



1-1-1978

# The Definition of Legal Competence: Will the Circle be Unbroken

David M. White

Follow this and additional works at: <http://digitalcommons.law.scu.edu/lawreview>



Part of the [Law Commons](#)

## Recommended Citation

David M. White, *The Definition of Legal Competence: Will the Circle be Unbroken*, 18 SANTA CLARA L. REV. 641 (1978).  
Available at: <http://digitalcommons.law.scu.edu/lawreview/vol18/iss3/3>

This Article is brought to you for free and open access by the Journals at Santa Clara Law Digital Commons. It has been accepted for inclusion in Santa Clara Law Review by an authorized administrator of Santa Clara Law Digital Commons. For more information, please contact [sculawlibrarian@gmail.com](mailto:sculawlibrarian@gmail.com).

# THE DEFINITION OF LEGAL COMPETENCE: WILL THE CIRCLE BE UNBROKEN?

David M. White\*

*[B]efore the Law stands a doorkeeper. To this doorkeeper there comes a man from the country who begs for admittance to the Law. But the doorkeeper says that he cannot admit the man at the moment. . . . "If you are so strongly tempted, try to get in without my permission. But note that I am powerful. And I am only the lowest doorkeeper. From hall to hall keepers stand at every door, one more powerful than the other."<sup>1</sup>*

*Franz Kafka*

## INTRODUCTION

The definition of legal competence in America is facing unprecedented challenge, aimed both at the standards for entry into the legal profession and the professional conduct of attorneys. Challenges to law school admissions criteria, law school attendance requirements, and bar examinations have emerged, as have movements advocating the relicensing of lawyers and the certification of specialists. In addition, recent years have witnessed the creation of a new professional subclass—paralegals.

Despite their apparent broad range, each challenge is actually an individual effort to reform and thus offers only a limited potential for change. This article will examine the entire scope of these challenges to the profession. It argues that, considered separately, these movements accept or reinforce the traditional composition of the legal profession as wealthy, white, and male. However, if considered in conjunction, the range of change suggested by these movements offers hope for a clearer, more rational definition of legal competence, and for a legal profession more representative of society at large.

---

\* Staff Attorney, Childhood & Government Project, Boalt Hall, Berkeley, Ca.; B.A. 1968, Boston College; J.D. 1973, Harvard University; Member, State Bar of California. The research and writing of this article was supported by a grant from the Spencer Foundation of Chicago, Illinois. The author wishes to acknowledge the assistance of Lowell Chun-Hoon, Linda Pierce and Terry Roth in researching and editing the article.

1. F. KAFKA, PARABLES AND PARADOXES 267-68 (1937).

In the move to reform the definition of legal competence, the stakes are high both for society and the legal profession, for the law is truly the foundation of democratic society. New laws are continually erected to combat problems; laws which historically have been written and interpreted by lawyers.<sup>2</sup> America cannot solve these problems without sufficient numbers of lawyers or without lawyers representative of society. However, lawyers themselves have a stake in the struggle. Attorneys enjoy considerable prestige and income today,<sup>3</sup> due in a large part to their relative scarcity. Although burgeoning legislation would logically increase the overall demand for lawyers, there were fewer practicing attorneys per 100,000 in population in 1970 than in 1900.<sup>4</sup> This growing circle of attorneys remains largely white<sup>5</sup> and male<sup>6</sup>—a group who would seem to have an obvious

---

2. Domination of the public business of America by lawyers has continued since the American Revolution. Of the 56 signers of the Declaration of Independence, 25 were lawyers. Of the 55 members of the Constitutional Convention, 31 were lawyers. In the first Congress, 10 of the 29 Senators and 17 of the 65 Representatives were lawyers. C. WARREN, *A HISTORY OF THE AMERICAN BAR* 211 (1911). "In 1970, 67 senators, a majority of representatives, and 4 Cabinet members were lawyers. . . . About one-quarter of all state legislators since 1900 have been lawyers." H. PACKER & T. EHRLICH, *NEW DIRECTIONS IN LEGAL EDUCATION* 3 (1972) [hereinafter cited as PACKER & EHRLICH].

3. Although recent political events may have tarnished the lawyers' image, the status of the profession has always outweighed the constant undercurrent of distrust of lawyers. The most complete survey of occupational prestige, conducted in 1947, indicated that U.S. Supreme Court Justices ranked first among all workers. Lawyers received excellent or good ratings from 89% of the population. R. HALL, *OCCUPATIONS AND THE SOCIAL STRUCTURE* 269 (1969).

"In 1965 the average annual net income for lawyers was about \$10,000 (as compared to \$7,000 for wage earners in the United States generally). The average for lawyers in partnership was \$22,000. . . . Partners in the large firms in the big cities probably averaged at least \$30,000." PACKER & EHRLICH, *supra* note 2, at 2.

Recent surveys have pointed out the affluence at the pinnacle of the profession. It is estimated that the median net income per partner in the top New York firms was \$151,000 in 1976. Senior partners averaged more than \$200,000, and the newest partners averaged \$64,573. Brill, *Big-Time Law: A Money Tree*, *ESQUIRE*, March 1, 1978, at 15. The 10 largest firms in New York are estimated to have gross annual revenues between \$20,000,000 and \$40,000,000. Bernstein, *The Wall Street Lawyers are Thriving on Change*, *FORTUNE*, March 13, 1978, at 105.

4. According to U.S. Bureau of Census data, there were 141 lawyers per 100,000 people in 1900. In 1970 there were 133 practicing lawyers per 100,000. CARNEGIE COMMISSION ON HIGHER EDUCATION, *COLLEGE GRADUATES AND JOBS: ADJUSTING TO A NEW LABOR MARKET* (1973) [hereinafter cited as *COLLEGE GRADUATES AND JOBS*].

5. There were an estimated 3,000 black attorneys in 1973. O'Neil, *Racial Preferences and Higher Education: the Larger Context*, 60 *VA. L. REV.* 925, 943 n.80 (1974). The total number of nonwhite law students was estimated at no more than 2% of the total in 1969. *COLLEGE GRADUATES AND JOBS*, *supra* note 4, at 100.

6. Women comprised less than 3% of the overall law school enrollment for decades. The figure rose to 9% in 1971. Thorne, *Professional Education in Law*, in *EDUCATION FOR THE PROFESSIONS OF MEDICINE, LAW, THEOLOGY, AND SOCIAL WELFARE* 166 (1973) [hereinafter cited as *EDUCATION FOR THE PROFESSIONS*].

interest in protecting the prestige and income of lawyers.

Political processes could reconcile this conflict between societal and professional interests if this were any other profession. However, the legal profession enjoys a unique status. The legislature generally licenses other professionals,<sup>7</sup> but the judiciary licenses lawyers.<sup>8</sup> In addition, the legislatures to which political reform efforts would typically be directed are comprised largely of attorneys.

Consequently, meaningful reform of the legal profession must come from within the ranks of the profession itself. Lawyers must search their own motives and protect the public interest through careful analysis of the merits of suggested changes. In the hope of facilitating the process of reform, this article will discuss and briefly assess the major changes being suggested today.

## THE CHALLENGES TO PROFESSIONAL ENTRY REQUIREMENTS

### *Defining Legal Competence*

According to the dictionary, a lawyer is "One versed in the laws, or a practitioner of law; one whose profession is to conduct lawsuits for clients, or to advise as to the prosecution or defense of lawsuits, or as to legal rights and obligations in other matters."<sup>9</sup> According to the legal definition, based on professional entry requirements, a lawyer is a person who has: 1) completed three years of college,<sup>10</sup> and gained admission to law school; 2) completed three years of law school;<sup>11</sup> and 3) passed

---

7. For a review of occupational licensing practices and judicial responses to challenges of those practices, see Wallace, *Occupational Licensing and Certification: Remedies for Denial*, 14 WM. & MARY L. REV. 46, 46-53 (1972).

8. For a review of the unique status of lawyers as licensees by the judiciary, see Note, *ABA Approval of Law Schools: Standards, Procedures, and the Future of Legal Education*, 72 MICH. L. REV. 1134, 1134 n.2 (1974).

9. WEBSTER'S NEW INTERNATIONAL DICTIONARY 1402 (2nd ed. unabridged 1960).

10. AMERICAN BAR ASSOCIATION, APPROVAL OF LAW SCHOOLS, STANDARDS AND RULES OF PROCEDURE, Standard 502 (1973) [hereinafter cited as ABA STANDARDS]. Although about 20% of the states require only 2 years of college, most state bars require at least three years of college prior to legal training, but the practical requirement for pre-legal education is more properly considered as a college degree, which is required by 7 state bars and over three-fourths of all ABA accredited law schools. EDUCATION FOR THE PROFESSIONS, *supra* note 6. General education requirements cannot be avoided, *In re Bergeron*, 220 Mass. 472, 107 N.E. 1007 (1915); even after successfully passing the bar examination, *In re Alexander*, 167 Mich. 495, 133 N.W. 491 (1911).

11. Full-time students must attend law school for three years, part-time students must attend for four years. ABA STANDARDS, Standard 305(a) (1975). Thirty-three states require that legal schooling be done at an ABA approved law school. York and Hale, *Too Many Lawyers?*, 26 J. LEGAL EDUC. 1, 3 (1973) [hereinafter cited as York &

a bar examination.<sup>12</sup> The contrast in the definitions is instructive. The dictionary tells what a lawyer does. The legal requirements focus on what a lawyer has done. As such, the legal requirements implicitly deny the legitimacy of work performed by individuals who are not lawyers but whose work is similar to that of lawyers.<sup>13</sup>

The three elements of the legal definition of a lawyer are three chief barriers to the practice of law: the bar examination, law school admission, and law school attendance itself.

Each of these barriers has come under increasing attack for a variety of reasons. Included among these attacks are those leveled at the two standardized tests involved in the entry process: the Law School Admission Test and the Multi-State Examination. Since professional competence is defined in terms of satisfying these entry barriers, the challenges directed at each one will be examined in turn.

### *The Bar Examination*

The bar examination has been challenged more frequently and more openly than any other element in the process of becoming a lawyer. Only four states allow graduates of certain law schools to join the bar without passing a bar examination,<sup>14</sup> and for all other prospective lawyers the bar examination re-

---

Hale]. See also notes 64 and 66, *infra*. Where such requirements are in effect, a candidate may not sit for the bar examination without proof of graduation from a law school or where applicable, an accredited law school. *Henington v. State Bd. of Bar Examiners*, 60 N.M. 393, 291 P.2d 1108 (1956); *Application of Sebatz*, 80 Wash. 2d 604, 497 P.2d 153 (1972); *Rosenthal v. State Bar Examining Comm.*, 116 Conn. 409, 165 A. 211 (1933); *In re Lorrington's Petition*, 75 Nev. 330, 340 P.2d 589 (1959).

12. Four states allow graduates of certain approved law schools to join the bar without passing a bar examination. NATIONAL CONFERENCE OF BAR EXAMINERS, THE BAR EXAMINER HANDBOOK 17 (1968). The ABA has consistently opposed the diploma privilege. *Id.* at 248.

13. The practical dividing line between a lawyer's work and a nonlawyer's is quite hard to identify. ABA CODE OF PROFESSIONAL RESPONSIBILITY (Preliminary Statement 1970), Ethical Consideration 3-5 states, in part: "Functionally, the practice of law relates to the rendition of services for others which call for the professional judgment of a lawyer. The essence of the professional judgment of the lawyer is his educated ability to relate the general body and philosophy of law to a specific legal problem of a client. . . ." The ABA has negotiated interoccupational treaties with nine different groups performing functions similar to lawyers. These groups include, for example, claims and adjusters in 1939, banks with trust functions in 1941, realtors in 1943, accountants in 1951 and social workers in 1965. EDUCATION FOR THE PROFESSIONS, *supra* note 6.

14. In 1968, the "diploma privilege" existed only in Mississippi, Montana, West Virginia and Wisconsin. NATIONAL CONFERENCE OF BAR EXAMINERS, THE BAR EXAMINER HANDBOOK 17 (1968).

mains a barrier to practicing law. In at least ten states within recent years, lawsuits challenging the bar examination have been filed.<sup>15</sup> The thrust of each suit is similar; the examination has a considerable discriminatory impact upon minority candidates, does not reflect the actual requirements of legal practice, and is administered in an arbitrary fashion. These suits reflect the more widespread discontent with the examination which has been expressed in both private conversations and public demonstrations.

Challenges to bar examinations have met with universal defeat in the courts, although some suits are still pending. The Fourth and Fifth Circuits, however, have rejected complaints of biased bar examinations within the last two years, and their example is likely to be followed. In these cases, the rigorous standards which have been applied to other employment tests were declared irrelevant to the bar examination,<sup>16</sup> and only a rational relationship between the examination and the practice of law was required.<sup>17</sup> This standard was met by bar examiners' testimony that they had met this standard based upon their own professional experience in practicing law and grading bar examinations.<sup>18</sup> In addition, statistical proof was offered to demonstrate that bar examination results closely reflected law school examination results.<sup>19</sup> Further proof that the bar exami-

---

15. For details of the individual suits, see Bowles, *Report on Litigation Involving Bar Examinations*, 44 B. EXAMINER 134 (1975).

16. Rigorous standards for job relatedness, typically demonstrated through statistical validity studies, are imposed by the Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e (1972). However, this statute was not applied because the act did not, by its explicit terms, apply to licensing agencies. *Richardson v. McFadden*, 540 F.2d 744, 747 (4th Cir. 1976); *Tyler v. Vickery*, 517 F.2d 1089, 1096 (5th Cir. 1975), *cert. denied*, 426 U.S. 940 (1977). Decisions which held Title VII applicable to licensing situations were not cited or discussed in either opinion. See *Puntolillo v. New Hampshire Racing Comm'n*, 375 F. Supp. 1089 (D. N.H. 1974). *Sibley v. Memorial Hospital*, 488 F.2d 1338 (D.C. Cir. 1970).

17. The Fifth Circuit refused to apply the Title VII standards to a challenge brought under the fourteenth amendment, as some courts had done prior to the 1972 amendments to Title VII extending its coverage to state and local government employment decisions. *Tyler v. Vickery*, 517 F.2d 1089, 1096-97 (5th Cir. 1975), *cert. denied*, 426 U.S. 940 (1977). The Fourth Circuit felt constrained, by the Supreme Court's decision in *Washington v. Davis*, 426 U.S. 229 (1976), to require that a discriminatory purpose be shown to find a constitutional violation. *Richardson v. McFadden*, 540 F.2d 744, 748 (4th Cir. 1976).

18. *Richardson v. McFadden*, 540 F.2d 744, 750 (4th Cir. 1976); *Tyler v. Vickery*, 517 F.2d 1089, 1102 (5th Cir. 1975), *cert. denied*, 426 U.S. 940 (1977).

19. *Richardson v. McFadden*, 540 F.2d 744, 748 (4th Cir. 1976); *Tyler v. Vickery*, 517 F.2d 1089, 1103 (5th Cir. 1975), *cert. denied*, 426 U.S. 940 (1977). The Fourth Circuit observed that a perfect correlation between bar examination results and law

nation reflected the practice of law was considered both impossible to produce and unnecessary to the result.<sup>20</sup>

### *Law School Admission Criteria*

Law school admission criteria have come under equally widespread, if less formal criticism. The typical standards for admission combine a candidate's undergraduate grade-point average (UGPA) with the score on the three-hour Law School Admission Test (LSAT) administered by the Educational Testing Service (ETS). When these tests are combined by the Law School Data Assembly Service, a component of ETS, a Predicted First Year Average (PFYA) is computed for each candidate. These PFYAs can be compared to two decimal places. Considerable weight is given these numbers in making admissions decisions. In fact, the American Bar Association requires that its accredited law schools use the LSAT or demonstrate that they are using an acceptable substitute.<sup>21</sup> In addition, since state laws require some college attendance prior to law school, the grades earned in college can scarcely be ignored in making the admissions decision.

Some law schools have experimented with eliminating or discounting these traditional criteria either for all candidates or for a portion of the accepted class.<sup>22</sup> A more general avoidance of traditional criteria has occurred in schools where "special admission" programs designed to increase minority enrollment have been established. These programs are not always publicized, and may allow white students who are "disadvantaged" to apply under special admission status.<sup>23</sup> Even these departures from traditional criteria, however, rarely abandon them altogether, but rather permit applicants with

---

school grades might seem to indicate that bar examinations were unnecessary. 540 F.2d at 743. See note 99 *infra*.

20. *Richardson v. McFadden*, 540 F.2d 744, 749 (4th Cir. 1976); *Tyler v. Vickery*, 517 F.2d 1089, 1103 (5th Cir. 1975), *cert. denied*, 426 U.S. 940 (1977).

21. "A law school which is not using the Law School Admission Test administered by Educational Testing Service should establish that it is using an acceptable test." ABA STANDARDS, *supra* note 15, Standard 503.

22. The most widely publicized exception to primary reliance on LSAT scores for admission involved the accreditation of the Antioch School of Law by the ABA. See Note, *supra* note 8, at 1149 n.83.

23. The practices of such special admission programs seem to have remained in the internal records of the law schools operating them. Indeed, the stark formality of the racial special admissions program at the University of California at Davis Medical School may have been its undoing in the Supreme Court. See *Regents of Univ. of Cal. v. Bakke*, 46 U.S.L.W. 4896, 4908 (1978).

lower PFYA's to be admitted.

Challenges to law school admission criteria have occasionally resulted in compromise, but rarely with outright success. The PFYA continues to dominate law school admission decisions, and the LSAT continues to dominate the formulation of the PFYA.<sup>24</sup> The chief justification for reliance on the LSAT continues to be that it predicts law school grades with some accuracy,<sup>25</sup> and recently, there have been efforts to demonstrate that the LSAT also is predictive of bar examination results.<sup>26</sup> There is little effort, however, to prove that the content of the LSAT is appropriate for choosing lawyers beyond demonstrating that the LSAT scores predict law school grades.<sup>27</sup>

### *Law School Attendance*

A successful challenge to the requirement of law school attendance is a rare and lonely experience. Legal in only seven states, it is pursued by a handful of candidates who study for

---

24. As LSAT scores are actually used in the admission decision, even high scoring candidates have an incentive to score as high as possible, since significant consequences attach to even trivial score differences on the test.

Last year, for example, 141 N.Y.U. Law School applicants had college grade point averages of between 3.50 and 3.74 (out of a possible 4.0) and Law Board scores of between 599 and 650. Only 52 of them were accepted. But of 136 other applicants who had the same high college grades, but got between 649 and 700 on the Law Boards, 120 were accepted. And, at N.Y.U., if you had a mediocre four-year college grade record of 2.75 to 3.0, but got over 750 on the three-hour Law Board exam, your chances of admission were about three times better than that of an applicant who had a near perfect four-year college record of 3.75 to 4.0, but got 550 to 599 on the Law Boards—a score that is about 50 points higher than the national average.

Brill, *The Secrecy Behind the College Boards*, NEW YORK MAGAZINE, Oct. 7, 1974, at 73.

25. See Linn, *Test Bias and the Prediction of Grades in Law School*, 27 J. LEGAL EDUC. 293, 306-16 (1975).

26. A. CARLSON & C. WERTS, *RELATIONSHIPS AMONG LAW SCHOOL PREDICTORS, LAW SCHOOL PERFORMANCE, AND BAR EXAMINATION RESULTS* 27-40 (1976).

27. The content of the LSAT has changed since it was first administered in 1948. The original form of the LSAT was developed from test questions already included in the files of ETS from tests for other occupations. Reese, *The Standard Law School Admission Test*, 1 J. LEGAL EDUC. 124, 125 (1948). New question types are added as the LSAT evolves, but there is no explanation offered as to why one question type is more appropriate than another.

Both the LSAT of 1952 and of 1975 included questions involving reading comprehension, data interpretation, and principles and cases, however, the 1952 version included questions involving contrary and irrelevant statements, and figure classification, while the 1975 version substituted reading recall, error recognition, and sentence correction.



the bar in a lawyer's office or through a correspondence school.<sup>28</sup> This study of law outside of law schools has been condemned by the American Bar Association since 1921,<sup>29</sup> but those states and students which ignore this condemnation are actually continuing the preparation for the bar which most lawyers experienced less than a century ago.

While the prospects for successful circumvention of law school are low today,<sup>30</sup> the prospects for broader change in the legal profession are greatest when the requirement of law school attendance is disputed. More lawyers would be licensed if traditional law school attendance were only one avenue to the bar, since impecunious students might be able to study for the bar if they could earn while preparing. In addition, minority students could approach the bar in greater numbers if they did not first have to enter law schools where special admission may never have been established, or might have been recently abolished.

There is presently no movement to eliminate law school attendance as a requirement for lawyers. Rather, recent actions by several states have eliminated previous options to study law in an attorney's office.<sup>31</sup> The primary justification for eliminating these options is that candidates preparing in this manner rarely pass the bar examination.<sup>32</sup>

The various challenges to the examinations, admission criteria, and attendance are met with a circle of justifications. The LSAT is justified on the basis of its correlation with law school grades, and with the results on the bar examination as well. Law school attendance is justified because graduates tend to pass the bar examination in greater numbers. The bar examination itself is defended by a comparison of its pass rate with those who are successful in law school.

The result of this circular pattern has been the perpetua-

---

28. York & Hale, *supra* note 11, at 3 n.8.

29. Stolz, *infra* note 82, at 155-56.

30. In 1976, 49,099 persons took a bar examination, and 34,951 passed. Of those who passed, a mere 19 prepared for the bar by law office study; 11 in Virginia, 5 in California, 2 in Mississippi, and 1 in Vermont. National Conference of Bar Examiners, *Admission to Bar by Examination in 1976*, 46 B. EXAMINER 152-53 (1977).

31. In 1951, law office study was still permitted in 35 states. NATIONAL CONFERENCE OF BAR EXAMINERS, *THE BAR EXAMINERS HANDBOOK* 40 (1968). By 1972, only seven states allowed preparation for the bar wholly outside law school. York & Hale, *supra* note 11 at 3 n.8.

32. See note 66 *infra*. By comparison, the pass rate for legal apprentices was 15% in 1952, before most states abolished the option. J. BRENNER, *SURVEY OF THE LEGAL PROFESSION* 6 (1952).

tion of a bar composed largely of affluent, white males. These are the individuals who must pass on the challenges of minorities and women. These individuals also enjoy an advantage in entering law school, pursuing legal studies and passing the bar. These are the individuals who possess two assets essential to enduring the entry experience, but not available to all candidates and potential candidates—time and money.

#### TIME AND MONEY

The two major elements of the experience which virtually any contemporary lawyer must endure are time and money. Time to pursue a college education, a law school education and a bar review course is available to the wealthy more than the poor. Likewise the money necessary to finance these studies comes with affluence. Racial minorities and women assume these burdens with greater difficulty than their white male counterparts.

#### *Time*

The first time-serving requirement involves completion of a certain amount of college. Irrespective of whether a particular state requires two, three, or four years of college, the requirement is based on a conception of a normal college course of four years leading to a baccalaureate degree. However, the particular requirement in each state is difficult to articulate in terms of a body of knowledge to be acquired, since college does not progress evenly from year to year, but rather is a series of courses which may be taken in a variety of sequences. Thus, a state which requires its legal candidates to stay in college longer does not necessarily require candidates to learn more of a specific body of knowledge. Indeed, no state has attempted to lay down specific requirements for the content of prelegal education; rather the Association of American Law Schools merely advises prospective law students to avoid undergraduate law courses,<sup>33</sup> and the American Bar Association limits courses "without substantial intellectual content" to ten percent of the credits toward the college preparation requirement,<sup>34</sup> unless the candidate fulfills the requirements for a bachelor's degree. Even reformers only suggest that the law

---

33. See Stolz, *infra* note 82, at 174. Training for the Public Profession of the Law, A Report to the Association of American Law Schools, Sept. 7, 1971, app. II at 155-56.

34. ABA STANDARDS, *supra* note 11, Standard 502(a).

student have studied some economics, some history and a "hard" science to help in the study of law.<sup>35</sup> Consequently, no matter how deeply one looks into the rationale for college attendance before law school, one finds that it is a period of time to be filled by candidates as they please.

The second time-serving requirement involves completing three years of full-time legal study, or four years of part-time study. Time is the essence of the official definition of law school, for the ABA defines an approved course of legal studies in terms of hours and weeks,<sup>36</sup> and some state legislation does likewise.<sup>37</sup> Although there has been criticism of the three year law school requirement because it is too long, the reforms are still expressed in terms of time.<sup>38</sup> This fixation on the time spent in law school results from the fact that the American Bar Association does not prescribe a specific law school curriculum.<sup>39</sup>

The third time-serving requirement involves taking a bar examination after completing law school. Bar examinations are typically offered long enough after normal law school graduation so that a bar review course can conveniently be taken by the graduates.<sup>40</sup> This is a necessity because the ABA dictates

---

35. See PACKER & EHRLICH, *supra* note 2, at 78.

36. [T]he law school shall require as a condition for graduation, the completion of a course of study in residence, of not less than 1200 class hours, extending over a period of not less than ninety weeks for full-time students, or not less than one-hundred and twenty weeks for part-time students.

ABA STANDARDS, *supra* note 10, Standard 305(a).

37. See, e.g., MICHIGAN SUPREME COURT, RULES FOR THE BOARD OF LAW EXAMINERS, Rule 2 (1976); CAL. BUS. & PROF. CODE § 6060(e) (West Supp. 1978).

38. A special ABA Committee of Accreditation has recently proposed that a law school be permitted "to establish a course of study that will permit a full-time student to qualify for the first professional law degree by satisfactorily completing not less than 900 class hours during not less than sixty weeks of instruction extending over a period of not less than twenty months." PACKER & EHRLICH, *supra* note 2, at 81-82. Professors Packer and Ehrlich advocated conferring the first professional degree in law after two years of law school—a reform rejected by the profession. See Stolz, *The Two-Year Law School: The Day the Music Died*, 25 J. LEGAL EDUC. 37 (1973).

39. The ABA's requirements are quite broad.

The law school shall offer:

- (i) instruction in those subjects generally regarded as the core of the law school curriculum,
- (ii) Training in professional skills, such as counselling, the drafting of legal documents and materials, and trial and appellate advocacy,
- (iii) and provide and require for all student candidates for a professional degree, instruction in the duties and responsibilities of the legal profession.

ABA STANDARDS, *supra* note 11, Standard 302(a).

40. Most states offer their bar examination in February and July. See National

that "[t]he law school may not offer to its students, for academic credit or as a condition to graduation, instruction that is designed as a bar examination review course."<sup>41</sup> This rule means that a candidate who has served time in college and law school in anticipation of entering the legal profession must wait several more months before taking the bar examination, and the profession makes no effort to prescribe what the candidate should do during this time. All candidates presumably study for the bar, but those who must work during this review period hurt their chances of passing significantly.

### *Money*

Money is the second element common to all three phases of becoming a lawyer, and every candidate must spend considerable sums in completing each phase. Four years of expenses at a state-supported university can easily exceed \$10,000,<sup>42</sup> and law school represents a further investment. Despite some subsidy by the law school,<sup>43</sup> the cost of a single year at a private law school may exceed \$5,000.<sup>44</sup> The net result is that there are "increasing numbers of law students who graduate as lawyers with over \$10,000 of debt."<sup>45</sup> Bar review courses are a virtual necessity in many states,<sup>46</sup> and additional financial burdens to students who have yet to reap economic benefits from a license to practice law.

Wealthy students are more likely to become lawyers since they are better able to afford the expenditure of time and money necessary to complete the experiences which define a lawyer. From college entrance onward, capable students with wealth have a better opportunity to continue formal schooling

---

Conference of Bar Examiners, *Admission to Bar Examinations in 1976*, 46 B. EXAMINER 152-53 (1977). This scheduling leaves time after the customary semester's end in December or June for bar preparation.

41. ABA STANDARDS, *supra* note 11, Standard 302(b).

42. *See, e.g.*, UNIV. OF CAL., LOS ANGELES, GENERAL CATALOG 15 (1977) (estimates yearly expenses for a student at \$3,342).

43. *See, e.g.*, PACKER & EHRLICH, *supra* note 2, at 65.

44. Harvard estimates a total annual cost of approximately \$6,800. ASSOCIATION OF AMERICAN LAW SCHOOLS, ANNUAL PRELAW HANDBOOK 159 (1976). Stanford estimates a total cost of approximately \$7000; Yale, \$7,200. *Id.* at 311, 375. State-supported schools are less expensive; \$4,425 for a year at University of California at Davis. *Id.* at 83.

45. PACKER & EHRLICH, *supra* note 2, at 73 n.55.

46. In California, among candidates who took the bar in 1973, only 23% who took no bar review course passed, while 60% of those who took a bar review course passed. COMM'N TO STUDY THE BAR EXAMINATION PROCESS, FINAL REPORT TO THE BOARD OF GOVERNORS OF THE STATE BAR OF CALIFORNIA app. D, at 6 (1975).

than students who are capable but impecunious.<sup>47</sup> Recent survey evidence indicates that the percentage of law students with family incomes below \$10,000 has actually decreased since 1960, while the percentage with incomes over \$40,000 has increased.<sup>48</sup> The author of the survey concluded that "[e]ven allowing for inflation the schools we studied appear to draw students from more affluent families than in the past."<sup>49</sup> Not surprisingly, those minorities and women who enter law school are also comparatively affluent.<sup>50</sup>

Wealthy law students expect to become wealthy lawyers, for "[a]t Stanford 70 percent and at Yale 60 percent of the students entering the Class of 1972 hoped for incomes of about \$70,000 by 1982."<sup>51</sup> These aspirations result partly from the students' own affluence and partly from a realistic perception

---

47. For example, students who fall in the top quartile in academic ability, but the bottom socioeconomic quartile have approximately the same chance of entering college within five years of high school graduation as students in the top socioeconomic quartile but the next-to-the-bottom quartile of ability. See Michelson, *The Further Responsibility of Intellectuals*, 43 HARV. EDUC. REV. 64 (1973).

48. At U.S.C., only five percent of the 1970 class came from families with incomes under \$10,000; in 1960, a majority of all graduates came from this group. This change is not unique. The other schools exhibited at least some decline in the percentage of low income students. At the same time, the percentage of students from families with incomes of at least \$40,000 increased at all schools during the ten year period. The increase was most dramatic at U.S.C. where the percentage of students from families with incomes of at least \$40,000 increased from three percent in 1960 to 23 percent in 1970.

Stevens, *Law Schools and Law Students*, 59 VA. L. REV. 551, 573 (1973).

Each school drew a majority of its 1970 and 1972 classes from relatively high economic groups. The largest single category in each sample was the \$10,000-\$19,000 parental income group. Most noticeably, only 2.9 percent of the students in our sample came from the lowest parental income group, even though this group represented 10.3 percent of the general population. At the same time, there was a much closer correspondence in the highest income group: while only 14.7 percent of all families had incomes exceeding \$15,000, over 14 percent of the students sampled came from families earning over \$40,000.

*Id.* at 572-73.

49. *Id.* at 573.

50. "Of the minority students in our sample, 21.9 percent were from families with 1968 income in excess of \$15,000, although only 6.3 percent of minority families in the population as a whole were in this income range." *Id.* at 600. This elite minority is partially limited by the self-selection process implicit in deciding to enter law school. Of black college seniors, 3.8% planned to enter law school in the following year, while 4.8% of the white students so planned. L. BAIRD, *THE GRADUATES: A REPORT ON THE CHARACTERISTICS AND PLANS OF COLLEGE SENIORS* 18 (1973).

51. Stevens, *Law Schools and Law Students*, 59 VA. L. REV. 551, 634 (1973). The median expected income at all schools surveyed was between \$20,000 and \$29,000 per year.

of lawyers' current incomes.<sup>52</sup> However, even students from poor backgrounds or with altruistic motives must entertain some expectations of higher incomes simply because they invested so much in law school.<sup>53</sup> So long as society demands that its lawyers go to college and law school, there is a limit to the generosity it can expect from lawyers in rendering their services for low fees.<sup>54</sup> To a considerable degree, a continued insistence that lawyers be trained in law schools is a continued acceptance of a profession which is unable to provide legal services at low cost.

#### THE WAY WE WERE: HISTORICAL DEVELOPMENT OF PROFESSIONAL ENTRY REQUIREMENTS

Lawyers were not always required to attend law school. The present prerequisites for practicing law have evolved through a process of challenge and change. An examination of the challenges indicates that the substance of the changes reflects the political power of the legal profession itself at least as much as the perceived inadequacies in the professional conception of legal competence. The challenges can be divided into three principal groups: challenges of populism, professionalism, and nativism.

##### *The Challenge of Populism*

The bar which America inherited from England was a gentlemen's profession, with high entry standards involving even longer periods of study and clerkship than are required today. In the period from 1800 to 1830, over ninety percent of the Massachusetts lawyers were college graduates,<sup>55</sup> while only seventy-one percent had graduated from college in 1951.<sup>56</sup> At the turn of the nineteenth century, Massachusetts required eleven years of training and practice for college graduates and

---

52. See note 3 *supra*.

53. See Katzman, *Economically Speaking . . . Is a Legal Education Worth the Price?*, 54 A.B.A. J. 979, 980 (1968).

54. *Id.* This suggests that the potential competition among lawyers on the basis of fee schedules, permitted by the abolition of minimum fee schedules, see *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), will be diminished by the need felt by all lawyers to pay for the law school investment.

55. HIGHER EDUCATION AND THE LABOR MARKET (M. Gordon ed. 1974): Haber, *The Professions and Higher Education in America: A Historical View* 237, 244.

56. Blaustein, *College and Law School Education of the American Lawyer—A Preliminary Report of the Survey of the Legal Profession*, 3 J. LEGAL EDUC. 409, 411 (1951).

nine for non-college educated lawyers.<sup>57</sup> Today, college and law school take seven years to complete. Additionally, the First Circuit of the federal judiciary had a graded profession which divided practicing attorneys into four categories, depending on their length of service in the bar.<sup>58</sup> Today, suggestions that legal specialists be recognized beyond the basic legal license appear novel.

Though these high standards of training and experience were imposed by some early bar associations in the name of competence, they seem to have been transparent attempts by members to limit competition within the bar,<sup>59</sup> and certainly they were perceived as such by common citizens who resented special privileges for an elite. The public reaction against this elaborate system of exclusion and privilege was strong and swift. Floating on the currents of democratic populism loosed during the Jacksonian era, popular sentiment swept away many of the restrictions to becoming a lawyer, and by 1860, only nine of the thirty-nine jurisdictions required any legal study before practicing law.<sup>60</sup> Thus, the period between Andrew Jackson's presidency and Abraham Lincoln's witnessed the largest challenge and change for the legal profession ever experienced in our history, as the most stringent standards were virtually abolished.

### *The Challenge of Professionalism*

Feeling that the legal profession had lost most of its prestige and competence,<sup>61</sup> in 1878 a small group of lawyers formed the American Bar Association (ABA), which spearheaded efforts to raise both the standing and standards of the profession.<sup>62</sup> This movement had a number of goals which were in-

---

57. A. REED, *TRAINING FOR THE PUBLIC PROFESSION OF THE LAW* 83 (1921).

58. To qualify as an attorney in the [First United States] Circuit Court, an applicant must have been either a college graduate who had studied law in the office of an attorney or counsellor of the Court for three years (four years if a non-graduate), or admitted to practice in the State court for one year. After two years' practice in the Circuit Court as attorney, he was eligible for admittance as counsellor. Counsellor "of six years' standing in practice" might be "called by the court to the degree of Barrister, and after ten years' standing in practice to the degree of Sergeant of Law."

C. WARREN, *supra* note 2, at 243.

59. Currie, *The Materials of Law Study*, 3 J. LEGAL EDUC. 331, 344 (1951).

60. A. REED, *supra* note 57, at 150.

61. *Id.* at 206.

62. "[W]hile the A.B.A. undoubtedly contained the leaders of the profession it represented a very small proportion of the bar as a whole. In 1900 only 1.3 percent of

strumental in shaping contemporary professional prerequisites.

In 1881, the first reform advocated by the ABA was that candidates for the bar *be allowed* to substitute law school attendance for apprenticeship as a law clerk.<sup>63</sup> Until 1870, all states which required preparation for the bar recognized only study in an attorney's office as acceptable training,<sup>64</sup> and law schools were a luxury attended by those who could afford additional study beyond the legal requirements.<sup>65</sup> Thus, the ABA recommendation that law school study be recognized as a legal alternative to law office study in preparation for the bar eased the burden on prospective lawyers studying in law school and transformed law schools from floundering institutions into financially sound establishments.<sup>66</sup> In addition, this marked the first recognition of law school as a legitimate preparation for the bar.

Soon the ABA turned its attention to the standards for the entire profession, and in 1892 it advocated that all candidates for the bar study two years either in law school or a law office, while by 1897 it advocated three years of such study.<sup>67</sup> This was a direct response to the perceived inadequacy of the Jacksonian reforms. Most states had already begun to impose some prerequisites for the bar, and by 1890 twenty-three out of forty-nine jurisdictions had some requirements. The ABA recommended

---

lawyers were members; by 1920 a little over 9 percent." Stevens, *Two Cheers for 1870: The American Law School*, in 5 PERSPECTIVES IN AMERICAN HISTORY 529 n.98 (1971).

63. *Id.* at 454. The substitution was similar to the substitution allowed by a majority of states in the early nineteenth century, when college attendance was accepted in lieu of some apprenticeship. See Currie, *supra* note 59, at 344-45.

64. Stevens, *supra* note 62, at 457.

65. Auerbach, *Enmity and Amity: Law Teachers and Practitioners, 1900-1922*, in PERSPECTIVES IN AMERICAN HISTORY 534 (1971).

One of the earliest law schools in America, the Litchfield Law School, compiled a list of graduates which attested to its privileged place in American political life. Founded in 1784 by practicing attorneys, its record is unequalled. By 1833 it had produced over 1,000 students. Among the 805 names preserved in records, there were 2 vice-presidents of the United States, 3 U.S. Supreme Court Justices, 34 judges of state supreme courts, 6 cabinet members, 2 ministers to foreign countries, 101 members of Congress, 28 Senators, 14 Governors and 10 Lieutenant Governors. Stevens, *supra* note 62, at 413 n.29. As luxuries, law schools faced financial instability. For example, Yale Law School was begun in 1824 when the University adopted a local law school and exercised its prerogative of conferring degrees on the graduates. The law school almost failed financially in 1846 and again in 1869. It was not until the turn of the century that it became self-supporting. Columbia abandoned the teaching of law between 1826 and 1847. Additionally, Princeton began a law school in 1846, which failed in 1852. *Id.* at 415-44.

66. In 1902, Harvard Law School had an income of \$23,000 over expenses. Stevens, *supra* note 62, at 444 n.10.

67. *Id.* at 454.



standards which would lengthen the requirements and expressed a preference for law school study. The push for higher standards became intertwined with a preference for formal legal studies, and by 1909 the Association's Section on Legal Education recommended that professional preparation consist of four years in a law office or three years in law school.<sup>68</sup>

The emergence of law schools as the preferred educators of the bar coincided with a number of events which made law schools seem more attractive than ever before. The first was the "case method" introduced at Harvard Law School by Christopher Columbus Langdell in 1870.<sup>69</sup> This method still dominates law school and rests on the premise that law is a science which can be learned by studying written court opinions.<sup>70</sup> Since law office study could not make similar claims, law schools enjoyed a position of preferred legitimacy.<sup>71</sup> The second was the emergence of the corporate law firm, also around 1870.<sup>72</sup> These firms, generally associated with Wall Street, were larger and more impersonal than earlier firms<sup>73</sup> and chose their young lawyers

---

68. *Id.* at 455.

69. Currie, *supra* note 59, at 331.

70. Langdell postulated: "First, that law is a science; secondly, that all of the available materials of that science are contained in printed books." Address by Langdell to the meeting of the Harvard Law School Association (Nov. 5, 1886), *cited in* 2 WARREN, HISTORY OF THE HARVARD LAW SCHOOL AND OF EARLY LEGAL EDUCATION IN AMERICA 374 (1908). This conception of the law has been characterized as an outgrowth of German scientism which was gripping America's universities during that period. Stevens, *Aging Mistress: The Law School in America*, 2 CHANGE 32, 34 (Jan.-Feb. 1970).

71. Law office study was more appropriate for the acquisition of practical experience, but law schools seem not to have tried to compensate for their disadvantage. Students engaged in clinical legal aid practice typically find themselves tied to an exclusively poor clientele, since the ABA model student practice rule limits students to indigent clients, as do the rules of many states. EDUCATION FOR THE PROFESSIONS, *supra* note 6, at 137. Students therefore often resist the introduction of clinical education programs, since they involve working for free instead of wages which many law students can command. *Id.* at 138. Law firms have recently filled this gap in practical training with summer clerkships, and widespread employment of law students during summers has emerged since 1960. *Id.* at 136. The net result is an uneven pattern of practical training. Some students serve poor clients for free during law school, some work for attorneys during the school year or during vacations, while still others must pursue practical training only after they have passed the bar.

72. Stevens, *supra* note 70, at 34. The rapid growth of Wall Street firms occurred between 1890 and 1910. *See* Stevens, *supra* note 62, at 435.

73. In 1878, the firm of Strong & Cadwalader was established in New York with 2 partners, 4 members of the legal staff and 4 members of the non-legal staff. By 1918, the firm had grown to 8 partners, 15 members of the legal staff and 29 members of the non-legal staff. H. TAFT, A CENTURY AND A HALF AT THE NEW YORK BAR 176 n.6 (1938). When a four-man firm was formed in Richmond, Virginia at the turn of the century, it was compared to "the larger New York law concerns." J. AUERBACH, UNEQUAL JUSTICE 30-31 (1976). But these early corporate firms were quite small by contemporary stan-

from among the best law students at the most prestigious law schools.<sup>74</sup> This process gave the firms the opportunity to reduce training efforts previously offered law clerks and to hire only those who had already displayed aptitude for the law. The third event was the transformation of the clerical work force from a largely male occupation to one increasingly comprised of women.<sup>75</sup> To some extent, this change reflected a decrease in the status of the work formerly performed by law clerks. Previously, clerks had acted as scribes and messengers as well as apprentices. However, once law students became the youngest available legal talent, only menial tasks were left,<sup>76</sup> work for which women could be hired at lower wages.<sup>77</sup>

Law schools, then, were preferred to apprentice jobs because they reduced training costs, employment costs and selection costs for firms which could not depend on personal acquaintance to choose their young legal talent. Law schools were able to justify this preference by offering a scientific approach to legal studies. Thus, the pressures for professional standards had been transformed into both requirements for formal study and a preference for law school study.

### *The Challenge of Nativism*

As states were changing their legal licensing laws to reflect the interests of the ABA and corporate law firms, a flood of

---

dards. At least 20 firms in New York City currently have more than 100 lawyers, 10 in Chicago, 5 in Philadelphia, 4 each in Cleveland, Washington, D.C., and San Francisco. In the United States as a whole, there are now more than 10 law firms with more than 200 lawyers. One behemoth, Baker & McKenzie of Chicago, has 396 lawyers. Cantor, *Law Firms are Getting Bigger . . . and More Complex*, 64 A.B.A. J. 215, 218 (1978).

74. 2 R. SWAINE, *THE CRAVATH FIRM* 2 (1946). The major urban firms still draw heavily from the most prestigious law schools. In 1957 and 1962, surveys of the partners of the 20 largest firms on Wall Street revealed that 71% were from Harvard, Yale and Columbia law schools. Likewise, Chicago firms with more than 25 partners had 21% of their lawyers from Harvard, 3% from Yale and 1% from Columbia. Stevens, *supra* note 62, at 532 n.110. Today, the largest firm in New York City, Shearman & Sterling, has drawn 43 of its 73 partners from Harvard, Yale, and Columbia. See MARTINDALE-HUBBELL LAW DIRECTORY 2810B-2813B (1978).

75. See B. BLIVEN, *THE WONDERFUL WRITING MACHINE* 73 (1954).

76. This sexual shift in the labor force has gone relatively unnoticed in histories of the legal profession. Instead, the technical innovations that accompanied the shift are supposed to have prompted the decline of law clerks. "The invention of the typewriter and the telephone diminished the law office roles of clerk-copyist and messenger, and practicing lawyers had less need of apprentice labor. By the end of the nineteenth century attendance at law schools had greatly risen, and apprenticeship had declined." EDUCATION FOR THE PROFESSIONS, *supra* note 6, at 104.

77. In the 1880's an experienced woman secretary-typist might earn \$20 a week; a man could earn \$30 a week. B. BLIVEN, *supra* note 75.

unintended beneficiaries engulfed the profession. At the turn of the century, America was teeming with immigrants and still assimilating newly emancipated slaves. While members of these groups aspired to the bar, prejudices rendered an apprenticeship approach impractical. Law school, however, offered an alternative route to the bar which was more readily available.

Law schools prospered after they were recognized as legally acceptable educators for the profession, and night law schools grew most rapidly, serving the needs of urban dwellers who worked during the day.<sup>78</sup> During this period, law schools were founded by Negroes, the YMCA, and the Knights of Columbus to serve groups which could not enter apprenticeships.<sup>79</sup> Soon, however, night law schools became associated with foreigners,<sup>80</sup> and while the quality of night law schools may have been justifiably questioned, latent prejudice surely prompted many of the questions. The chosen solution was to establish standards for all law schools.

To set these standards, the Association of American Law Schools was established in 1900, accepting at first only schools which required two years of study, a requirement which grew to three years in 1907.<sup>81</sup> The American Bar Association added its influence to this effort to raise professional standards, and

---

78. Between 1890 and 1930, the number of exclusively full-time schools increased from 41 to 82, but the number of part-time schools jumped from 20 to 98. *EDUCATION FOR THE PROFESSIONS*, *supra* note 6, at 105.

79. From 1868 to 1921, 12 Negro law schools had started and two survived; Stevens, *supra* note 62, at 428 n.16. There were 10 Y.M.C.A.-run law schools in 1921, in addition to those run by the Knights of Columbus. *Id.* at 429 n.21.

80. The bar was swelled with the influx of foreign-born attorneys. By 1916, 15% of New York City lawyers were foreign born, and an additional third had foreign-born parents. Auerbach, *supra* note 65, at 572. Night law schools were seen as the source of the problem. For example, the dean of Wisconsin's law school commented:

If you examine the class rolls of the night schools in our great cities, you will encounter a very large proportion of foreign names, Emigrants and sons of emigrants [sic], remembering the respectable standing of the advocate in their own home, covet the title as a badge of distinction. The result is a host of shrewd young men, imperfectly educated, crammed so they can pass the bar examination, all deeply impressed with the philosophy of getting on, but viewing the Code of Ethics with uncomprehending eyes. It is this class of lawyers that cause Grievance Committees of Bar Associations the most trouble.

Richards, *Progress in Legal Education*, in *HANDBOOK OF THE A.A.L.S.* 63 (1915), *quoted in* Stevens, *supra* note 62, at 463 n.79.

81. The Association of American Law Schools accepted schools as members if they required a high school diploma, two years of study for 30 weeks each, and provided access to a library of U.S. and state reports. In 1905 the legal education requirement was raised to three years and two-year law schools were denied membership in 1907. Stevens, *supra* note 62, at 456.

in 1921, a committee composed of the various factions in legal education molded a compromise which has guided the profession into the current era.<sup>82</sup>

Pursuant to this compromise, law school was designated as the only acceptable way to prepare for a bar examination,<sup>83</sup> and night law schools were acceptable only if they required four years of study compared to the three years required for day schools. In addition, the ABA proposed to publish a list of law schools that complied with these standards. Finally, the ABA reiterated its opposition to the "diploma privilege" and required that all law school graduates pass a bar examination administered by public authorities.<sup>84</sup>

The 1921 recommendations were indeed a compromise, but a compromise which set legal education on a definite course. Legal clerkships were on the wane at that time, but they were dealt out of the compromise completely because there was no organized constituency battling for their continued legitimacy. Night law schools were not so cursed, but they did have to accede to requirements for longer periods of study and the attendant economic pressure which such extended matriculation put on students and schools alike. Day schools won the legitimate claim to three years of study for all students, as opposed to the two years then required at many schools.<sup>85</sup>

Bar examiners won their long-standing battle with prestigious law schools, which had seen the examiners both as allies of night schools, and bothersome barriers to the profession for their own students.<sup>86</sup> The "diploma privilege" did not disappear overnight, but its high-water mark had passed.<sup>87</sup> As a

---

82. For a description of the compromise and an identification of the forces behind each element, see Stolz, *Training for the Public Profession of the Law*, in PROCEEDINGS, ASSOCIATION OF AMERICAN LAW SCHOOLS, 1971 ANNUAL MEETING, § II, at 154-58 (1971) [hereinafter cited as Stolz].

83. The Committee on Legal Education of the ABA had been advocating law school as the only way to prepare for a bar examination since 1880, but the Association rejected this resolution as backed by "schoolmen." See *id.* at 149.

84. The ABA first voiced its opposition to the "diploma privilege" in 1892 and has never reversed its stand. Stevens, *supra* note 62, at 458.

85. See Stolz, *supra* note 82, at 176. However, many schools still required only two years, and some had only recently adopted a three year requirement. *Id.*

86. Harvard received "most-favored school" treatment in Massachusetts. Among other schools given the diploma privilege, were Yale (1872), Pennsylvania (1875), Iowa (1873) and Hastings (1878). Stevens, *supra* note 62, at 457-58. By 1890, 26 schools in 16 states had the diploma privilege. Kirkwood, *Requirements for Admission to Practice Law*, in SURVEY OF THE LEGAL PROFESSION 103 (1952).

87. In 1921, 22 schools in 15 states had the privilege; in 1948, only 13 schools in 9 states. *Id.* Only four states still retain the privilege. See *supra* n. 54.

result of the compromise, bar examiners no longer catered to the needs of law clerks, but rather improved their liaison with law schools so that students would face bar examinations that closely resembled their law school experience.<sup>88</sup>

The compromise did not change the legal status of bar admission requirements, but the ABA imprimatur on the compromise lent prestige to the recommendations and generated pressure for the states to accede. Each state was a separate target and progress was measured in the number of jurisdictions following the recommendations.<sup>89</sup>

In the early years of this century, the legal profession faced the problem of overcrowding.<sup>90</sup> In response, the profession expressed its disapproval of night law school which trained ethnic newcomers for the bar. Aided by the economic and political chaos that followed this period, the profession successfully met the potential threat of overcrowding.

Soon after the 1921 compromise, the Great Depression changed the face of America. Many youths were caught in school and those who could afford tuition had little incentive to enter the dwindling labor market.<sup>91</sup> Law schools benefitted generally<sup>92</sup> by this turn of events, but law schools approved by the ABA benefitted most.<sup>93</sup> When World War II broke out, law

---

88. This change did not occur overnight, but the increased passing rates on bar examinations have been attributed to the close cooperation between bar examiners and law schools. See note 134 *infra*.

89. See Stevens, *supra* note 62, at 499. However, no comparisons were made of the quality of lawyers in states adopting the recommendations, as against the others. For example, Kansas was the only state to require two years of college before legal training, yet there were no explicit claims that Kansas lawyers were the best. Likewise, West Virginia was the only state to require three years of law school at the time, Colorado required two years, and only Kentucky and Wyoming required one year of law school. *Id.* at 496. Even by 1947, the list of states prohibiting legal clerkships as preparation for the bar did not comport with any ranking of the states according to the quality of their bar. The 15 jurisdictions prohibiting the clerkships were Alabama, Arizona, Colorado, District of Columbia, Florida, Indiana, Minnesota, New Mexico, Ohio, Oklahoma, Oregon, South Dakota, Utah, West Virginia, and Wisconsin. *Id.* at 505 n.5.

90. See note 4 *supra*.

91. "All during the 1930's, despite inadequacies of student support and poor job prospects, total Ph.D output continued to expand at about 6 percent per year." Carter, *The Academic Labor Market*, in HIGHER EDUCATION AND THE LABOR MARKET 303 n.8 (M. Gordon ed. 1974).

92. "There were 46,397 law students in 1928. The number fell to 39,417 in 1931 and had risen again to 41,920 in 1935. Meanwhile the number of law schools actually increased: from 173 in 1928 to 182 in 1931, to 195 in 1935." Stevens, *supra* note 62, at 500.

93. Between 1928 and 1935 the number of students in A.B.A. schools actually increased by 5,000—represented only partly by an increase in the

school enrollments dropped and the traditional discouragement of female lawyers gave way during wartime.<sup>94</sup> After the war, however, the GI Bill dealt another blow to night law schools, since returning veterans faced a bleak employment market but had the financial ability to attend approved law schools full-time.<sup>95</sup> Thus, by 1961, part-time schools approved by the ABA enrolled only twenty-nine percent of law students; in 1971 the figure had dropped to twenty percent.<sup>96</sup>

The entire period from 1870 to the present has seen a consolidation of the influence of full-time, approved law schools. This evolution has set the context for current challenges and changes. In 1870, the opportunity to attend law school was available for all who could pay. Today, the opportunity to attend law school is severely limited. Many who are willing to pay and who could succeed at legal studies are denied admission.<sup>97</sup> In 1870, bar examinations were administered without regard to the wishes of law schools,<sup>98</sup> while today, bar examination results are consciously compared to law school grades.<sup>99</sup> Law

---

number of such schools from 66 to 68—while numbers in unapproved schools fell by 10,000 although the number of such schools remained constant at 107. The marginal law schools were finding it difficult to survive economically.

*Id.* at 500-01.

94. "[B]y the academic year 1943-44 there were only 6,422 students in the schools, of whom a quarter were women." *Id.* at 504.

95. The returning war veteran swelled the ranks of the law schools. By 1947 there were 51,015 law students—far more than in any earlier year . . . . No fewer than 36,999 of law students in 1947 were full-time day students in approved law schools . . . . The 47 unapproved schools had only 14.3 percent of the student body—7,296, of whom 6,082 were evening students.

*Id.* at 504-05.

96. EDUCATION FOR THE PROFESSIONS, *supra* note 6, at 154-55.

97. In 1973, every accredited law school rejected applicants whom it considered qualified for the study of law. Comment, *Racial Bias and the LSAT: A New Approach to the Defense of Preferential Admissions*, 24 BUFFALO L. REV. 439, 439 n.3 (1975). An example of the dramatic shift in law school selectivity can be drawn from the experience of Boalt Hall Law School in Berkeley. In 1954, the school accepted 70% of those who applied, in 1968, only 34%. Stevens, *supra* note 62, at 525 n.84. By 1971, Boalt Hall reported more than 10 applicants for every opening. COLLEGE GRADUATES AND JOBS, *supra* note 4, at 99.

98. Since there was no state which required attendance at law school before taking the bar examination, law schools were unable to control the content of the examinations.

99. Thus, grades on individual questions can be compared with those on the whole examination or with law school averages, and the grades on the examination as a whole can be compared with the law school averages of the same applicants. If the examination as a whole correlates success-

schools, once merely an alternative to apprenticeship, have come to dominate preparation for the bar and the actual meaning of the word lawyer.

### *The Standardized Tests*

In the days when law schools competed for students with law offices, night schools, and correspondence schools, there was no effort to regulate the quality of the student body beyond the imposition of prelegal requirements.<sup>100</sup> Each time these requirements were raised, the pool of eligible applicants was decreased while the likely applicant's social class increased.<sup>101</sup> Whether the primary motive was the increase in academic standing of law schools, or the preservation of a privileged bar, the imposition of prelegal education requirements served both ends.

The compromise of 1921 enhanced the position of full-time law schools. The most prestigious among them considered ways of preserving their status both by limiting the number of stu-

---

fully with the law school averages of the applicants, we may assume that an individual question is successful to the extent that applicants who received high rankings on the examination also got high rankings on that question, and those who get low rankings on the examination got low rankings on the question.

Brenner, DeGraff & Elliot, *Statistical Studies of Bar Examination Results*, in SURVEY OF THE LEGAL PROFESSION 422 (1952). See *Richardson v. McFadden*, 540 F.2d 744, 749 n.11 (4th Cir. 1976):

If the only demonstration of job relationship required is that it has a positive relationship to training course performance—*e.g.*, law school—then why does not training performance itself demonstrate that the applicant is fit to practice his profession? It is certainly clear that nothing correlates better with training school performance than training school performance itself. An applicant for the Bar who has graduated from an accredited law school arguably may be said to stand before the Examiners armed with law school grades demonstrating that he possesses sufficient job-related skills. Why, then, any bar examination at all?

See A. CARLSON & C. WERTS, *RELATIONSHIPS AMONG LAW SCHOOL PREDICTORS, LAW SCHOOL PERFORMANCE, AND BAR EXAMINATION RESULTS* (1976). "There is a strong correlation between bar examination scores (both MBE and essay) and law school grades. This result suggests that bar examination scores and law school grades are measuring the same legal skills and knowledge." *Id.* at viii.

100. The prelegal education requirements began quite low. In 1829, Harvard Law School admitted students who were not qualified to enter Harvard College. Stevens, *supra* note 16, at 418. By 1921, Stanford, Columbia, Western Reserve, Harvard, Pennsylvania and Yale were requiring a college degree. Four schools required three years of college, 23 two years and 21 one year. More than half the schools required only high school graduation or less. *Id.* at 432 n.29.

101. In 1866, when Harvard required law students to be college graduates or eligible for admission as seniors at Harvard College, enrollment promptly dropped. Stolz, *supra* note 82, § II, at 144.

dents and raising their academic standing. Harvard had a tradition of failing one-third of each first-year class.<sup>102</sup> Yale was not so large and decided not to expand for the luxury of failing students previously accepted.<sup>103</sup> Along with Columbia, which ceased to expand during this period, Yale developed a legal aptitude test to identify likely failures in law school.<sup>104</sup> It is the contemporary counterpart of these early legal aptitude tests which regulates entry into law schools.

It is these tests which regulate entrance to the profession. It is these tests which preserve the traditional legal profession dominated by wealthy, white males. Through an understanding of these tests can come an understanding of the process by which wealthy, white males are continually preferred law school applicants. Through a challenge to these tests can come a more fundamental challenge to the hegemony of modern law schools.

*The LSAT.* The Law School Admission Test must be taken by all applicants to ABA-approved law schools.<sup>105</sup> It was developed in 1947 at the request of several prestigious law schools<sup>106</sup> during the period which marked the end of World War II and the beginning of greater demand for legal education.<sup>107</sup> The LSAT replaced the legal aptitude tests administered by individual schools.<sup>108</sup> As the demand for legal educa-

102. In 1926-27, Harvard had a first-year class of nearly 700, of which about 250 were failed after one year of study. Stevens, *supra* note 62, at 456.

103. Although Yale had never had a class of over 100 students in its history, the dean announced that 100 was the maximum number of students that would ever be accepted. By 1928-29, Yale was rejecting over two-thirds of its applicants to maintain this limit. *Id.* at 488 n.93.

104. *Id.* at 489. Columbia had been administering the test since 1921 to its own students in order to validate the test results on the basis of law school grades. I. KANDEL, *PROFESSIONAL APTITUDE TESTS IN MEDICINE, LAW, AND ENGINEERING* 43 (1940). In 1937, the School of Jurisprudence at the University of California adopted a legal aptitude test for admission. *Id.* at 51. In 1925, the University of North Carolina and University of Illinois law schools began experimenting with a legal aptitude test administered to their students and those of seven other universities. Johnson, *The Development and Use of Law Aptitude Tests*, 3 J. LEGAL EDUC. 192, 193 (1950).

105. See notes 21 & 22 *supra*.

106. Columbia, Harvard and Yale initiated the development of the LSAT by enlisting the support of 10 other law schools in approaching the Educational Testing Service. Reese, *The Standard Law School Admission Test*, 1 J. LEGAL EDUC. 124, 125 (1948).

107. See *EDUCATION FOR THE PROFESSIONS*, *supra* note 6, at 167.

108. When it was proposed to institute a nationwide test, the statistical testing experts at Yale assured us that the College Entrance Examination Board, soon to be the Educational Testing Service, could by virtue of its great experience and large technical staff produce from the beginning a test equal to if not superior to the then current Yale Legal



tion increased during the 1960's, the importance of high LSAT scores also increased.<sup>109</sup> As the importance of the LSAT increased, questions about its validity and cultural bias also increased.<sup>110</sup>

Ideally, legal aptitude tests are designed to aid in a selection decision whereby a limited number of law school places are offered to a larger number of applicants. The aptitude tests are supposed to identify those most likely to succeed in law school.<sup>111</sup> Thus, as the number of applicants changes, so too the

Aptitude Test. With this assurance we went ahead enthusiastically.

Braden, *Use of the Law School Admission Test at the Yale Law School*, 3 J. LEGAL EDUC. 202, 203 (1950). During the academic year 1948-49, ETS tested over 400,000 examinees in such varied programs as the College Entrance Examination Board, the Navy College Admission Test, the Medical College Admission Test, the Preliminary Examinations for the Society of Actuaries, the Pre-Engineering Inventory, the Entrance Examinations of the Military Academy, Naval Academy, Merchant Marine and Coast Guard Academies, the National Teacher Examinations, the Graduate Record Examinations, and tests for the Department of State and the National Research Council, in addition to several scholarship programs. Johnson, *The Development and Use of Law Aptitude Tests*, 3 J. LEGAL EDUC. 192, 193 (1950).

109. In 1962, about 26,000 candidates took the LSAT, R. STRICKLAND, HOW TO GET INTO LAW SCHOOL 20 (1974); by 1972, the number had risen to 119,694. York & Hale, *supra* note 11, at 23 n.112. In 1961, only eight of the 134 ABA-approved law schools had entering classes whose median LSAT score was 600 or above. In 1972, it was estimated that more than 100 of the 149 approved schools had entering classes with median LSAT scores over 600. *Id.* at 3-4 nn.11 & 17. These high scores reflect the severe competition for places in law school. In 1972, over 80,000 people applied for about 37,000 places in ABA-approved schools. Comment, *Racial Bias and the LSAT: A New Approach to the Defense of Preferential Admissions*, 24 BUFFALO L. REV. 439 (1975).

110. When faced with an increased application rate, law schools could conceivably expand their facilities rather than reject many qualified applicants. This has not been their choice, however. In 1961, there were 134 ABA-approved law schools. In 1972, there were 152 such schools. This can be compared with 1935, when there were 195 schools, of which 68 were approved by the ABA. Stevens, *supra* note 16, at 501. Law schools that have already been built seem quite cautious about expanding their enrollment. Overall, the ABA reported that total first year enrollment for 1972 was three percent lower than the previous year, since schools cut back first year enrollment after two large classes entering the preceding two years. COLLEGE GRADUATES AND JOBS, *supra* note 4, at 102. Those with established reputations seem most reluctant to expand.

In the period from the fall of 1960 to the fall of 1972 the law school population has risen 141 percent. Of this increase, 24 percent was in schools accredited since 1960, 10 percent in the group identified as "least selective" and 21 percent in "municipal" schools, or a total of 55 percent in schools with only local reputations, while at the other end of the spectrum, the "national" schools enrolled only 4 percent of the increase; the remaining 41 percent of the increase went to schools of medium selectivity and reputation.

York & Hale, *supra* note 11, at 22.

111. [The Columbia Faculty of Law] experience, since 1928, with our own legal capacity test had revealed that it was of real value in identifying those applicants who were definitely bad risks. But, since the close of the war, the task of selecting [our] student body from among a

“passing” score on the aptitude test changes. Traditionally, there has never been an attempt to identify an unequivocal passing score, since the selection decision only requires information about greater or lesser aptitude. This selection process introduces two avoidable decisions into the process of admitting lawyers to the bar. First, the prediction of law school performance, once thought irrelevant to legal practice, now becomes central to it. Second, it occasions a comparison among legal candidates beyond a simple pass/fail dichotomy. Candidates are not judged qualified or unqualified, but rather they are judged either more or less qualified. It is these two avoidable decisions which have dictated the design of the current LSAT and prompted the controversy which now surrounds the test.

In order to produce a test which distinguishes among candidates as more or less apt to succeed in law school, individual test items must be developed which themselves distinguish among candidates. Thus, a test item which all candidates get right or wrong will merely add or subtract a constant score from each candidate's overall test score. The most efficient test item, then, would be one which half the candidates got right and half wrong.<sup>112</sup> This means that a test question which appears meaningful to an expert may be eliminated from an aptitude test simply because it does not differentiate candidates sufficiently.<sup>113</sup>

---

vastly increased number of applicants had made [us] feel the need of a capacity test that would not merely eliminate the poor student but would assist [us] in discriminating between the excellent student and one who is only good.

Reese, *The Standard Law School Admission Test*, 1 J. LEGAL EDUC. 124, 125 (1948). It is important that this argument was an element of the contemporary persuasion and not a gloss on history by an observer.

112. Carver, *Two Dimensions of Tests: Psychometric and Edumetric*, 29 AM. PSYCH. 512, 513 (1974).

113. Similar observations have been made about the SAT Achievement Tests.

The primary purpose of a College Board Achievement Test is to indicate the relative achievement of the candidates—that is, to differentiate among candidates and to indicate which have learned the most and which have learned the least. Very easy or very difficult items do not contribute to this purpose and therefore must be eliminated regardless of their value for other purposes.

Coffman, *The Achievement Tests*, in THE COLLEGE BOARD ADMISSIONS TESTING PROGRAM 59 (W. Angoff ed. 1971). Test writers have perennial difficulty in constructing items at the extreme range of difficulties and exhibit very limited ability to estimate the relative difficulty of the items they do produce. Donlon & Angoff, *The Scholastic Aptitude Test*, in THE COLLEGE BOARD ADMISSIONS TESTING PROGRAM 27 (W. Angoff ed. 1971).

A further constraint on test questions involves the requirement that test questions differentiate candidates consistently. If one half of the candidates answer one test item correctly, while the other half fails the item, then a second question which the first group failed and the second group passed would eliminate the value of both questions. Both groups would receive identical scores and the two-item test would have failed in its purpose. More significantly, the existence of inconsistent response patterns would call into question the propriety of including either question on a test of aptitude. For a test to probe for aptitude, it should identify abilities evidenced by correct responses to test items. When inconsistent response patterns occur, they suggest that no single ability is required to answer the various items.

Consequently, both to produce different scores for different candidates and to suggest the existence of underlying abilities which constitute aptitude for legal studies, tests are designed to include only questions which consistently differentiate candidates. Accordingly, only about one-half of the items prepared for the LSAT are actually included and scored in a form of the LSAT.<sup>114</sup> Each potential question is written because it supposedly probes for abilities important to legal study. However, when each question is "pretested" by inclusion in an actual form of the LSAT, but without credit added or subtracted for responses given by candidates,<sup>115</sup> only one-half of the submitted questions are considered appropriate for later inclusion as a scored item on the LSAT. The other half are discarded because they do not differentiate candidates, or do not differentiate consistently with other items on the test.

Since each item must be "pretested" to insure that it differentiates candidates in a manner consistent with other items on the LSAT, a further, if unnecessary, characteristic of the

---

114. Slightly more than one-half of the items which we try out experimentally appear in a final form of the Law School Admission Test. No item appears in the final version of the Test unless (1) its content is agreeable to the members of the Policy Committee; (2) it is considered to be a good item in the judgment of several test specialists; (3) it is editorially and gramatically correct; (4) it contributes to the predictive efficiency of the test; and (5) it is on a level of difficulty appropriate to the group who take the test.

Johnson, *The Development and Use of Law Aptitude Tests*, 3 J. LEGAL EDUC. 192, 195 (1950).

115. One of every six questions on the SAT is a pretest item that is not officially scored. Ravitch, *The College Boards*, THE NEW YORK TIMES MAGAZINE, May 4, 1975, at 13.

LSAT has evolved. If only differentiation among current candidates were desired, then questions could be pretested during one administration of the LSAT and included as score-producing items on the next administration. However, ETS has decided to equate forms of the LSAT with each other.<sup>116</sup> This process permits the comparison of scores received at different administrations of the LSAT, or on different forms of the LSAT used at the same test administration.<sup>117</sup> The equating process results in a return to the original form of the LSAT for score comparisons and for evaluation of the entire design of the LSAT. This means that the LSAT was originally developed to consistently differentiate the first group of candidates to take the examination in 1948.<sup>118</sup> The contemporary forms of the LSAT also retain those characteristics of the original test which accomplished that objective in 1948.

In examining the 1948 version of the LSAT, there is less interest in the test itself than in the candidates who took the test. This is a consequence of the already-discussed design of the test to consistently differentiate candidates. A test might differentiate one group of candidates but not another, or a test might produce consistent scoring for one group but not another.

---

116. Beginning in June 1941, the scores on every form of the SAT were equated directly to the scores on some preceding form of the SAT, and ultimately and indirectly to the April 1941 form. The group tested in April 1941 thus became the standardization group, defining the continuing scale in terms of which scores on all future forms of the SAT would be expressed.

Angoff & Dyer, *The Admissions Testing Program*, in *THE COLLEGE BOARD ADMISSIONS TESTING PROGRAM 3* (W. Angoff ed. 1971).

The effort to achieve parallelism among the forms centers on the definition of the test specifications and on the development of test forms that adhere to the specifications. The specifications for any given test in the program consist of three principal elements: 1) the distribution of item difficulty, 2) the distribution of item-test correlations, and perhaps most important, 3) the distribution of item content.

*Id.* at 9.

117. The scoring scale of ETS products is a range of 200 to 800, with a median of 500 and a standard deviation of 100. The scale is similar for all tests so that a score of 563 on different tests, or on different forms of the same test represents the same relative positions among candidates. Thus, any score changes should reflect changes in the relative position among candidates.

*Id.* at 11.

118. The test was first pretested at seven law schools in 1947. Stevens, *supra* note 62, at 525 n.84. The 12 schools which participated in the first official administration of the LSAT in 1948 were: Columbia, Cornell, Duke, Harvard, New York University, Northwestern, St. John's, Stanford, California, Michigan, Southern California, and Virginia.

Thus, a test cannot be evaluated apart from the group that gave those responses.

The candidates who took the earlier versions of the LSAT were predominantly wealthy, white males,<sup>119</sup> and those who took the first form of the LSAT may have actually represented an unusually privileged segment of the law school population. Thus, the early forms of the LSAT were acceptable because they consistently differentiated wealthy, white males. During the immediate post-war period, the LSAT may have been merely identifying the talented among the privileged who aspired to the legal profession, and the fact that it differentiated accurately among this relatively homogeneous group was an advantage, not a drawback.

However, as the demand for legal education increased from all groups, especially women and minorities, the fact that the LSAT was first developed without significant involvement of these groups became a distinct liability. In particular, law schools which relied more heavily on LSAT scores found that they could not identify talented legal prospects from minority groups. Instead, "special admission" programs were established to disregard LSAT scores in the search for minority talent. An understanding of how this situation was created requires an understanding of the process by which cultural bias can infect the LSAT.

The LSAT is designed to probe for abilities considered important to success in law school, particularly, an ability to "think like a lawyer."<sup>120</sup> Individual test items are included because the authors of the test feel that they would be correctly answered by those who possess that ability. Those items which produce inconsistent response patterns are assumed to involve

---

119. This inference is drawn from the composition of the legal profession at that time. In 1951, the legal profession had only 2.5% women and only 1% of the profession was black. *EDUCATION FOR THE PROFESSIONS*, *supra* note 6, at 160. As late as the 1960's, before law schools became inundated with applicants whom they were forced to reject, two-thirds of the students came from families where the father was a professional, proprietor, or manager (as compared to 15% nationwide) and two-fifths of the law students had family incomes over \$15,000 (as against one-twentieth nationwide). *Id.*; see note 48 *supra*.

120. In 1947, the committee on teaching and examination methods of the Association of American Law Schools found five distinguishable skills of thought involved in "thinking like a lawyer.": (1) the ability to determine the holding of a case (legal analysis); (2) the ability to form principles from the study of separate cases (legal synthesis); (3) the handling of complex fact situations (legal diagnosis); (4) the ability to interpret statutes and regulations; (5) the ability to apply legal principles to solving problems (legal solution). *PROCEEDINGS, ASSOCIATION OF AMERICAN LAW SCHOOLS, 1947 ANNUAL MEETING 76-79 (1947)*.

abilities distinct from those inherent in thinking like a lawyer. Thus, the discarded items supposedly involve irrelevant difficulties which were undetected by the item writers or editors; only mathematical consistency specifications identified them.

In a population composed of two or more diverse cultures, the process of constructing a test which consistently differentiates candidates can introduce bias. Assume that there are two culturally distinct groups, the first comprising ninety percent of the candidates, and the second, ten percent. Consider the impact of consistency specifications on two hypothetical items in a pretest. The first contains irrelevant difficulties for the majority group because the correct response to the item assumes familiarity with the culture of the minority group. Thus, candidates from the majority group will correctly answer the item if they are familiar with the minority culture but not necessarily if they possess the ability the test item was designed to identify. The second item contains irrelevant difficulty for the minority group because it contains material familiar to the majority culture. Similar inconsistent scoring patterns on the item will result for members of the minority group.

The pretest process will eliminate those items found to have produced inconsistent scoring patterns. However, in this example only the first item is likely to be eliminated. The inconsistent response patterns among ninety percent of the candidates will be unacceptable. Yet the inconsistent response patterns among ten percent of the candidates on the second item may go undetected in the pretest and the question could remain on the final test. Thus, although both questions contained irrelevant material that made the question inappropriate for one of the groups taking the test, only one of the questions is likely to be eliminated from the test. This means that there is a subtle, systematic bias in tests which are constructed according to consistency specifications.

The result of this subtle bias is an artificial gap in average performance on the test between the two groups. In the case of the LSAT, there would be a gap expected between wealthy, white males and other candidates. Little empirical research has been conducted to identify these gaps, but the available evidence indicates that such bias does exist. There is a consistent pattern of higher scores from higher income candidates.<sup>121</sup>

---

121. There is no comparable study for the LSAT, but a study of the economic impact of the SAT reveals a direct and continuous correlation between family income

The available evidence suggests that women are handicapped in their request for admission to law school by their scores on the LSAT.<sup>122</sup>

The clearest evidence of bias exists when racial groups are compared,<sup>123</sup> a bias which has been discovered in other ETS-developed tests as well.<sup>124</sup>

Bias in the LSAT has important consequences for integrating the bar, since admission to law school is an essential prerequisite to becoming a lawyer. During the current period of intense competition for law school,<sup>125</sup> even a slight bias on the LSAT could mean virtual exclusion of minority groups from law school and the legal profession. The research which has been conducted suggests that the discriminatory consequences of heavy reliance on the LSAT may be dramatic.<sup>126</sup>

---

and SAT scores. ADMISSIONS TESTING PROGRAM OF THE COLLEGE ENTRANCE EXAMINATION BOARD, COLLEGE-BOUND SENIORS, 1973-74, at 27 (1974).

122. See EVANS, APPLICATIONS AND ADMISSIONS TO ABA ACCREDITED LAW SCHOOLS: AN ANALYSIS OF NATIONAL DATA FOR THE CLASS ENTERING THE FALL 1976 xiv (1976); Linn, *Test Bias and the Prediction of Grades in Law School*, 27 J. LEGAL EDUC. 293, 311 (1975).

123. The LSAT differentiation of white and black candidates is more than a comparison between their undergraduate grade point averages or their first year law school grades. Schrader & Pitcher, *Predicting Law School Grades for Black American Law Students*, in LAW SCHOOL ADMISSION COUNCIL ANNUAL REPORTS 528, 567 (1973) (Table 10). The LSAT was considerably more correlated with race than it was with first year grades for members of a single racial group. *Id.* at 554. When plausible assumptions were applied to data from the University of Washington Law School, scene of the famous case of *DeFunis v. Odegaard*, 416 U.S. 312 (1974), only one minority student would have been admitted on the basis of Predicted-First-Year-Averages, while between 4 and 11 students would have been admitted if the performance of the previous year's minority students in law school were used as the criterion for admission. Breland & Ironson, *DeFunis Reconsidered: A Comparative Analysis of Alternative Admissions Strategies*, 13 J. EDUC. MEASUREMENT 89, 96 (1976).

124. Dramatic differences in acceptance rates for minority students are seen when SAT scores are the basis for admission compared to an admission strategy based on the previous college performance of minority students. Schmidt & Hunter, *Racial and Ethnic Bias in Psychological Tests: Divergent Implications of Two Definitions of Test Bias*, 29 AM. PSYCH. 1 (1974). Black medical students who finish the first two years of medical school in good standing have lower average Medical College Admission Test scores than white students who fail academically. Feitz, *The MCAT and Success in Medical School*, paper presented at the Annual Convention of the American Educational Research Association, Chicago, Illinois (1974). The National Teacher Examination was examined for racial bias and "an unsuspected factor, such as whether a personality referred to in a test item is black or white, may have more to do with candidates' scores than the manifest content—whether the personality is a musician or a novelist, for example." Medley & Quirk, *The Application of a Factorial Design to the Study of Cultural Bias in General Culture Items on the National Teacher Examination*, 11 J. EDUC. MEASUREMENT 235, 244 (1974).

125. See notes 97 and 109 *supra*.

126. See note 123 *supra*.

*The Multistate Bar Examination.* The LSAT was developed to regulate the flow of applicants into law schools which had too few places to accommodate all qualified applicants.<sup>127</sup> The scarcity of law school places established an upper limit on the number of potential candidates for the bar.<sup>128</sup> The legal profession, then, was able to regulate the number of candidates for the bar, by insisting on preparation in law school. In this context, the insistence on competitive ranking through the LSAT may be excused as an aid in selection.<sup>129</sup> The bias involved in the LSAT against minority groups may be an inevitable consequence of this ranking for selection,<sup>130</sup> and "special admission" programs for members of minority groups may be a necessary response to this selection bias.<sup>131</sup>

The bar examination, however, ought not be governed by such considerations. Despite the constant protestations that

---

127. Reese, *The Standard Law School Admission Test*, 1 J. LEGAL EDUC. 124, 125 (1948).

128. See note 84 *supra*.

129. "The primary purpose of a College Board Achievement Test is to indicate the relative achievement of the candidates—that is, to differentiate among candidates and to indicate which have learned the most and which have learned the least." Coffman, *The Achievement Tests*, in *THE COLLEGE BOARD ADMISSIONS TESTING PROGRAM* 59 (W. Angoff ed. 1971).

130. There is a persistent pattern of findings that the racial gap between whites and blacks is larger on norm-referenced tests such as the LSAT than on grade-point averages earned on academia. See notes 95 & 96 *supra*. The conclusion of inevitability must rest on a combination of the impact of test specifications discussed in the text and of the sincerity of major testing companies of eliminating all potential sources of cultural bias in their current test offerings. For one study finding bias on the MBE see COLORADO ADVISORY COMMITTEE TO THE U.S. COMMISSION ON CIVIL RIGHTS, *ACCESS TO THE LEGAL PROFESSION IN COLORADO BY MINORITIES AND WOMEN* (1976).

131. The "special admission" programs may have been initiated partly because proponents considered standardized norm-referenced tests to be biased, but the defense of those programs against charges of "reverse discrimination" against white applicants did not include material indicating test bias. *E.g.*, *Bakke v. Regents of Univ. of Cal.*, 18 Cal. 3d 34, 59-60, 132 Cal. Rptr. 680, 705-706, 553 P.2d 1152, 1177-78 (1976), *aff'd*, 46 U.S.L.W. 4896 (1978). See also 3 *DEFUNIS v. ODEGAARD & THE UNIV. OF WASHINGTON* 1339 (A. Ginser ed. 1974), oral argument in the United States Supreme Court, February 16, 1974).

Mr. Justice Douglas: My Attorney General, when I was teaching law many years ago, I discovered to my consternation that these tests, these so-called tests, had built in racial bias. Is there any finding in this record as to your test?

Mr. Groton: There is no finding in this record, Mr. Justice Douglas, because neither party wished even to bring that subject up. Obviously Mr. DeFunis would not make that claim, and the University of Washington did not attempt in Court to prove that it engaged in previous racial discrimination.

See also 46 U.S.L.W. at 4906 n.93.



the legal profession is becoming overcrowded,<sup>132</sup> the license to practice law should not be restricted to a predetermined number or percentage of applicants. Instead, the license should be available to all candidates who meet the standards of competence established by the state. The traditional bar examinations have espoused this goal,<sup>133</sup> and bar passage rates have reflected this philosophy, rising as the quality of candidates rise.<sup>134</sup> Some states have passage rates which approach one hundred percent.<sup>135</sup>

The recent emergence of the Multistate Bar Examination (MBE), administered by ETS, has changed the format, philosophy and probable consequences of the bar examination.<sup>136</sup> This examination transfers the design of the LSAT and other ETS products into an inappropriate context where scarcity of licenses is not a prior constraint to becoming a lawyer, where ranking of candidates is unnecessary, and where bias in test results cannot be adjusted by introducing "special admission" procedures for minority candidates.<sup>137</sup>

Like the LSAT, the MBE yields scores which reflect the relative success of candidates on the test. No passing score is

---

132. "The Department of Labor estimates that until 1980 the traditional modes of employment for lawyers will provide jobs for 14,500 new ones annually, or for about half of the estimated annual supply." York & Hale, *supra* note 11, at 26. The projections of the Department of Labor, however, tend to underestimate the actual number of jobs in a growing occupation. U.S. BUREAU OF LABOR STATISTICS, U.S. DEPT. OF LABOR, BULL. NO. 1824, OCCUPATIONAL MANPOWER AND TRAINING NEEDS 3 (rev. 1974).

133. In Georgia, for example, the bar examiners set a passing score of 70% which "has no significance standing alone, [but] it represents the examiners' considered judgments as to 'minimal competence required to practice law.'" Tyler v. Vickery, 517 F.2d 1089, 1102 (5th Cir. 1975), *cert. denied*, 426 U.S. 940 (1977).

134. During 1932, 45% of those taking bar examinations passed; in 1948, 60% passed. "The increase in the percentage passing the bar examinations is a result of the higher educational standards and of a healthy correlation between law school curricula and bar examination content." Merritt, *The National Conference of Bar Examiners*, in BAR EXAMINATIONS AND REQUIREMENTS FOR THE BAR 491 (1952). In 1971, 72% passed. York & Hale, *supra* note 11, at 7.

135. In 1971, North Dakota had a 100% passing rate. Among the more populous states, Florida's passing rate of 90% was the highest. York & Hale, *supra* note 11, at 7 n.30.

136. The MBE consists of 200 multiple choice questions, with questions in the subject areas of Constitutional Law, Contracts, Criminal Law, Evidence, Real Property, and Torts. It is administered twice a year on the same two days for all states choosing to use the MBE, now numbering over 40. COMMISSION TO STUDY THE BAR EXAMINATION PROCESS, FINAL REPORT TO THE BOARD OF GOVERNORS OF THE STATE BAR OF CALIFORNIA 3 (1975).

137. Although the legal challenges to the bar examination referred to in note 17 *supra* were initiated by minority students, the relief prayed for would aid all those arbitrarily excluded from the profession. No special relief for minority students is contemplated.

established for the nation;<sup>138</sup> instead, each state chooses its own passing score.<sup>139</sup> Since each score reflects relative performance rather than an independently established standard of performance, each state is actually opting for a probable pass rate on the bar when it chooses a passing score.<sup>140</sup> Thus, although there is a theoretical opportunity for all who take the bar examination to pass, the introduction of the MBE makes it virtually impossible for all to pass.<sup>141</sup> Scarcity is introduced where once there was opportunity.

Whatever the chosen passing score, the choice is unfortunate since candidates whose abilities are virtually indistinguishable will pass or fail the test because of blind luck. This is due to an "error of measurement" on the MBE which results in almost one-third of the candidates clustering around the average grade of 140 out of 200 questions with scores that are essentially the same.<sup>142</sup> Some will cluster above the typical passing score of 70, others will fail.

While the MBE shares infirmities which infect the LSAT, solutions available to law school admission officials are not appropriate for bar examiners. First, scores on the LSAT which are so close that differences between them could occur by chance due to errors of measurement are supposed to be treated as reflecting no difference.<sup>143</sup> Second, where the LSAT score is inconsistent with other data in a candidate's file, the score can

---

138. Opening Remarks of Dean Joe E. Covington to the Joint Session of the National Conference of Bar Examiners and the Section of Legal Education and Admissions to the Bar of the American Bar Association, in San Francisco, Cal. (Aug. 15, 1972), reprinted in 42 B. EXAMINER 10, 15 (1973).

139. *Id.*

140. Each state is urged to set the passing score *after* the results of the MBE have been reported. Remarks of John E. Eckler to the Joint Session of the National Conference of Bar Examiners and the Section of Legal Education and Admissions to the Bar of the American Bar Association, in San Francisco, Cal. (Aug. 15, 1972), reprinted in 42 B. EXAMINERS 21, 22 (1973). Thus, the choice of a passing score can hardly be divorced from the choice of a passing rate among the candidates.

141. On the February, 1976 examination, the *median* score was 136.0, below the typical passing score of 140. Covington, *The Multistate Bar Exam—1976*, 45 B. EXAMINER 70, 71 (1976).

142. The margin of error on the February, 1976 MBE was calculated at six points. EDUCATIONAL TESTING SERVICE, TEST ANALYSIS, MULTISTATE BAR EXAMINATION D (1976). This means that scores within 12 points are statistically indistinguishable. *Id.* at E. The cluster of scores near passing was so dense that 31% of the candidates received scores between 133 and 145. See Covington, *supra* note 141.

143. Score differences between two candidates of 67 points on the LSAT should be disregarded in making an admission decision since the difference could be produced by chance rather than different innate abilities in the candidates. See Fremer & Chandler, *Special Studies*, in THE COLLEGE BOARD ADMISSIONS TESTING PROGRAM 172 (W. Angoff ed. 1971).

be disregarded.<sup>144</sup> These safeguards, necessary to correct the common faults of the LSAT and MBE, are unavailable for a licensing examination. First, since a single passing score must be chosen for all candidates, scores which are so close to the passing score that error of measurement could have caused the candidate to fail must nonetheless be considered failing scores.<sup>145</sup> Since the MBE is given only twice each year, an unlucky candidate must wait until the next administration to correct the measurement error involved in using a multistate examination in a single state.<sup>146</sup> Second, it would be highly unorthodox for a committee of bar examiners to inquire into a candidate's history to determine whether the candidate was competent to pass the bar. Thus, greater emphasis is actually placed on a single score on the MBE than on the LSAT, despite the fact that there is less justification for their common test design when used as a licensing examination.

#### PROSPECTS FOR CHANGE

Access to the legal profession is now limited by the number of places in law school. Applicants to law school are screened by the LSAT, and applicants to the bar are further screened by an examination increasingly controlled by the MBE. There is no question that this series of barriers to access decreases the potential supply of lawyers, and that those who pass the bar continue to be largely wealthy, white males. Yet the question of motives behind the erecting of barriers remains. For some persons, exclusionary or racist motives are thinly veiled,<sup>147</sup> while others believe that professional standards have necessarily been raised with requirements of prolonged study or high

---

144. The point here is one that has been made repeatedly before but which cannot receive too much emphasis: The scores must be used in the light of all the available information about applicants and there will be many occasions when the evidence of the scores should be discounted because it is overwhelmed by contrary evidence from other sources.

EDUCATIONAL TESTING SERVICE, LAW SCHOOL VALIDITY STUDY SERVICE 19 (1973).

145. Cf. Remarks of Prof. Joe E. Covington, *Discussion of Multistate Bar Examination Program*, reprinted in 46 B. EXAMINER 176, 180 (1977) (scrutiny to be given to the essays of those persons scoring between 135 and 140 on the MBE).

146. Inconvenient as this solution is for candidates, it may satisfy the due process requirements to which a single candidate failing a bar examination is entitled. *Tyler v. Vickery*, 517 F.2d 1089, 1103-05 (5th Cir. 1975), cert. denied, 426 U.S. 940 (1977); *Whitfield v. Illinois Bd. of L. Examiners*, 504 F.2d 474 (7th Cir. 1974); Cf. *Richardson v. McFadden*, 540 F.2d 752 (4th Cir. 1976) (dictum) (due process not satisfied by reexamination unless applicant given unlimited opportunity to retest).

147. See, e.g., J. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA passim* (1976).

test scores.<sup>148</sup> However, the contours of the impending changes in professional standards cast light on the motives behind past events, an illumination that comes from inconsistencies in the bar's response to similar situations. Rather than embrace practices justified in earlier eras as necessary for a competent profession, the bar is now contemplating and in some cases implementing changes whose primary consistency with history is the identity of those protected by the practices.

### *Relicensing*

Reacting to charges that many licensed lawyers are incompetent, the bar is considering abandoning the "license for life" and instead requiring all lawyers to be periodically relicensed.<sup>149</sup> Unlike the original licensing process, relicensing will not require candidates to pass an examination;<sup>150</sup> instead lawyers will be required to attend classroom instruction in a variety of legal fields.<sup>151</sup> Thus, those lawyers who can afford to pay for the instruction will receive what amounts to a "diploma privilege" and will be relicensed. This is contrary to the ABA's consistent opposition to such a privilege for law school graduates.<sup>152</sup> However, since current bar examinations, particularly the MBE, merely pit candidate against candidate, practicing lawyers cannot consent to an examination process which assures failure for a fixed percentage of the bar. Consequently, relicensing after classroom instruction deflects criticism of the profession without assuring a competent bar or expulsion of the incompetent.<sup>153</sup> The motive behind the change is evident from

---

148. Although those maintaining this position are doubtless legion, there seems to be no benchmark apart from the requirements themselves which proponents rely on to validate their convictions.

149. Janofsky, *Should a Lawyer's License to Practice Be Good for Life?*, 48 CAL. ST. B. J. 121 (1973).

150. Every five years a California attorney will be required to take a bar examination, but only if the attorney failed to complete the requisite classroom hours of instruction. Committee on Maintenance of Professional Competence, *Plan for Maintenance of Professional Competence*, 50 CAL. ST. B.J. 387 (1975).

151. California requirements would involve attendance at 60 hours of classroom instruction in at least seven different substantive areas of the law every five years. *Id.*

152. See note 52 *supra*.

153. Rather than incompetence, the most frequent subjects of formal disciplinary action by bar associations involve "conversion, bribery, fraud, conviction of a felony, income tax evasion, and solicitation." Marks & Cathcart, *Discipline Within the Legal Profession: Is It Self-Regulation?*, 1974 UNIV. ILL. L. F. 193, 217. In addition, most complaints filed with grievance committees of bar associations involve "neglect" rather than incompetence. In New York City, over half the complaints filed which stated a prima facie allegation within the jurisdiction of the grievance committee

the "diploma privilege" given practicing attorneys but denied aspiring lawyers.

### *Specialization*

The law has long been a unified profession. The license to practice is a general one, without limitation on the type or scope of practice. This general license gives lawyers from different specialties a common bond of interest. A unified bar can govern its members with authority,<sup>154</sup> and encroachments on legal business from other professions can be arbitrated through the offices of a central authority.<sup>155</sup> The decision to recognize legal specialists, then, is less an acquiescence to the growing number of specialists<sup>156</sup> than it is a cautious departure from the longstanding virtues of a single legal license.<sup>157</sup>

The current plans to license legal specialists reflect this caution. All lawyers must still pass a single bar examination and for the first years of practice, no recognized specialization is sanctioned.<sup>158</sup> After actually accumulating experience in a legal specialty, a candidate must either pass a specialty examination<sup>159</sup> or may begin immediately to advertise as a specialist.<sup>160</sup> In pursuing these changes, the bar is eschewing the law

---

involved neglect. *Id.* at 212. Not all disciplinary boards have jurisdiction over complaints alleging incompetence. California, for example, tells complainants that "competence" is generally not within the jurisdiction of the state bar. *Id.* at 208 n.29.

154. State legislatures began requiring all lawyers to join the state bar association during the 1920's. In return for this compulsory membership, the states granted the profession extensive rights of self-government. Stevens, *supra* note 62, at 497.

155. As a potential matter, it may be difficult to distinguish some lawyers' work from that of nonlawyers. Thus, the ABA has negotiated interoccupational treaties with nine different groups performing functions similar to lawyers. These groups include claims adjusters in 1939, banks with trust functions in 1941, realtors in 1943, accountants in 1951, and social workers in 1965. EDUCATION FOR THE PROFESSIONS, *supra* note 6, at 116.

156. The general, solo practice has long been thought to be the norm in the legal profession. However, slightly more than half of the solo practitioners in California now consider themselves to be specialists. See PACKER & EHRLICH, *supra* note 2, at 12. About two-thirds of California lawyers as a whole consider themselves specialists. Stolz, *supra* note 82, at 179.

157. Only three specialties, Criminal Law, Taxation, and Workers' Compensation Law, are recognized in California. California Board of Legal Specialization, *New Standards Set for Certification and Recertification of Legal Specialists*, 50 CAL. ST. B.J. 309 (1975). For summaries of specialization plans in several states, see Note, *Legal Specialization and Certification*, 61 VA. L. REV. 434, 450-56 (1975).

158. See Note, *supra* note 157.

159. A written examination is required in California. California Board of Legal Specialization, *New Standards Set for Certification and Recertification of Legal Specialists*, 50 CAL. ST. B.J. 309, 311, 313, 314 (1975).

160. See the description of the New Mexico plan in Note, *supra* note 157, at 454.

school as the formal educator of specialists,<sup>161</sup> and instead embracing the now discarded apprenticeship model of training through experience in law offices. This specialist-apprenticeship model does not increase the number of women or minority group members in the profession, however, as an apprenticeship model for the general legal license might. Instead, it allows those firms which specialize to regulate the number of specialists by controlling the number of lawyers they train. Licensing specialists, then, gives the privilege of advertising specialization to those already privileged to enter the legal profession and to be hired by a firm capable of training a specialist.<sup>162</sup>

### *Certifying Paralegals*

Although the name is new, the job of a paralegal is a traditional one. A variety of individuals perform tasks which involve legal matters, but do not amount to the practice of law.<sup>163</sup> They have learned their jobs from practical work experience, much as legal apprentices once learned the law. However, it is unlikely that paralegals will be able to become certified through work experience. Instead, proposals to certify paralegals depend on extended periods of formal schooling to instill competence.<sup>164</sup> This shift from office training to academic preparation

---

The extent to which legal advertising may be regulated is unclear after the Supreme Court decision in *Bates v. State Bar*, 433 U.S. 350 (1977). Although the Court found that price advertising for routine, standardized services was constitutionally protected, price advertising for specialists' services, which are presumably less routine, may not be similarly protected. Holding oneself out as a specialist is probably protected, unless it can be viewed as misleading or deceptive.

161. It has been suggested that law schools may be inadequate vehicles for training specialists. See Packer & Ehrlich, *supra* note 2, at 14-15. But if law schools cannot adequately train specialists, the assumption that they are the best approach to training lawyers generally is weakened.

162. Opportunities for specialized training are limited at two levels. Most such training occurs in large firms and in government service, opportunities which are themselves limited to graduates of the more prestigious law schools. See Stolz, *supra* note 82, at 181-82.

163. A lawyer can employ law secretaries, lay investigators, lay detectives, lay researchers, accountants, lay scriveners, nonlawyer draftsmen or nonlawyer researchers. In fact, he may employ nonlawyers to do any task for him except counsel clients about law matters, engage directly in the practice of law . . . or appear in formal proceeding.

ABA COMM. ON PROFESSIONAL ETHICS OPINIONS, No. 316 (Supp. 1967). In large law firms, attorneys may be outnumbered by subprofessionals. One Wall Street firm with more than 100 lawyers was reported to have a non-legal staff of 240. EDUCATION FOR THE PROFESSIONS, *supra* note 6, at 117.

164. See, e.g., SPECIAL COMM. ON LEGAL ASSISTANTS, PROPOSED CURRICULUM FOR TRAINING OF LAW OFFICE PERSONNEL (1971). This publication recommends a two-year

is analogous to the shift from law clerks to law students. However, law clerks and students have typically been white males. Paralegals, on the other hand, are usually assumed to be women or members of minority groups.<sup>165</sup> Moreover, the study involved in becoming a paralegal does not shorten the requirements for becoming a lawyer. Rather, each cohort of students will pursue a separate course of study leading to a separate career. This stands in contrast to a possible model where both lawyers and paralegals learned skills through practical experience and rose in professional standing as their skills improved. This model was once embraced to train lawyers, and today is being considered to license legal specialists. However, it is not being considered where the effect might be to increase the number of lawyers and to decrease their status by accepting members who worked their way up through a progression from paralegal to lawyer.

### *The Chance for Progress*

There has been considerable agitation over access and accountability in the legal profession. As noted earlier, much of the pressure for reform has focused on entrance to and exit from law school. The previous pages have presented the case for shifting the focus to the rigid requirement that all lawyers matriculate in law school. However persuasive this argument may be, it can hardly expect to be the turning point in professional reform. Those who have initiated the current prerequisites to becoming an attorney have profited, not suffered, from the regime. Instead, the argument suggests the need to reconsider decisions made in the course of history. The vehicle, however, will not be historical revision, but rather logical analysis of the reasons offered for continuing the current regime. This analysis

---

college-level program for the legal assistant and a four-year college-level program for the legal administrator. Stanford Law School offers a J.M. degree after two years of law school study. EDUCATION FOR THE PROFESSIONS, *supra* note 6, at 113. For those who have already completed college, an intensified program lasting several months has been suggested. PACKER & EHRLICH, *supra* note 2, at 18.

165. Those promoting paralegals may have exposed their underlying prejudices by touting these jobs as "especially appealing to mothers who have completed their years of service to children and seek a second family income." CURRICULUM STUDY COMMITTEE, TRAINING FOR THE PUBLIC PROFESSIONS OF THE LAW, PROCEEDINGS OF THE 1971 ANNUAL MEETING OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS, pt. 1, § II, at 65 (1971). The suggested intensified program for college graduates was conceived as accomodating "for example, women who have recently graduated from college, college-educated mothers or school-age children, and unemployed aerospace engineers." PACKER & EHRLICH, *supra* note 2, at 18.

could be part of a review of contemporary changes for relicensing, specialization, and paralegal training. A more formal analysis could take place in the courtroom—the forum where lawyers turn for adjudication of disputes beyond their own professional realm.

The courtroom, however, is not a neutral forum for the discussion of disputes over entry into the legal profession. The reason is too obvious: the judge and opposing counsel are already lawyers. It is too much to expect those who have endured, even profitted from the current system to be impartial observers. However, there are potential burdens of proof and persuasion which could justifiably be imposed upon the courtroom analysis which would render the judgments reached more trustworthy.

The bar examination process must bear a rational relationship to the state's legitimate interest in assuring a competent bar.<sup>166</sup> However, close examination of this relationship has generally not been required, because the courts have traditionally adopted a deferential posture toward the judgment of those persons who have established the prerequisites for becoming a lawyer.<sup>167</sup>

The primary vehicle for introducing objective analysis into a review of barriers to legal practice is Title VII of the Civil Rights Act of 1964.<sup>168</sup> As interpreted by the courts, Title VII requires that any prerequisite to employment or promotion which has a discriminatory impact on minority groups or members of a single sex must be demonstrably related to job performance.<sup>169</sup> The retention of prerequisites with a discriminatory impact must be a "business necessity" which is essential to the safe and efficient operation of the employer's business with no available alternative prerequisite involving lesser dis-

---

166. See *Schwartz v. Bd. of Bar Examiners*, 353 U.S. 232 (1957). "A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but *any qualification* must have a rational connection with the applicant's fitness or capacity to practice law." *Id.* at 239 (emphasis added).

167. See, e.g., *Richardson v. McFadden*, 540 F.2d 744 (4th Cir. 1976); *Tyler v. Vickery*, 517 F.2d 1089 (5th Cir. 1975), *cert. denied*, 426 U.S. 940 (1977); *Hackin v. Lockwood*, 361 F.2d 499 (9th Cir.), *cert. denied*, 385 U.S. 960 (1966). Even when these judgments have a racially uneven impact, close examination is unlikely absent some proof of an intent to discriminate. See *Washington v. Davis*, 426 U.S. 229 (1976).

168. 42 U.S.C. § 2000e (Supp. V 1975).

169. "The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).



criminary impact.<sup>170</sup> Proof of job-relatedness is preferably accomplished through a statistical validity study, investigating the relationship between successful performance on the prerequisite and successful performance on the job.<sup>171</sup> Where a statistical study is technically infeasible, a review of the content of the prerequisite can justify its use when there is an apparent relationship between the content of the prerequisite and that of the job.<sup>172</sup> If the employer fails to demonstrate job-relatedness, the prerequisite must be eliminated from the employment process and the courts will occasionally impose a requirement of proportional hiring of members of groups previously disadvantaged by the prerequisite.<sup>173</sup>

There is considerable doubt about the applicability of Title VII to challenges to barriers surrounding the practice of law, because licensing agencies are not specifically mentioned in Title VII.<sup>174</sup> Thus, in the case of *Tyler v. Vickery*, the Fifth Circuit declared the bar examiners to be excluded from Title VII because they were not employers.<sup>175</sup>

However, *Tyler* was not really a Title VII case, it was an equal protection challenge in which the plaintiff attempted to equate the constitutional requirements of the fourteenth

---

170. The Fourth Circuit has articulated the most widely accepted formulation of the "business necessity" doctrine:

The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with lesser differential racial impact.

*Robinson v. Lorillard Corp.*, 444 F.2d 791, 798 (4th Cir.), cert. dismissed, 404 U.S. 1006 (1971).

171. 29 C.F.R. § 1607.5(a) (1977).

172. Evidence of content validity alone may be acceptable for well-developed tests that consist of suitable samples of the essential knowledge, skills or behaviors composing the job in question. The types of knowledge, skills or behaviors contemplated here do not include those which can be acquired in a brief orientation to the job.

*Id.*

173. Although quotas have been imposed to correct discrimination in employment situations, see, e.g., *Crockett v. Green*, 534 F.2d 715 (7th Cir. 1976); *Carter v. Gallagher*, 452 F.2d 315 (8th Cir.), cert. denied, 406 U.S. 950 (1972), licensing agencies could not impose quotas simply because there is not a fixed number of licenses to be awarded. Thus, statistics may demonstrate the existence of a discriminatory license requirement, but cannot be the guide for the elimination of discriminatory policies.

174. Title VII explicitly applies to employers, employment agencies, and labor organizations. 42 U.S.C. § 2000e (Supp. V 1975).

175. 517 F.2d 1089, 1096 (5th Cir. 1975), cert. denied, 426 U.S. 940 (1977).

amendment with the standards of Title VII.<sup>176</sup> Such a strategy is unavailable in the wake of *Washington v. Davis*,<sup>177</sup> and the issue of Title VII and licensing must be squarely confronted. Two federal courts have already held that licensing agencies are subject to Title VII. The first case to apply Title VII standards to licensing was *Sibley Memorial Hospital v. Wilson*, in which the Court of Appeals for the District of Columbia analyzed the language of Title VII and concluded that Congress did indeed intend to regulate licensing.<sup>178</sup> A subsequent case involving the licensing of jockeys by a race track followed the same reasoning.<sup>179</sup> The recent guidelines for employee selection issued by several federal agencies give tentative endorsement to the applicability of Title VII to licensing agencies.<sup>180</sup>

If Title VII standards of job-relatedness are imposed on the bar examination and prerequisites to taking the examination, several major revisions are possible. As this article has argued, the most fundamental challenge possible to current legal licensing arrangements is the requirement that candidates attend law school. The discriminatory impact of this prerequisite is evident.<sup>181</sup> The reasons for underrepresentation of minority group members and women in law school are varied. For some, law school is not an option which students have been encouraged to consider.<sup>182</sup> For others, the admission requirements of high college grade point averages and LSAT scores preclude

---

176. *Id.* at 1092, 1096. Plaintiffs also raised an unsuccessful due process claim. *Id.* at 1092, 1103-05. The court rejected plaintiff's assertions that the standards of Title VII applied to challenges of discrimination in the bar examination process and instead applied a requirement that the examination bear a "rational relationship" to the interests protected by the state through its legal licensing scheme. *Id.* at 1101 (citing *Schwartz v. Bd. of Examiners*, 353 U.S. 232, 239 (1957)).

177. 426 U.S. 229 (1976); see note 167 *supra*.

178. 488 F.2d 1338 (D.C. Cir. 1970). The court concluded that an employer-employee relationship was not necessary, for Congress intended to reach employers, labor organizations and employment agencies which controlled access to the job market by an individual. Although *Sibley Memorial Hospital* was not Mr. Wilson's employer, its discriminatory actions interfered with his employment opportunities. *Id.* at 1341.

179. *Puntolillo v. New Hampshire Racing Comm'n*, 375 F. Supp. 1089 (D. N.H. 1974).

180. See 41 C.F.R. § 60-3.2(b) (1977).

181. Only 4.9% of the law students entering school in Fall, 1976 were black. Evans, *Applications and Admission to ABA Accredited Law Schools: Fall, 1976*, in LAW SCHOOL ADMISSION COUNCIL ANNUAL REPORTS 7 (1977). By comparison, approximately 12% of the population is black. U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS, series p-25, No. 614 (1975). Although women comprise a slight majority of the population, they comprise less than 23% of the law school population. Evans, *supra*.

182. See notes 121 & 150 *supra*.

legal education.<sup>183</sup> Yet, even if recruitment was intensified and admission expanded through the addition of more law school places, the discriminatory impact of law school attendance requirements would likely remain. This is because the investment required to pursue a legal education is prohibitive to many qualified minority students and women. These individuals lack the time and the money necessary to pursue law school.<sup>184</sup> Consequently, despite potential reforms in access to legal education, the discriminatory impact of requiring law school attendance will likely remain. This means that the "business necessity" of requiring law school before taking a bar examination will be drawn into issue under a Title VII challenge.

If only law school attendance were drawn into doubt through a lawsuit, the most likely method of validating the prerequisite would be a comparison between law school grades

---

183. For indications of the importance of high LSAT scores for admission, see notes 24 & 109 *supra*. The average undergraduate grade-point averages of law students has also increased substantially in the last decade. Evans, *Applications and Admissions to ABA Accredited Law Schools: Fall, 1976*, in LAW SCHOOL ADMISSION COUNCIL ANNUAL REPORT 6 (1977). The impact on women and minority candidates of high LSAT requirements is more severe than requirements that candidates present high undergraduate grade-point averages. For example, among applicants to law school, women have approximately equal LSAT scores with men, but higher undergraduate grade-point averages. Similarly, if the credentials of most students at elite law schools are used as benchmarks for minority admissions to these schools, LSAT scores present a much higher barrier to admission than do undergraduate grade-point averages. For example, 12 of the top 14 law schools admitted students of whom 90% had LSAT scores above 600 and 90% had undergraduate grade-point averages above 3.2. *Id.* at 60 (Table 24). These schools admitted slightly more than 400 minority students each year. *Id.* at 59. Nationwide, 799 black and chicano applicants to law school had undergraduate grade-point averages above 3.25, but only 262 had LSAT scores above 600. *Id.* at 32-33 (Tables 12, 13).

184. See note 47 *supra*. See also EDUCATION FOR THE PROFESSIONS, *supra* note 6, at 163. The pressures of poverty begin to exert themselves on black students during their college years.

The total resources of black students . . . were on the average, about \$600 lower than those of white students. Black students were twice as likely as whites to be unable to find summer work; and when they did obtain work, their average summer earnings were approximately \$200 lower than those of white students. Black students were twice as likely as white students to have borrowed during the first two years of college, although the average indebtedness of black and white borrowers was not very different.

E. HAVEN & D. HORCH, HOW COLLEGE STUDENTS FINANCE THEIR EDUCATION iv (1972). Women also face inordinate pressures from a lack of time and money to pursue law school. For a discussion of the racial and sexual bias implicit in requirements that youth persevere in formal schooling before entering the labor market, see White & Francis, *Title VII and the Masters of Reality: Eliminating Credentialism from the American Labor Market*, 64 GEO. L.J. 1213 (1976).

and bar examination results.<sup>185</sup> The underlying theory would posit that if higher grades in law school were related to higher grades on the bar examination, then law school would be a legitimate prerequisite to the bar examination. This theory, however, still leaves the issue of requiring law school in doubt.<sup>186</sup> A more appropriate question would ask whether law school graduates are significantly more likely to pass the bar than those who have not attended law school.<sup>187</sup> This question could also arise if correlations between law school success and bar results were accepted into evidence, since even a valid prerequisite must give way to a less discriminatory alternative.<sup>188</sup> Law office preparation would be such an alternative if reasonably correlated with bar results.

Yet, each of these offers of proof may seem irrelevant to the impatient. These individuals will ask why there is any business necessity possible for a prerequisite to an examination which itself is allegedly predictive of performance on the job of a lawyer. If an individual passes the examination, prerequisites ought to be forgotten.<sup>189</sup> There is, of course, the avoidable cost of administering the bar examination to those who fail, but bar examinations are typically paid for by the applicants themselves.

The potential for meaningful change is enhanced if both the current bar examination and its prerequisites are jointly challenged. The foregoing analysis would be altered since the criteria of bar examination success would itself be drawn into question as a valid barrier to legal practice. At the same time, the typical justification offered for current bar examinations—that they accurately reflect law school grades—would be suspect. Instead, the bar examination would necessarily be compared to the actual practice of law.

At the present time, this comparison could not be con-

---

185. See COMMISSION TO STUDY THE BAR EXAMINATION PROCESS, FINAL REPORT TO THE BOARD OF GOVERNORS OF THE STATE BAR OF CALIFORNIA 7-8 (1975).

186. The logical extension of justifying the bar examination on the basis of its correlation to law school grades would be the abolition of bar examinations as being duplicative. See *Richardson v. McFadden*, 540 F.2d 744, 749 n.11 (4th Cir. 1976).

187. Such comparisons were the basis for outlawing law office study in many jurisdictions. See ABA SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, BAR EXAMINATIONS AND REQUIREMENTS FOR ADMISSION TO PRACTICE 94 (1952).

188. See note 170 *supra*.

189. *But see* *Rosenthal v. State Bar Examining Comm.*, 116 Conn. 409, 165 A. 211 (1933) (candidate passed bar examination but was not admitted to practice due to attendance at unaccredited school); *In re Alexander*, 167 Mich. 495, 133 N.W. 491 (1911) (candidate passed bar examination but had not graduated from high school).

ducted through a statistical validity study. There simply is no data available which evaluates the performance of lawyers.<sup>190</sup> Instead, a comparison of the job duties of attorneys and the tasks involved in passing the bar examination could be compared.<sup>191</sup> In fact, bar examiners have already recognized that the bar examination is unlike the actual practice of law.<sup>192</sup> Lawyers implicitly recognize this fact when they decline to be relicensed on the basis of a bar examination.<sup>193</sup> Judged by this criteria, the MBE would be less content-valid than the typical essay portion of the bar examination.<sup>194</sup> Both parts of the predominant version of bar examinations would fail, however, if the Supreme Court's reasoning in *Albemarle Paper Co. v. Moody* is applied to the bar examination.<sup>195</sup> There the Court required that a preemployment test which was used to select employees for a variety of jobs must be related to each of those jobs.<sup>196</sup> Since the legal profession is actually quite specialized,

---

190. In reviewing charges that the bar examination discriminated against racial minorities without adequately reflecting the requirements of legal practice, "the Commission determined that at the present time, at least, it was practically impossible to arrive at an acceptable measure of one's effectiveness as an attorney." COMMISSION TO STUDY THE BAR EXAMINATION PROCESS, FINAL REPORT TO THE BOARD OF GOVERNORS OF THE STATE BAR OF CALIFORNIA 7-8 (1975).

191. Although the precise delineation of a job analysis for lawyers cannot be predicted, it is certain that groups within the profession perform different tasks. Some attorneys, for example, spend most of their time in a courtroom; others rarely appear in court. Such a job analysis, then, would support the observation that the bar is composed of specialists in certain aspects of the law. Perhaps this would pave the way for specialized bar examinations given to new entrants to the profession, rather than the current practice of allowing only experienced lawyers to be licensed specialists.

192. "[F]or the only time in the applicant's entire career is he responsible for curb-stone answers to a tremendous range of problems without recourse to a library, and without the opportunity of testing his tentative answers against the judgment of his office associates." Remarks of Dean John Fitzgerald, National Conference of Bar Examiners Annual Meeting (Aug. 27, 1957), *Examinations for Law School and for the Bar: A Comparison*, reprinted in 26 B. EXAMINER 33, 46 (1957).

193. In California, an attorney who completes the prescribed number of class-room hours need not take the bar examination to be relicensed. See Committee on Maintenance of Professional Competence, *Plan for Maintenance of Professional Competence*, 50 CAL. ST. B.J. 387 (1975). If bar examinations were felt to adequately mirror actual practice, one would expect the examination to be required for relicensing rather than merely class attendance.

194. The essay examination arguably requires skills in writing which reflect practice to a degree. However, the practice of law rarely, if ever, presents an attorney with a multiple-choice problem.

195. 422 U.S. 405 (1975).

196. "A test may be used in jobs other than those for which it has been professionally validated only if there are 'no significant differences' between the studied and unstudied jobs." *Id.* at 432. Recognition that the practice of law is no longer general but actually consists of numerous "jobs" would require bar examinations to be validated for all these jobs. Of course, the problems inherent in attempting to fit the bar examination within Title VII remain. See notes 167-80 and accompanying text *supra*.

the general license to practice all types of law may not survive. This is not an inevitable conclusion. A bar examination could be devised which would be so unconcerned with legal substance and so concerned with "legal abilities" that it would be valid for all branches of the profession. However, such an examination would probably have to be validated through a statistical validity study, since the content of such an examination would probably be unlike any particular lawyer's actual job. If instead, a variety of bar examinations preceded practice in a variety of legal specialties, the practical potential for respectable passing rates among law office candidates would be greatly enhanced. Likewise, the practical as well as legal requirement that lawyers study in law school would be diminished.

#### CONCLUSION

The circle of lawyers remains relatively closed, despite significant protests from those excluded from the profession and those served by it. The response of lawyers to criticism and challenges has been a series of justifications which themselves are circular. True reform, which will open the ranks of lawyers to more than a token few women or minorities and which will improve the quality of legal services without merely improving the image of the bar, depends on breaking the circle of justification for the present regime. Turning outward to study the actual work of lawyers and the actual needs of unserved but potential clients is a necessary beginning. The legal framework for scrutinizing requirements for admission to the bar exists. It remains the profession's responsibility to begin the scrutiny.

