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The Privilege of Reexamination in Professional Licensure

BY BERNARD C. GAVIT*

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Last fall The National Conference of Bar Examiners (which was formed under the auspices of the American Bar Association) at its annual meeting considered the problem of reexaminations for admission to the bar. In that connection it occurred to me that the bar examiners might learn something from the medical examiners. I made, therefore, some inquiry as to the rules and practice upon the subject from a number of medical examining boards. The results gave unusual point to Dogberry's dictum to the effect that "comparisons are odorous".

The inquiry was limited to the more populous states where the problem in legal circles is particularly acute. But I found that apparently the medical examiners had, even there, no problem as compared with the law examiners. I found no state which had a rule limiting the number of reexaminations for a medical license although there may be some.¹ The number of failures is, however, comparatively small, the lowest figure I received being 5% and the highest 25%. The statistics of the American Medical Association disclose that in 1932 7.6% of the applicants for medical license failed the state board examinations. In view of the fact that some of the boards examine osteopaths and others, the average of failures seems to be something less than 5% when the applications for medical licenses alone are considered. Practically all of those failing on the first examination succeeded in passing a second or third examination, and rarely, if ever, were as many as five or six examinations given. This seems due to two factors. First, the number of failures is so small that it is possible to give some individual attention to those applicants who fail and to adequately supervise their further necessary training. Second, a great deal of elimination goes on before admission to the examination is granted so that only those who have already demonstrated some considerable ability are dealt with by the examining boards.

The comparison with the situation in the bar examining field is startling. In the New York medical examination, for example, from 5% to 10% fail the first examination. In the New York bar examinations the

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¹Discussion of this paper brought out the fact that at least eighteen states limited reexaminations to two.

board fails 50 % at each examination under what it, not without a sense of humor, designates as a "flexible pass mark", but which might more appropriately be termed an "inflexible pass mark". In other words the board there divides the class in two; it passes the top half and fails the bottom half. The average of failures at bar examinations, including first-timers and repeaters, for the United States for the year 1932 was 55 % ! That result is rendered more painful by the further fact that ultimately in the neighborhood of 90 % of those who took the examinations for the first time will succeed at a subsequent examination in passing and being admitted to the bar. Of original candidates taking their first examination in the years 1922, 1923 and 1924, in New York, 95 % have passed; in Pennsylvania, 93 % ; in Illinois, 86 % ; and in California, 83 %. The total number of admissions also is clearly too large. The number of admissions to the medical profession is annually only between 55 % to 60 % of the number of admissions to the legal profession.

It is thus apparent that the medical profession is years ahead of the legal profession on the subject of licensure. The reasons are not hard to find. The medical profession has succeeded in eliminating to all practical purposes, the commercial medical school. But last year there were 185 organized law schools in this country, and in the neighborhood of 55 % of those schools must be classified as commercial schools. They enroll slightly over half of the law students. The American Bar Association 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 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. It is an obvious judgment that it is impossible to keep one's heart and mind in the atmosphere of idealism and his hand in the cash register at one and the same time. At least ten new law schools were organized during 1933,—all of them commercial, making no pretense of meeting any standards.

One of the more "odorous" 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 graduation from an approved medical school as a prerequisite for admission to the medical examination, lawyers and judges have succeeded in establishing a similar standard in only a single state! (It is but fair to say, however, that several other states do approximate this minimum standard.) In view of the fact that in a considerable number of states the courts have the power to make the rules as to admission to the bar it is very apparent that they 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 cannot even stand the strain of the self-made business man. 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 cannot longer be asked to put up with mediocre lawyers.

I have spoken of the "superiority of lawyers". It is not for the purpose of being facetious. The truth is that since Chief Justice Marshall wrote into the federal constitution the doctrine of the supremacy of the courts, which doctrine gives the courts the final judgment on all individual and governmental activities, we have a constitutional acceptance of the superiority of lawyers. The doctrine of the supremacy of the courts is based on the lawyer's belief in his own superiority; he alone is qualified to finally direct our experiment in democracy. It remains to be seen whether he is willing to face the fact that anything more than a verbal superiority depends on the broad and deep learning and moral and social achievements of the lawyer in action in modern society.

The problem of reexamination is very pertinent, for the bar examination is the only mechanism we have at present which may possibly filter out *some* of the undesirables. It is obviously inadequate. The past results, where some ninety percent of all applicants, regardless of their original preparation, succeed in finally passing, demonstrate 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*. 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.

Medicine and law again part company, for medical training and licensure include clinical experience. A very few states require a short clerkship for final admission to the bar, but only after the formal bar examination. Indeed it seems that law schools will never be able to finance and conduct any extended clinical experience for law students on a parity with medical school training in their own hospitals although a slight beginning has been made in a few schools. The practical difficulties seem insurmountable, and indeed the obvious solution seems to be a law office training following formal instruction supervised by the schools.

It becomes increasingly clear that the best of bar examinations is an inadequate tool in solving the problem of admission to the bar. Any *ex post facto* determination of a candidate's fitness 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 cannot be left to chance. The problem must be passed on to the schools, as it has been in the medical world. The commercial law school must go; law schools must impose stringent standards under the administration of bar examining authorities.

But in the meantime we must struggle with the bar examinations and make them as effective as possible. The problem is immediate and cannot wait for the "best possible" solution.

The most effective immediate prophylactic is a limitation on the number of reexaminations permitted for each applicant. About one-fourth of the states now have some such limitation, although the number of repeater examinations allowed is too high, being often as many as six or more. No one has suggested that such a limitation would be illegal. I know of no case where the question has been raised but it seems apparent that the regulation can easily be sustained. All that is necessary is that there be found for it a reasonable basis in present and past experience and a reasonable expectation that it will serve the purpose intended.

On that score it is an obvious judgment that such a regulation is reasonable. We are already committed to the view that there should be a dividing line between those qualified and those not qualified to practice law or medicine, and pushing the line up a little to exclude those who

fail three examinations for license is, based on past experience, a most liberal dividing line. Like all lines it looks, and is, arbitrary, but it would certainly have the effect of keeping out those more clearly improperly prepared and at the same time of improving the preparation of those who undertake the examination. Of itself it would tend to force students into the better law schools for experience demonstrates that on anything other than an antique bar examination the graduates of the standard law schools enjoy a percentage of 85-100 % of success in passing the first examination and almost without exception succeed in passing a second or third examination.

The most persuasive argument in favor of some such uniform limitation is that it effectively places a penalty on 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 cannot 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* 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. It's no good talking about law and medicine being professions 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 properly laid is more than obvious. The applicant who wishes a certificate as to those qualities who has 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 career 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 every day 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 cannot 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 or medical 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. But the fact remains that we need not be too concerned over those whose powers of perception are somewhat limited and who ultimately seem satisfied with a mediocre training; particularly if we offer them a fair opportunity of success after their limitations are pointed out to them.

With good grace we can certainly draw the line against the applicant who fails three times. My opinion is that the privilege of reexamination should, in the usual case, be limited to two repeater examinations. Good men with adequate preparation are likely to fail their first examination. They are ill, or nervous, or too confident. Men from good schools sometimes fail because they have been led to believe that their education is so superior that a reexamination as to their knowledge is something of a superfluity. They do not review their early work with the result that they fail to pass. Two additional examinations ought to, and do, take care of that group.

Those who fail because of inadequate preparation are certainly sufficiently warned by their first failure, and the common experience of a large group of others with similar preparation, so that a second and third trial seem all that can honestly be required.

A lawyer is certainly in no position to give much advice to the medic on this subject. Medical standards for admission to examination for a license are so high that the problem of reexamination after failure is relatively unimportant. I suppose, however, that there are some few who could still profitably be finally eliminated by the state medical examinations. There would seem to be no harm, and indeed all indications are that positive benefits would result, if medical reexaminations were limited to two in number. Certainly in the legal field it is a necessary expedient, for until the legal system turns to the elimination of the poorer grades of lawyer material through the standard schools some elimination must be effected through the state bar examinations. At present the elimination is negligible. Nor does the system sponsor the standard or superior rather than the inadequate law school and character training. Something could be gained along those lines, however, by the simple expedient of curtailing the privilege of reexaminations.