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# ADMISSIONS TO THE BAR IN INDIANA: A CRITICAL HISTORY AND ANALYSIS<sup>1</sup>

RICHARD P. TINKHAM\*

In 1451 B. C., Joshua heeded the Divine Power, and the walls of Jericho came tumbling down in answer to the seven marches around the city, the loud shouts and the blasts of trumpets. Thirty-four hundred years later we find the Indiana Bar preparing for its fifth march about the seemingly impregnable walls of Article VII, Section 21 of the State Constitution. There is no shouting, no blaring of trumpets. One hears only the lagging shuffle of a disheartened legion, accustomed to defeat and expecting defeat. What is the history of the first four marches?

The foresight of the fathers of the state was acute, but they did not build strongly enough. The Constitution of 1816 avoided reference to requirements for admission to the bar of Indiana, and thus the duty of providing safeguards for the people against an immigration of unsuccessful aspirants from other states and the incubation of an unscrupulous and illy-prepared bar fell upon the legislature. That body responded in 1843 with an act<sup>2</sup> which at the time was amply competent to take care of the existing situation.<sup>3</sup> Then came the convention of 1851. The sagacity of the fathers of Indiana had scant time to manifest itself in legislative action when the delegates to this convention, in a wave of democratic dementia, pulled into almost irreparable chaos the structure which the fathers had so carefully erected.

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\* See p. 492 for biographical note.

<sup>1</sup> In writing this article it is assumed that the case for higher requirements for admission to the bar has been unimpeachably established by the efforts of the American Bar Association and the Indiana State Bar Association. This article deals only with the means of accomplishing this result in Indiana.

<sup>2</sup> Chap. 38, Sec. 93-114, Revised Statutes of the State of Indiana, 1843.

<sup>3</sup> The act provided for the admission to practice in all lower courts on a license issued by two Circuit Judges and admission to practice in all courts on a license issued by two Supreme Court Judges. It also included a requirement for oaths in support of the State and Federal Constitutions, and further provided for penalties for violation. It is submitted that considering the status of education, the immaturity of business, and the long recognized competence of law-office trained lawyers, these requirements were sufficient for the times.

The delegates perhaps noticing with what great facility they were able to destroy the work of 1816 and 1843, took heed to build with stronger stuff. The Constitution was amended to entitle "Every person of good moral character, being a voter"<sup>4</sup> to admission to the practice of law. That this amendment has been a constant source of blight and shame to the bar of this state, one needs only to note the five assaults made upon it.<sup>5</sup>

Charles M. Hepburn, of the Indiana University School of Law, has ably traced the history of what is known as the democratic decadence of the nineteenth century and its effect upon the Indiana Bar.<sup>6</sup> Reference to this scholarly report will be worth while. Mr. Hepburn begins his inquiry by recounting the earliest requirements for admission to practice law. The report is here quoted:

"Thus in the year 1402, a statute of Henry IV, after a preamble referring to 'sundry damages and mischiefs that have ensued before this time to divers persons of the realm by a great number of attorneys, ignorant and not learned in the law, as they were wont to be before this time' proceeds to declare what sort of men should be attorneys—'virtuous men,' in short, 'and learned.' So three hundred twenty-seven years later an act passed in 1729, 'for the better regulation of attorneys' prescribes among other things, that no person thereafter may be permitted to enroll as attorney unless he shall have served a clerkship of not less than five years."<sup>7</sup>

To say that the technicalities and intricacies of the legal and business worlds had increased in the six score and two years between the Act of 1729 and the amendment of 1851 would be but to utter a truism. Yet Indiana in 1851 removed all restraint on eligibility to practice the difficult profession of law, while one hundred and twenty-two years earlier the authorities of England had deemed the preparation for the practice of law so necessarily arduous and labyrinthine that they had required five years of clerkship as a prerequisite. This pragmatism of a principle, carried that principle *ad absurdum*, and was as beneficial to the advancement of democracy as was the guillotining of Marie Antoinette and Louis XVI. Both were inept gestures of a democracy gone mad.

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<sup>4</sup> Constitution of Indiana, Art. 7, Sec. 21.

<sup>5</sup> The attempts to amend Art. 7, Sec. 21, will be found post n. 10.

<sup>6</sup> Reports, Indiana State Bar Association, 1921, p. 11.

<sup>7</sup> *Idem*, p. 14.

Indiana was not alone in this moral let-down.<sup>8</sup> In 1840, of the thirty states then in the union, only eleven required definite preparation for the bar. The decadence gained headway until in 1860 only nine out of thirty-nine states required a period of legal training. Sister states soon realized the blunder which had been committed under the cloak of democracy. Headed by the American Bar Association, there began a wave of reform which climaxed in the year 1921 when the committee on legal education and admissions to the bar, under the able leadership of Elihu Root, promulgated an approved list of requirements, with which every lawyer is familiar.<sup>9</sup>

Let it be said to the credit of Indiana that she has attempted to ride on the crest of this wave of moral renaissance. Four times has the state legislature placed an amendment before the people, which each time has been known as the "Lawyers' Amendment."<sup>10</sup> Three times did the people of Indiana approve

<sup>8</sup> *Idem*, pp. 14-15.

<sup>9</sup> Reports, American Bar Association, Vol. XLVI, 1921, p. 687.

(a) "The American Bar Association is of the opinion that every candidate for admission to the bar should give evidence of graduation from a law school complying with the following standards:

(1) It shall require as a condition of admission at least two years of study in a college.

(2) It shall require its students to pursue a course of three years duration if they devote substantially all of their working time to their studies, and a longer course, equivalent in the number of working hours, if they devote only part of their working time to their studies.

(3) It shall provide an adequate library available for the use of the students.

(4) It shall have among its teachers a sufficient number giving their entire time to the school to insure actual personal acquaintance and influence with the whole student body.

(b) "The American Bar Association is of the opinion that graduation from a law school should not confer the right of admission to the bar, and that every candidate should be subjected to an examination by public authority to determine his fitness."

<sup>10</sup> The tabulation of the voting is as follows:

(a) Nov. 6, 1900:

For Governor, 655,965.

For Amendment, 200,031; against Amendment, 144,072.

(b) Nov. 6, 1906:

For Secretary of State, 589,244.

For Amendment 39,061; against Amendment, 12,128.

(c) Nov. 8, 1910:

For Secretary of State, 627,133.

For Amendment, 60,357; against Amendment, 18,494.

(d) Sept. 6, 1921, special Election:

For Amendment, 78,431; against Amendment, 117,479.

the amendment, but each time it was lost because of the lack of a constitutional majority.<sup>11</sup> These results were not victories for those opposed to the reform, but were victories for that conqueror of most forward movements, public indifference.<sup>12</sup> The fourth time the amendment was submitted to the people it was clearly defeated, but again public indifference was the real victor. It must be noted that an amendment authorizing a tax on income was submitted at this same election. The "Lawyers' Amendment" went down in the land-slide which buried the tax amendment.

A moral must be drawn here. The fifth assault on this relic of an unwise democracy is about to be made. The "Lawyers' Amendment" is now flying under new colors: "That the constitution of the State of Indiana be amended by striking out all of Section 21 of Article VII."<sup>13</sup> An amendment authorizing taxes on incomes is also ripe for submission to the people.<sup>14</sup> The fiasco of 1921 is apt to be repeated if the amendments are submitted simultaneously.<sup>15</sup>

The Indiana State Bar Association was slow in furnishing the necessary leadership which such a drastic change requires. As late as 1906 when sister states were reformed or reforming, a committee of the association recommended the appointment of a committee and the appropriation of funds to assist in the rati-

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<sup>11</sup> See *In re Denny*, 156 Ind. 104 (1901); *In re Boswell*, 179 Ind. 292 (1912).

<sup>12</sup> Mr. Andrew A. Adams reading the report of the Committee on Legal Education of the Indiana State Bar Association at the 1909 meeting, said:

"As is well known, such efforts (having referred to the attempts to amend the constitution) have come to naught, more on account of want of investigation and indifference on the part of the voters of the state than any positive opposition to the change sought by the proposed amendment."

<sup>13</sup> Chap. 368, Acts 1927, p. 759.

This amendment is not the exact one recommended by the Indiana State Bar Association. See *Indiana Law Journal*, Vol. 1, No. 4, 1925, p. 92:

"That Sec. 21, Art 7, be amended by striking out the words 'Every person of good moral character being a voter shall be entitled to admission to practice law in all courts of justice' contained in Sec. 21, Art. 7, of the Constitution of the State of Indiana."

The form in which this amendment was adopted by the legislature entirely conceals its purpose from the voter.

<sup>14</sup> Chap. 267, Acts 1927, p. 758.

<sup>15</sup> It is understood that Senate Bill 259 providing for submitting the proposed amendments to the people has been found to be invalid, and it is not known at this time when or in what manner the amendments will be submitted.

fication of the "Lawyers' Amendment" then about to be submitted to the people. The recommendation of the committee was defeated, it is submitted, because of two reasons which are drawn from the discussion of the report by members of the association:

1. The fact that the then leaders of the Indiana Bar could not have passed examinations when they began to practice, and
2. The fact that an appropriation of one thousand dollars would have left the treasury depleted.<sup>16</sup>

Despair is written between the lines of the report of the committee on legal education in 1909,<sup>17</sup> and the committee is of the opinion that the amendment will never succeed. The same tone is prevalent in the report made in 1914.<sup>18</sup> The situation takes on a new character, however, in the report of the same committee made in 1922.<sup>19</sup> The committee recommended the approval of the requirements as adopted by the American Bar Association in 1921. Such approval was readily forthcoming, but approval without power of enforcement has meant little or nothing.

Honorable Julius C. Travis of the Supreme Court struck another optimistic note in his report as chairman of the committee

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<sup>16</sup> Reports, Indiana State Bar Association, 1906, p. 148.

The fallacy of this opposition is readily apparent. Times have changed, as has the opinion of the association; Reports, Indiana State Bar Association, 1922, p. 12:

"We recognize also that applicants to the Bar today face essentially new conditions. These conditions have arisen in a comparatively short time from various wide-spread causes in our twentieth century civilization—the ever-growing complexity of the business and social problems with which lawyers as lawyers have to do, the ever-growing volume and complexity of the law itself, the new and intensive methods of doing business in law offices, methods which render it impossible for law office students to obtain now such legal training as their fathers obtained in law offices."

It is suggested that point 2 is also untenable today. The Bar Association is of the opinion that this is a vital matter and should be pursued. If the funds in the treasury are to be spent at all, should they not be spent in furthering the high purposes of the bar in the most practical manner available?

<sup>17</sup> Reports, Indiana State Bar Association, 1909, p. 143.

<sup>18</sup> Reports, Indiana State Bar Association, 1914, p. 34.

<sup>19</sup> Reports, Indiana State Bar Association, 1922, p. 11.

at the 1925 meeting.<sup>20</sup> The recommendation of the committee that a fifth assault be made upon the constitutional barrier<sup>21</sup> was adopted. The association further approved the recommendation of the committee that the amendment be submitted at a special election at which no other amendment would be submitted to the people. The same committee in 1926, under the leadership of James M. Ogden, now attorney general, reported the adoption of a set of rules for admission to practice in the circuit and superior courts in Indiana.<sup>22</sup> These rules were printed and distributed to the circuit judges and to all local bar associations. The rules provided for two examinations each year, one on the first Monday in February, and the other on the first Monday in July. The questions were to be furnished by the State Bar Association. This action by the association was a distinct step forward, but the practicability of the system and the extent to which it is employed in the various counties remains to be investigated.<sup>23</sup> Dean Paul V. McNutt of the Indiana University School of Law, as chairman of the committee on legal education in 1928, stated in his report:<sup>24</sup>

“These rules (referring to those adopted in 1925) were adopted in comparatively few counties, in some of which the rules were changed to meet local ideas, or were not observed after adoption \* \* \* Your committee believes that the rules are the best means of protecting the profession until a constitutional amendment is adopted; \* \* \* your committee believes that a constitutional amendment is necessary to protect the profession against the admission of incompetents \* \* \* It is recommended that the association sponsor the foregoing amendment<sup>25</sup> and urge the next general assembly to approve and submit it.”

Thus, in brief, is the history of the attempt to undo the folly of the Convention of 1851. What is the analysis of this situation at the present moment? Has the Bar Association taken note of the reasons for the four failures? Why are the people indifferent or opposed? What is the remedy?

It is submitted that the sense of the association as evidenced in the report of the committee on legal education for 1928, to

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<sup>20</sup> *Indiana Law Journal*, Vol. 1, No. 4, 1925, p. 90.

<sup>21</sup> *Ante* n. 13.

<sup>22</sup> *Indiana Law Journal*, Vol. II, No. 1, 1926, p. 15.

<sup>23</sup> It is understood that such an investigation has been proposed and that a report will be made in a forthcoming issue of this Journal.

<sup>24</sup> *Indiana Law Journal*, Vol. IV, No. 1, 1928, p. 76.

<sup>25</sup> *Ante* n. 13.

the effect that the amendment of the constitution is necessary "to protect the profession against the admission of incompetents," is the only thorough-going solution of the problem. The assumption of this obvious premise gives rise to the sadly unaccomplished task, after twenty-nine years of indifferent effort, of enkindling the smoldering interest of the people to a voting heat. If the premise be true, and if history may be relied upon, therein lies the sole solution. The people must be educated to the value of the amendment.

Beginning with an outspoken opposition to this reform,<sup>26</sup> the State Bar Association has gradually increased its interest in this vital matter until now the association has attempted to follow the advices of the American Bar Association by recommending uniform examinations to be given by local bar associations, and by reaching the patent conclusion that a constitutional amendment was the only thorough relief available. Approval of this contemplated reform is only a small portion of the burden foisted on the shoulders of the State Bar Association, for the public must be extensively informed concerning the benefit which is bound to accrue to it through the ratification of this amendment. This task belongs to no one but the Indiana State Bar Association and each individual member thereof. In the 1906 meeting of the Indiana State Bar Association, a prominent member of the bar suggested in opposition to a motion that a committee be appointed and funds be appropriated to assist in the ratification of the then proposed "Lawyers' Amendment," that the fact that the people knew the lawyers were supporting the movement would ensure its defeat.<sup>27</sup> This "watchful-waiting" method has been pursued for twenty-nine years with not much success. Isn't today a propitious time for the Bar Association to change its tactics? At least the method of positive support should be given a fair trial.

The benefits to be derived by the people are many. Lack of space prevents a minute discussion of each of them. The public should be vitally interested in the reliability of its legal advisers, it should be interested in lessened taxes due to more efficient litigation handled by an efficient bench and bar, it should be interested in the lessening of time required between the filing of suit and the final adjudication thereof, it should be interested

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<sup>26</sup> See Reports, Indiana State Bar Association, 1906, pp. 153, ff.

<sup>27</sup> Reports, Indiana State Bar Association, 1906, p. 157.

in the elimination of the inadequately prepared lawyer who, by force of circumstance, is compelled to make a living by preying upon members of the public themselves, it should be interested in establishing the moral tone of the bar on a level with the bar in other states, and on a level with the other professions in the State of Indiana.<sup>28</sup> Nothing could be more lucid than this statement made by Mr. Elihu Root in 1916 before the American Bar Association:

"The constant pressure of democratic assertion of individual rights is always towards reducing the difficulty of bar examinations. One consequence is the excess of lawyers that I have mentioned. Another consequence is that the efficiency of our courts is reduced, their rate of progress retarded, the expense increased, their procedure muddled and involved by an appreciable proportion of untrained and incompetent practitioners; by badly drawn, confused, obscure papers difficult to understand, by interlocutory proceedings which never ought to have been taken and proceedings rightly taken in the wrong way and inadequately presented; by vague and haphazard ideas as to rights and remedies; by ignorance of the principles upon which our law of evidence is based; by ignorance of what has been decided and what is open to argument; by waste of time and worthless evidence and useless dispute in the trial of causes; by superfluous motions and arguments and appeals; and by the correction of errors caused by the blunders of attorneys and counsel. In many jurisdictions there is a considerable percentage of the bar whose practice causes the courts double time and labor because the practitioner is not properly trained to use the machinery furnished by the public for the protection of his clients. In the meantime other litigation waits and the public pays the expense."<sup>29</sup>

Hear what Judge Andrew A. Bruce, then of Minnesota but now of Northwestern University School of Law, said to the American Bar Association in 1920:

"Above all, the public should be made to understand the real importance and governmental values of the American Judge and that it is in the law schools that the American Judge must be trained. They should be led to realize that the lawyer of today is but the judge of tomorrow, and that even the practicing lawyer, as an officer and an adviser of the court, has a great public and governmental function to perform. If they did so they would support our law schools."<sup>30</sup>

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<sup>28</sup> Reports, Indiana State Bar Association, 1914, p. 35.

"There is in Indiana legislation governing the practice or vocation of medicine, dentistry, pharmacy, veterinary science, nursing, embalming, railroad engineering and other pursuits. Many of these do not rise to the dignity of the law."

<sup>29</sup> Reports, American Bar Association, 1916, p. 361.

<sup>30</sup> Reports, American Bar Association, 1920, p. 480, 494.

It is submitted that three obvious inferences may be drawn from history: (1) The amendment will not succeed at a general election unless public indifference is overcome by a strenuous educational campaign. (2) The amendment will not succeed at a special election at which another amendment, not favored by the people, is submitted, in the absence of an equally strenuous educational campaign. (3) The amendment will succeed if it is the sole question before the people at a special election. It must be recalled, in this connection, that the total number of persons voting at such special election constitute the electors, and a majority of the votes cast in favor of the amendment will effect a ratification of it.<sup>31</sup> It is further suggested that an educational campaign is desirable even though the amendment is the only question before the people. Such a campaign will ensure the ratification of the amendment.

After the adoption of the amendment the legislature will be free to impose requirements which will restore the bar to the favorable situation found in 1843, and which will eventually and certainly remove the odium and disrespect which has shadowed the advance of the Indiana Bar these seventy years and more.

How shall the people be educated to the value of this amendment? Today is the day of intensive public education. The public is educated to prefer and pay for certain makes of automobiles, certain makes of radios, certain brands of shoes, clothes, cigarettes and candy. The Community Chest, the Red Cross, the Chambers of Commerce and other public benefit organizations have succeeded in educating the public to a need of financial co-operation. We are not asking the people to buy, nor are we asking them to give, we are asking that they take a step which will result in time and money-saving to them. Should they not be informed of this fact?

Great public movements have recognized the adaptability of the bar of this state for the dissemination of information. The lawyers of the country and state were largely responsible for the successes of the Liberty Loan drives during the late war. The bar has never failed to actively support a worthy movement. Cannot this great influence and talent be directed toward this new goal? Would it not be possible and advisable to again

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<sup>31</sup> *State v. Swift*, 69 Ind. 505. *In re Denny*, 156 Ind. 104. *In re Boswell*, 179 Ind. 292.

establish a speakers' bureau with a state chairman, and a chairman in each county who would appoint certain members of the bar to expound the amendment before Chambers of Commerce, luncheon clubs and other public or semi-public gatherings? Would it not be advisable for the State Bar to procure the printing of material for the guidance of these speakers, and for distribution to the public in general? It is suggested further that the newspapers of this state would be only too glad to publish properly prepared articles and editorials in support of the amendment. To this end expert assistance should be engaged.

Let us now reconsider the action taken on the report of the Indiana Bar Association's special committee on pending constitutional amendments in 1906; the report is as follows:

In this generation, when even an undertaker and embalmer must pass an examination and establish his fitness before he may practice his calling in the State of Indiana, it looks as if the time is near at hand when the general assembly should be intrusted with authority to prescribe reasonable conditions for admission to the bar.

We recommend therefore that a special committee of fifteen be appointed by the president of this association, the chairman and two members of which shall reside in Indianapolis and that such committee be empowered and directed, for and on behalf of this association, *to take such measures as to it may seem effective to excite an interest in the pending constitutional amendment, and to induce the voters to adopt it at the polls.*<sup>32</sup>

"We further recommend that a sum of money sufficient for the reasonable purposes of the committee, not exceeding One Thousand Dollars, be appropriated from the funds now in the hands of the treasurer of this association, and be rendered payable from time to time to the committee to be employed by it in payment of its reasonable expenses in forwarding its work."<sup>33</sup>

While the mechanical details recommended in the report are not sufficiently set forth, and while the appropriation advised would be inadequate today, it is submitted that the spirit of the report should be whole-heartedly adopted and put into effect at the earliest opportunity.

Disorganization, good wishes and "watchful-waiting" have obtained four defeats and these failures have crippled the cause considerably. The Indiana State Bar Association has the power and ability to ensure the success of this fifth attempt. Is it going to profit by the four failures?

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<sup>32</sup> Italics by the author.

<sup>33</sup> Reports, Indiana State Bar Association, 1906, p. 148, Lucius C. Embree and Enoch G. Hogate, for the committee.