

THE SOCIAL IMPORTANCE OF PROPER STANDARDS
FOR ADMISSION TO THE BAR

BY

WILLIAM H. TAFT,
OF NEW HAVEN, CONNECTICUT.

A great French judge truly said that the profession of the law was "as old as the Magistrate, as noble as Virtue, and as necessary as Justice." The importance of having a Bar, the members of which are sufficiently skilled in the principles of law and the procedure of the courts, properly to advise laymen as to their rights and the method of asserting or defending them, and to represent them in judicial controversies, I need not dwell upon. It has been the habit in many states to regard the practice of the law as a natural right, and one which no one of moral character can be deprived of. Such a view of course ignores the importance of the profession to society and looks at its practice only as a means of earning a living. Laymen can readily be made to see that society should be protected against the malpractice of the medical profession and surgery by men who know nothing of disease or the effect of medicine, or the handling of a surgical instrument. It is, therefore, comparatively free from difficulty to secure laws prescribing proper educational qualifications for those holding themselves out as physicians or surgeons. The danger to society of the misuse of the power which a lawyer's profession enables him to exercise is not so acutely impressed upon the layman until he has had some experience in following bad advice. A legal adviser cannot ordinarily injure his client's bodily health, but he can lead him into great pecuniary loss and subject him and his family to suffering and want. The more thorough the general education of one who proposes to be a lawyer, the more certainly his mind will be disciplined to possess himself of the principles of law and properly to apply them. There is a spirit of hostility mani-

fested by some courts and lawyers, and some who are not lawyers, to the suggestion that a fundamental general education is necessary to the making of a qualified member of the legal profession. In Indiana the constitution impliedly forbids the imposition of examination for admission to the Bar. The argument is: "Look at Abraham Lincoln. He never had any education of any sort. He educated himself, and note his greatness both as a lawyer, a statesman and a man." Such an argument would do away not only with the necessity for education at the Bar, but the necessity for schools or colleges of any kind. The question is not whether exceptional men have made themselves learned men, educated men and great lawyers without the use of schools, academies, colleges or law schools, but the question is by what means are we likely to produce the best average members of the profession. By what means are we most likely to make them skilled and able and useful in the office for which the profession is created. Certain law schools in the country have imposed the necessity for a collegiate education upon intending lawyers, before they shall begin the study of their profession. In the medical profession, schools of a similar standard require, after the Bachelor's degree, a study of four years. In the law schools a study of three years is now generally required, and in many states the same period has been fixed as the necessary period of preparation for the Bar examinations. It is said this will exclude many worthy young men who would aspire to the law. As the reason of the profession for being is to serve society, the interest of society is the point from which we must approach the question, and but little consideration should be given to the welfare of those who would like to practice law and are not fitted to do it well. The graduates of colleges are in number greatly more than sufficient to supply the needs of the clerical, the medical and the legal professions, and there is no danger that there will be any dearth of lawyers of good material because a heavier burden of preparation is required of them. The view that the profession exists solely as a livelihood creates a demand for law schools furnishing the easiest and shortest way for their students to acquire the temporary information needed to pass the required

examinations. Such schools are cramming factories with no thought to the broad legal education which students should bring to the practice after they are admitted to the Bar. They confer only a smattering of the law and only a transient familiarity with the subjects upon which applicants are examined. Men who are thus prepared may become good lawyers, but if they do, it will be because of their natural mental capacity and the education that they give themselves afterwards, and not because of any basis of legal learning they acquired in such schools. For the good of society, the standards of legal education ought to be made higher and a broad collegiate education before the study of the law should be insisted upon as the *sine qua non*.

In most states the question of the admission to the Bar is given to the Supreme Courts. It should be possible, therefore, to secure, through such good and eminent lawyers, a proper standard for the making of new lawyers. They ought, of all men, to appreciate in the highest degree the benefit in the administration of justice of requiring the most thorough preparation for the practice of the profession. They could impose a standard for preliminary and fundamental education, and then for the education in law. Such an Association as this should have more influence with them than it ever can have through legislatures or upon the people, for it is dealing with its own. Of course the judges do not generally prepare the questions for examination or mark them. They delegate this to a committee of lawyers. When we find in one of the great states of the union a committee of examination that imposed questions based on cases taken from reports of its own state, some of doubtful authority, and gave no credit for answers which differed from the decisions of the courts, however good the reasons, we are not surprised to learn that some of the best prepared students from first-class law schools were rejected, and that applicants with education in the law much less thorough were admitted, who had pursued the course of studying the special character of previous questions and cramming on the answers to them from a book prepared by one of the committee. This book shows not a few instances in which the answers required were hardly sustained by good

authority, even in the particular state. Some features of this bad system have been changed. The reform should be more radical. No court that knowingly permits such a system to remain in vogue can escape criticism. Examinations of this kind commercialize the practice of the law more than any other one. Those who come to the Bar by a mere trick of memory, and without thorough absorption of legal principles, are not likely to improve the tone of the practice to which they have succeeded by such means. I am not, however, sufficiently familiar with the details of State Bar examinations, or with the curricula of law schools, to be able to write an informing paper on them, and I am glad to know that I am to be followed by one so much better qualified to speak on this subject.

What I wish to dwell upon especially today is the influence of a proper standard for admission to the Bar on another office of lawyers than that of advising and representing clients. We get our judges from the Bar, and we add to the education of our judges when they are on the Bench by the Bar. It is the tone of the Bar, therefore, and the ability and learning of the Bar that necessarily affect the learning and standards of the Bench. The influence of a great Bar to make a great court and to secure a series of great decisions, everyone familiar with judicial history knows.

The function of judges is to interpret constitutions and statutes, and apply and enforce them, and also to declare and apply that great body of customary law known as common law which we received from past generations. According to the view and theory of one who does not understand the practical administration of justice, they ought to interpret the exact intention of those who established the constitution, or who enacted the legislation, and they ought to apply the common law exactly as it came to them. But frequently new conditions arise that those who were responsible for the written law could not have had in view, and to which existing common law principles have never before been applied, and it becomes necessary for the court to make new applications of both. The power which the court thus exercises is said to be a legislative power, and it is

urged that it ought to be left to the people. That it is more than a mere interpretation of the legislative or popular will, and in the case of the common law that it is more than a mere investigation and declaration of traditional law is undoubtedly true. But it is not the exercise of legislative power as that phrase is used. It is the exercise of a sound judicial discretion in supplementing the provisions of constitutions and laws and custom, which are necessarily incomplete or lacking in detail essential to their proper application, especially to new facts and situations constantly arising. Then, too, legislation is frequently so faulty in proper provision for contingencies which ought to have been anticipated that courts cannot enforce the law without supplying the defects and implying legislative intention, although everyone may recognize that the legislative body never thought anything about the operation of the law in such cases and never had any intention in regard to them. Neither constitutional convention nor legislature nor popular referendum can make constitutions or laws that will fit with certainty of specification the varying phrases of the subject matter sought to be regulated, and it has been the office of courts to do this from time immemorial. Indeed, it is one of the highest and most useful functions that courts have to perform in making a government of law practical and uniformly just. You can call it a legislative power if you will, but that does not put you one bit nearer a sufficient reason for denying the utility and necessity of its exercise by courts.

Of all the people in the world who ought not to be heard in objection are the advocates of the initiative and referendum as a means of legislation. Legislatures and constitutional conventions have been bad enough in the enactment of measures inconsistent in themselves, and full of difficulty for those charged with their enforcement; but now it is proposed to leave the drafting of laws to individual initiative and to submit them to popular adoption without any possibility of correction and needed amendment after discussion which is always afforded in the representative system. The puzzles in legislation now presented to courts by this new method of making laws can be

better understood by reading some of the perspiring efforts of the Supreme Court of Oregon. Instead of dispensing with courts, this purer and directer democracy is going to force upon judicial tribunals greater so-called legislative duties than ever. Of course legislatures and the people have always the power to negative the future application of any judicial construction of a constitution, or a law, or any declaration of a common law principle, by amendment or new law.

The practical impossibility of making laws that are universally applicable to every case has thrown upon the courts the duty of supplying the deficiency either by construction of written laws or constructive application of the common law. This discretion of courts is guided and limited by judicial precedents. The precedents form a body of law called judge-made law by those who would attack it; but it is better to have judge-made law than no law at all. Indeed the curative and lubricating effect of this kind of law is what has made our popular governmental machinery work so smoothly and well. I cannot refer at length to the now much mooted question of the power of the courts to refuse to recognize legislative acts which are beyond the permissible discretion of the legislature in construing its own constitutional authority. I can only say that the power has been exercised for one hundred and twenty-five years and unless the courts continue to retain it, individual rights and every interest of all the people will come under the arbitrary discretion of a constantly changing plurality of the electorate to be exercised by varying and inconsistent decisions of successive elections.

But however necessary it is to entrust such discretion to the courts, we must recognize that its existence is made the basis for a general attack, by professed reformers of society, upon our judicial system, and that this attack is finding much sympathy among the people. There are good grounds for criticising our present administration of justice in the lax enforcement of the criminal law and in the high cost and lack of dispatch in civil litigation.

These defects are not all chargeable to the courts themselves, by any means. The lax administration of the criminal law is due

in a marked degree to the prevalence of maudlin sentiment among the people, and the alluring limelight in which the criminal walks if only he can give a little sensational coloring to his mean or sordid offense. Then the state legislatures, responding perhaps to a popular demand, and too often influenced by shallow but for the time being politically influential members of our own profession, devise every means to deprive the court of its power at common law to control the manner of trial and to assist the juries, but not to constrain them, to right conclusions. Codes of procedure of immense volume and exasperating detail keep litigants "pawing in the vestibule of justice" while the chance of doing real justice fades away. Then, too, unnecessary opportunity for appeals and writs of error and new trials is afforded by statute, and the litigant with the longest purse is given a great advantage. More than this, many questions that ought to be settled by administrative tribunals with proper authority have been thrust upon the courts. This has had two effects. It involves the courts in quasi-political and economic controversies that they ought not to be burdened with, and that necessarily expose them to criticism as being prejudiced. Second, it takes up the time of the courts in executive matters and delays dispatch of legitimate judicial work. The creation of the Interstate Commerce Commission, of state public utilities commissions, of boards of conciliation and arbitration in labor controversies, of commissions for fixing compensation for injured workmen, and of other executive agencies for the determination of issues involved in proper governmental regulation and exercise of the police power, are lifting much from the courts. Then our Association and many state associations are zealously and successfully working to induce legislatures and courts by statute and rules to simplify procedure and make it a vehicle of quick justice at little cost.

But the lax administration of the criminal law and the cost and delay of civil litigation are not the special objects of attack by social reformers. Their fire is directed against what they call the legislative power of the courts that I have described. This they contend is now being exercised to defeat measures es-

sential to true social progress by reactionary judges. Let us trace out the reasons for this antagonism and perhaps in them we can find the true solution of the difficulty so far as there is any real substance in their complaint.

In the federal constitution there were embodied two great principles, first, that the government should be a representative popular government, in which every class in society, the members of which have intelligence to know what will benefit them, is given a voice in selecting the representatives who are to carry on the government and in determining its general policy. On the other hand, the same constitution exalts the personal rights and opportunities of the individual and prescribes the judicial machinery for their preservation, against the infringement by the majority of the electorate in whose hands was placed the direction of the executive and legislative branches of the government. The common law rule was followed, by which each individual was given independence in his action, so long as that independence did not infringe the independence of another. This has given the motive for labor; industry, saving and the sharpening of intellect and skill in the production of wealth and its re-use as capital to increase itself. The material expansion of our country, unprecedented in history, would have been utterly impossible without it. When the constitution was adopted, there was not only legal independence of the individual, but actual independence in his method of life, because he could and did produce almost everything that was needed for his comfort in the then standard of living. We have now become a people with an immense urban population, far from the sources of necessary supply, and, therefore, we have become far more dependent on each other that life may go on and be enjoyed. While it is undoubtedly true that the living of the average individual is far more comfortable than it ever was, we have now reached a point in the progress of our material development when we are stopping to take breath and to take more account of those who are behind in the race. We are more sensitive to the inequality of conditions that exist among the people. We are pausing to inquire whether by governmental action, some changes cannot be made in

the legal relations between the social classes and in the amelioration of oppressive conditions affecting those who in the competition between individuals under existing institutions are receiving least advantage from the general material advance. It is essential that our material expansion should continue, in order to meet the demands of the growing population and to increase the general comfort. Were we to take away the selfish motive involved in private property we would halt, stagnate and then retrograde, the average comfort and happiness in society would be diminished, and those who are now in want would be poorer than ever. The trend of those who would improve society by collectivist legislation is toward increasing the functions of government, and one of the great difficulties they have to meet is provision for the rapidly increasing pecuniary burden that this entails. Municipalities and states that have attempted something of this kind are finding that their credit is exhausted and their tax resources are not sufficient. Whatever the changes, therefore, we must maintain, for the sake of society, our institutional system of individual reward, or little of the progress so enthusiastically sought can be attained. It is not alone constitutional restraints that limit thoughtless, unjust and arbitrary popular excesses, but also those of economic laws and the character of human nature, and these latter work with seemingly cruel inevitableness that ought to carry its useful lesson home.

The social reformers contend that the old legal justice consisted chiefly in securing to each individual his rights in property or contracts, but that the new social justice must consider how it can secure for each individual a standard of living and such a share in the values of civilization as shall make possible a full moral life. They say that legal justice is the removal of all those restrictions on the free action of an individual which are not necessary for securing the like freedom on the part of his neighbors, while social justice is the satisfaction of every one's wants so far as they are not outweighed by others' wants. The change advocated by the social reformers is really that the object of law should be social interests and not individual interests. They unjustly assume that individual rights are held inviolate

only in the interest of the individual to whom such rights are selfishly important and not because their preservation benefits the community. On the contrary, personal liberty, including the right of property, is insisted upon because it conduces to the expansion of material resources which are plainly essential to the interests of society and its progress. We must continue to maintain it whether our aim is individualistic or social. As long as human nature is constituted as it is, this will be true. When only altruistic motives actuate men, it may be different.

But we must recognize the strong popular interest in the sociological movement and realize the importance of giving it a practical and successful issue. We are not tied to the defects of the past, or present, and we ought to be anxious to guide the proposed reforms so that we shall secure all the good possible from them without ignoring the inestimable boon of experience we have inherited from centuries of struggle toward better things.

The Supreme Court of the United States has given many evidences of its appreciation of the changes in settled public opinion in respect to the qualification of individual rights by the needs of society. Its definition or rather lack of definition of the police power, and its proposed method of pricking out its limitations in accord with predominant public opinion, is an example. Indeed, many other instances of the infusion of social ideas into the law by construction of remedial statutes and by adjustment of common law principles to cases of social justice could be cited. It is noteworthy that this is most evident in the highest of our courts with judges of greatest experience, ability and learning in fundamental jurisprudence and of statesmanlike constructive faculty. It is through discrimination and farsighted legislators and through great and learned judges that we can safely and surely achieve the social changes and reforms within the practical range of enforceable law. It must be remembered that with men as they are, government and law cannot make every change in society, however desirable it may be. Law which is unenforceable or ineffective is worse than none. There are zones in the field of social relations in which progress can only be made by the

moral uplift of the individual members of society, and in which the use of legal compulsion is worse than futile.

Nevertheless, many who are enthused with the new ideas are prone to look askance upon what they call the individualistic system and are quite willing to do away with the constitutional restraints and the teachings and influence of the common law upon which such a system must rest. Relying upon the willingness of an inflamed majority to possess themselves of advantages over a minority, or the individual, they advocate remedies that tend toward confiscation.

Attempts made to carry out such ideas have, of course, startled the owners of property and capital to measures of defense and leading members of the Bar have ranged themselves in support of these measures. Indeed in the enormous material development, the services of the profession have been invoked and often to protect methods that were indefensible. The profession has suffered from not having that independence of clients, that the English barristers enjoy, in which the relation between the two is temporary and but for a single cause. Such a relation does not produce that widespread, popular impression of complete identity of the professional advocate and adviser with the client, especially the corporate client and all its interests and plans. For these reasons our profession at present is under suspicion of being subsidized by our relation to the property of our clients, and of not being able to discuss without prejudice the betterment of present conditions in society. Those who are advocating these reforms propose, therefore, in the future largely to dispense with lawyers, largely to dispense with constitutional restraints and to place their whole confidence in the direct action of the people, not only in the enactment of laws, not only in their execution and enforcement, but also in the judicial function of determining justice in individual cases. This hostility to our profession, while it is natural and can be explained, is unjust. We are as intelligent, generous, patriotic, self-sacrificing and sympathetic a class as there is in society. We are not opposed to progress, real progress. Moreover, we know how to do things, and in the end no successful legal step forward will be made

without our aid and shaping. We are far from lacking in a desire to improve social conditions. We recognize the inequalities existing between social classes in our communities, and agree to the necessity of new legal conceptions of their duties toward each other. But we have been driven by circumstances into an attitude of opposition. The proposals made for progress have been so radical, so entirely a departure from all the lessons of the past and so dangerous to what we regard as essential in preserving the inestimable social advances we have made since the Christian era, that we have been forced to protest. The result is that at present the militant social reformers and the lawyers are far apart. We don't talk exactly the same language. It is enough to answer our expressed opinions for them to say that we think and talk as lawyers.

What then is it necessary for us to do in this coming crisis; for it is a crisis in the life of courts and administration of justice. Many of the social reformers are oblivious of the lessons to be derived from experience in enforcement and operation of laws upon society. They do not realize the necessity for making the many different rules of law fit a system that shall work. They bring to the repair of a mechanism of interlocking parts, rude and unsuitable instruments. Nothing could more reflect upon their crude conception of judicial procedure than the proposition of a recall of judicial decisions. Social changes are not to be successfully made by a cataclysm, unless present conditions are as oppressive as those which caused the French Revolution. To be valuable they must come slowly and with deliberation. They are to be brought about by discriminating legislation proceeding on practical lines and construed by courts having an attitude of favor to the object in view.

I have spoken little to my purpose if I have not made clear the necessity for broadening much the qualification of the general body of our judiciary to meet the important and responsible requirements that the present crisis in our community has thrust upon them. Their coming duties call for a basic knowledge of general and sociological jurisprudence, an intimate familiarity with the law as a science, and with its history, an ability to

distinguish in it the fundamental from the casual, and constructive talent to enable them to reconcile the practical aspirations of social reformers with the priceless lessons of experience from the history of government and of law in practical operation. How can this be brought about? Only by broadening the knowledge and studies of the members of the legal profession. It is they who make the judges, who contribute to their education, and who help them to just, broad and safe conclusions.

What we lawyers need now is to rouse our profession to speak out. We must be heard in defense of the good there is in our present society and in pointing out the social injury which a retrograde step may involve. But we must also put ourselves more in touch with the present thinking of the people who are being led in foolish paths. We must study sociological jurisprudence. We must be able to understand the attitude of the sociological reformer. We must show our sympathy with every sincere effort to better things. What the people need in respect to this matter is light, and the profession engaged in administering law, and in promoting just judicial conclusions, must contribute their valuable assistance in giving it. In so far as the conditions in society are new, in so far as its needs are different from what they seemed to be at the time of the adoption of the constitution, or as they were recognized under the common law, embodied in a century of our judicial decisions, they should be studied by the profession. We should seek to know exactly what are the conditions that are sought to be remedied. We should be willing to meet them in seeking to remedy every condition that is possible to remedy consistently with the maintenance of those principles that are essential to the pursuit of material progress and the consequent attainment of spiritual progress in society and to permanent popular and peaceful government of law.

The working of the problem presented is not the task of a year. It may require a generation or more. We must prepare our successors, the future American Bar, to meet the demand.

Every law school should require those who are to be admitted to its halls to have a general education furnishing a sufficiently broad foundation upon which to base a thorough legal education.

That general education ought to include a study of economics and a study of sociology and the curriculum of every law school should include a close study of the science of general and sociological jurisprudence as a basis for the study of the various branches of our law; and this raising of law school standards should meet a sympathetic response from Supreme Courts in requirements for admission to the Bar. Then the members of the Bar will come to the discussion of social remedies in courts, in the halls of Congress and in legislatures, and in appeals to the people, properly equipped, and will bring the controversy down to a practical issue and the fight can be fought out on a common ground. The valuable lessons of the past will be given proper weight and real and enduring social progress will be attained. We shall avoid, then, radical and impractical changes in law and government by which we might easily lose what we have gained in the struggle of mankind for better things.