kinnane, *The Threatened Inundation of the Bar*, 17 A. B. A. JOUR. 475; Shafroth, *The Rising Tide of Advocates*, 16 A. B. A. JOUR. 451; Wormser, *Fewer Lawyers and Better Ones*, YEAR BOOK, NEW YORK STATE BAR ASSOCIATION (1929); FIRST ANNUAL REPORT, PROCTOR OF THE BAR, EIGHTH JUDICIAL CIRCUIT, NEW YORK STATE (1937) pp. 3, 8 & 9.

² Cf. Wickser, *The Law Schools and the Law*, 7 AM. LAW SCHOOL REV. 121; Wallbank, *The Function of Bar Examiners*, 7 AM. LAW SCHOOL REV. 295.

³ For the Period Ending June 30, 1936 (in pamphlet form).

quoting from the survey of the legal profession in New York county by the Committee on Professional Economics of the New York county Lawyer's Association as follows:

"The local bar as a whole is now so overcrowded as to constitute a serious problem to the public as well as to the profession, for the future as well as for the present. . . . More than half of the profession in New York county are in the income class below \$3,000 per year (the median for the entire profession is only \$2,990); 42½ percent below the respectable minimum family subsistence level of \$2,500 per year; one third below \$2,000 a year, one sixth below \$1,000, and almost one tenth at or less than \$500 per year; and a substantial number are on the verge of starvation with almost ten percent of the New York City Bar virtually confessed paupers, as indicated by applications for public relief . . . The economic distress of some members of the bar concerns not only those sufferers themselves, but also the bar as a whole and the public. It has a tendency to drive many of the sufferers to unethical acts."

The unfortunate condition of those in the lower income brackets (\$500-\$1,000) is not much of a credit to any profession, not alone the law. The assumption therefore is natural that lawyer's fees are spread too thin since there are too many lawyers, and that the only way to increase the income of the individual members is to decrease their number. And according to the laws of mathematics and of the physical universe that ought to automatically bring about the millennium. Indeed Dean Smith seizes upon this very procedure. He points out that there are 160,605 lawyers in the United States as compared with 153,803 physicians. He deduces that there is one lawyer for every 763 persons in the United States generally; in New York state there is one lawyer for 456 persons; and in New York City there is one lawyer for 378 persons. He leaves it for his reader to infer that the lawyer's chances of an adequate competence are less in New York city than in any other part of the country since the ratio of lawyers to population in that community is lower. There is, however, one grave fallacy in this process of reasoning in the assumption that necessarily the number of *clients* of a lawyer is limited by the quantity of the popu-

lation. In the medical profession this is true. Only *people* get sick! But we are in error when we overlook the vast quantities of clients represented by *non*-person entities such as administrative boards, governmental agencies, corporations without number, estates of decedents, and countless clubs and societies which constitute clients (and often the very best clients) to whom the legal profession can look for business. It is because of this very fact that lawyers are *not* confined to people for clientele that the metropolitan area of New York city contains more lawyers than any other equal geographical area in the United States and that same area contains more legal *business* than any similar area.⁴ It is manifest that no true picture can be predicated upon a reference to the relation between lawyers and population. Those who have gone further and have calculated the ratio between lawyers and per capita wealth are in no more secure position. It is not the possession of wealth which produces legal business, nor can it be used to measure the quantity of *business* available. It is the latter factor which must be isolated before anyone can conclude that the profession is overcrowded.

The Remedy Proposed.

Almost without exception the solution of the supposed overcrowded condition is presumed to repose in the law schools. These institutions have come to be viewed as the gateway to the profession and the cry is raised to close the gate — or, at least, to place it ajar. Again let me remind you that the lament comes from within the profession! The law schools as a rule have accepted the responsibility with little protest and have persistently drawn the gates closer and closer using the lever of higher entrance requirements and higher internal standards. But, *mirabili dictu!* instead of the number of students in law schools decreasing they have in recent years increased!⁵ Thus we have the phenom-

⁴ Dean Smith recognizes this. Cf. 7 AM. LAW SCHOOL REV. 569.

⁵ ANNUAL REVIEW OF LEGAL EDUCATION (1935) 31.

enon of a steady raising of standards on the part of the law schools and an accompanying increase in the enrollment. This leads to the conviction that this method of attacking the problem is failing, and to the more obvious conviction that the law of diminishing returns may crop up to plague the proponents of this procedure. By this I mean that there is obviously an approachable status legitimately demandable as to pre-legal training to go beyond which is not justifiable in view of the only legitimate purpose sought to be attained by standards, *i. e.*, sufficient maturity and mental ability to meet the requirements of a first class legal education as now conceived, to ultimately complete the law course in a satisfactory manner, and then go on to professional success. Who can demonstrate that the requirement of an A. B. degree is conducive to a higher type of professional man than the requirement of three years of college? Or of three years of college rather than two? As a matter of fact, there is some respectable authority developing for the proposition that two years of college is ample to qualify a prospect to enter upon his professional studies.⁶ However, assuming that the degree man is better qualified, does it follow from this that an M. A. man is still better qualified and a Ph. D. man still better qualified? If we can rely upon the experience of European Universities and that of some of our own we will have to conclude in the negative. Let us suppose that the ideal of a qualified professional man is sacrificed to the purely practical desire to reduce the numbers passing through the gateway of the law schools into the profession (the assumed solution of the overcrowded bar). This would justify the highest conceivable standards, even a Ph. D. degree as a pre-law requirement. But what would happen? The law of diminishing returns would justify and bring about a defiance of such arbitrary and unjust requirements.⁷ Its undemocrat-

⁶ Eagleton, *Academic Preparation for Law School*, 26 ILL. L. REV. 607.

⁷ Cf. Wickser, *The Law Schools and the Law*, 7 AM. LAW SCHOOL REV. 121, 129.

ic aspects are manifest. The profession would then have become a closed corporation and admission to it the privilege of the very elect! Furthermore, if this somewhat unthinkable state of affairs should be brought about, a condition might easily arise in the law schools wherein the students would be better educated than their professors! It is enough to say in conclusion that there is probably no one today who has the temerity to propose such requirements. Yet to do so is the logical ultimate of increasing standards in order to bring about a decrease in the personnel of the legal profession.

Enough has been written to demonstrate that while increasing standards are justifiable in the interests of a better qualified professional man, too great insistence on a progressive increase in standards will lead to a point beyond which the *desideratum* is no better served. Obviously then this procedure as a remedy for overcrowding is ineffective since up to now it has not decreased numbers appreciably, impractical if pursued beyond a certain point, (probably the A. B. requirement) and unfair in that it would deny the advantage of a legal training to thousands of persons who have no ambition to practice law, but who are following the discipline of its studies because of the advantages to be derived therefrom in their business or other avocations. Fortunately this quest for a solution has been proceeding in the wrong direction. It is obvious that the solution is not to be found on the admitting end of the profession, but rather on the admitted end, *i. e.*, within the profession itself.

The Real Solution.

More than once in this discussion it has been pointed out that the protest against overcrowding has come chiefly from within the profession. Psychologists might seize upon this phenomenon to turn the lamp of scrutiny back upon those from whom the loudest protests are heard. And in

this instance we would be greatly aided by psychology. It must be admitted, however, that in demonstrating the true solution to the problem of overcrowding, the writer will not be (nor can he be) aided by statistical proof. This will have to be perforce an *argumentum ab experientia*. The absence of statistics should not dismay us too much, however, since heretofore statistics have served chiefly to misconceive the nature of and the solution to our problem. One more preliminary remark is appropriate. Since the analysis hereafter presented will require the members of the profession, and withal the more successful members to sit in judgment upon themselves, the greatest candor and honesty will be necessary if this thesis is to be established.

The reason for the apparent overcrowding of the profession is traceable primarily to the selfishness of the more successful members of the bar. They proceed upon a theory of self-preservation promoted by a most thorough-going inferiority complex. This has led to a practice of the survival of the overworked! The simple fact is that those who have corralled more legal business than they can handle and still live like human beings refuse to share it and adopt the expediency of long, too long, hours of work in their offices, and the sacrifice of normal recreation periods (Saturdays and Sundays) upon the altar of their practice. In spite of the much vaunted capacity for self government which the legal profession loudly proclaims and jealousy guards, it in truth needs an N. L. R. A. (National Lawyers Readjustment Act) of its own limiting the hours of labor, the quantity of fees, etc., much in the same manner as was proposed in industry by the late N. I. R. A. And if this cannot come from within then it ought to be imposed from without the profession.

No one can deny that lawyers are like parasites. They thrive on the woes of others. And the depression was no exception! There was no depression of legal *business!* What with insolvent banks to liquidate, mortgages to foreclose,

bondholders' committees to represent, delinquent debtors to pursue, business reorganizations to guide, adjusted income tax returns to advise, the quantity of new legal business induced by the depression was certainly equal to (if it did not exceed) that which was lost by a contraction of the business enterprise. What happened? Did the profession as a whole thrive? It did not! Some of the fortunate ones thrived beyond all normal expectation.⁸ And their tactics were as ruthless as any employed by a capitalistic baron. Seizing upon the economic necessity and insecurity of staff, stenographers, and clerks, they reduced salaries while doubling and trebling the per capita output. Regular office hours were abolished, Sundays were given over to the sordid pursuit, competitive bidding for legal business became the order of the day! It is not to be supposed that the above situation is a figment of the writer's imagination. It is simply a recordation of practices which have come to his attention and within his personal observation. An honest reflection by the members of the bar will verify their truth.

It is not my purpose to infer that the fortunate members of the profession should have become altruistic humanitarians or philanthropic to the point of "sharing the loaf," although there is respectable precedent in the spiritual order for such a practice. What is lamentable, however, is the melancholy fact that most lawyers take it for granted that one must work long and wearisome hours in client caretaking; that additional legal talent is to be taken on only when the spirit and body refuse to be further overtaxed. When this does become necessary the avarice of the profession makes another appearance. Having garnered more business than they can properly take care of and thus having prevented

⁸ Cf. *Report of Committee on Co-operation With the Bench and Bar*, PROCEEDINGS, ASSOCIATION OF AMERICAN LAW SCHOOLS (1936) 74. Herein is a reference to a survey made by the Committee on Professional Ethics of the New York County Lawyers' Association (to which Dean Smith alludes, in his Report), which reveals that 30 per cent of the lawyers who responded to the questionnaire enjoyed 75 per cent of the income.

this business from flowing into channels leading to the younger men in the profession, they seize upon the advantage resulting from this (the large number of young lawyers who have no visible means of support) to drive an iniquitous and unconscionable bargain. They make it known to the prospect that they are conferring a favor upon him in permitting him to come into the office at no salary, of course (horrors, what impudence!) and insist further that if by some miracle the youngster might get enough time away from the office to secure a client and thus attract the business to the office, the employer will assist in handling it in view of the youngster's inexperience and of course take the major portion of the fees! More than this the experience which is often afforded to the newcomer is of such a revolting nature as to disgust anyone of normal sensibilities not to mention a professional man, a man with college training, a graduate of a law school who has been told by his professors (the prevaricators) that he had chosen an honorable calling—a dignified way of life. The "clerk" is sent out to the police courts for experience, to the city courts to learn trial tactics. He is commissioned to investigate the standing of witnesses in the neighborhood and soon learns to pursue the most approved Pinkerton tactics. In the meantime his preceptor is setting an unexcelled example of unabated industry to the young tyro. He works early and late, Saturdays, Sundays and holidays. How unanswerable is the power of example! I know of course that this sordid picture is in some parts overdrawn but I do not know of any law office large or small, prominent or insignificant, wherein a normal days' labor of eight hours, something akin to that of a bricklayer, is the rule.

What does all of this indicate? It indicates that the profession itself is the cause of the alleged overcrowded condition in the profession. It itself is not fair to the newcomer. In fact it is as ruthless as any nefarious gang could be. It resents encroachment upon its established domain and

guards its vantage points with tireless energy. Is there any wonder that the young lawyer is disillusioned even before he starts upon his career? Is it any wonder that he succumbs to the ways of expediency, to ambulance chasing, to petty "fixing" (for a fee) and the other unsavory practices which are the disgrace of our profession? He can not get legitimate business and yet his righteous elder professional brother scorns him for participating in unprofessional practices and clamors for his eradication, on a plea of overcrowding! Many lawyers are suffering from the same complex that so many in this twentieth century world suffer. They are too preoccupied with the assertion and enjoyment of *rights* to have any thought or inclination to accept professional obligations. I submit that the *profession* owes the newcomer a chance to prove his merit in a manner befitting a professional man. The manner of bringing about this opportunity would be a simple one of detail provided that the profession as a whole would admit its selfishness and recognize its professional duty to the newcomer. A system could be worked out through the medium of local bar associations whereby the membership would agree among themselves to add a new lawyer to the firm whenever the growth of business exceeded a sum sufficient to provide a definite and suitable income to the existing members. In addition to giving the youngster the prestige of a dignified professional connection this practice would bring him in contact with a personal manifestation of the best traditions of the legal profession. Here he could profit by example in emulating his elder brethren of the Bar and thus avoid the questionable tactics that are the despair of the profession. Perhaps that sounds impractical but it is impractical only to those who want more of material things than enough. Furthermore the members of the legal profession ought to be the first to translate the "handwriting on the wall" embodied in our modern tax programs to mean that the profit motive will no longer justify selfish quests for personal gain. A glance at the trend of in-

come taxation during the past twenty years is evidence enough of the validity of such a translation. It was quite alright in another day for one to think of oneself as pitted against the world. But the United States has since come of age and has been attended by increasing complexities in the social and economic order which convince thoughtful men that a new approach is necessary. It is no longer a condition represented by the individual against the world, but rather, Society against the world! Refining this thought leads to the conviction that universal justice will require the individuals who comprise our social organism to realize and accept the obligation which they as members owe to their fellow members. Nor will it be necessary to become an extremist in this program and submit to the arbitrary confiscation of the fruits of one's own labor. It will be enough when there is engendered a disposition to share *opportunity!* Up to now the legal profession and especially its more fortunate members have not seen fit so to do.

Conclusion.

That the quantity of legal business in the United States is increasing at perhaps a greater rate than the personnel of the profession is not capable of statistical demonstration. A few moments of honest reflection, however, ought to demonstrate it. Consider the unparalleled and permanent increase of governmental activities. This alone has created an inexhaustible amount of legal business. The Social Security Act presents a mine of legal problems. Someone has said, probably facetiously, that it contains a lawsuit in every line! It is a very courageous, not to suggest foolish business man who refuses or neglects to seek legal advice and counsel in these complex times. Then there are the other sources of legal business in the Security Exchange Administration, the Federal Land Bank, the Home Owners Loan Corporation, and the Communications Commission. In truth the complexities of modern life have created legal business in great-

er quantity than can be adequately handled by the existing organization. Rather than viewing with alarm the growing number of law school trained men who annually knock at the door of the profession, the older generation ought to extend the hand of welcome. For it is the younger men fresh from the law schools who are intimately familiar with the trends that have produced the complex contemporary legislative ascendancy which we are now experiencing. More than that they have had expert training in the technique of its interpretation and administration so that while they may lack the mechanical experience that can come only after years at the bar, they do have available to the profession the modern and necessary point of view quickened and disciplined under the guidance of the foremost and most articulate thinkers in modern times. Until, however, the members of our profession experience a change of attitude toward their own professional obligations we must continue to chant the dirge of another order; more legal business than ever before and more idle lawyers; longer hours than ever before and yet less opportunity for the young lawyer seeking an opportunity to work. And just as it was in the economic order, the cause, which many of my professional brethren are wont to call overcrowding, is simply improper distribution.

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