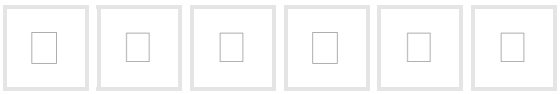
The Bar Exam Is Unfair and Undemocratic

BY ALLEN MENDENHALL 4/15/15 AT 5:53 PM

Passing a bar exam is required to practice law, but some wonder if the tests are unfair to lower-class applicants. MICHAEL COGHLAN



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The bar exam was designed and continues to operate as a mechanism for excluding the lower classes from participation in the legal services market. Elizabeth Olson of *The New York Times* reports that the bar exam as a professional standard "is facing a new round of scrutiny—not just from the test takers but from law school deans and some state legal establishments."

This is a welcome development.

The dean of the University of San Diego School of Law, Stephen C. Ferruolo, complained to the *Times* that the bar exam "is an unpredictable and unacceptable impediment for accessibility to the legal profession." He is right: The bar exam is a barrier to entry, a form of occupational licensure that restricts access to a particular vocation and reduces market competition.

The bar exam tests the ability to take tests, not the ability to practice law. The best way to learn the legal profession is through tried experience and practical training, which, under our current system, are delayed for years, first by the requirement that would-be lawyers graduate from accredited law schools and second by the bar exam and its accompanying exam for professional fitness.

Freedom of contract

The 19th-century libertarian writer Lysander Spooner, himself a lawyer, opposed occupational licensure as a violation of the freedom of contract, arguing that, once memorialized, all agreements between mutually consenting parties "should not be subjects of legislative caprice or discretion."

"Men may exercise at discretion their natural rights to enter into all contracts whatsoever that are in their nature obligatory," he wrote, adding that this principle would prohibit all laws "forbidding men to make contracts by auction

without license."

In more recent decades, economist Milton Friedman disparaged occupational licensure as "another example of governmentally created and supported monopoly on the state level."

For Friedman, occupational licensure was no small matter. "The overthrow of the medieval guild system," he said, "was an indispensable early step in the rise of freedom in the Western world. It was a sign of the triumph of liberal ideas.… In more recent decades, there has been a retrogression, an increasing tendency for particular occupations to be restricted to individuals licensed to practice them by the state."

The bar exam is one of the most notorious examples of this "increasing tendency."

Protecting lawyers from the poor

The burden of the bar exam falls disproportionately on low-income earners and ethnic minorities who lack the ability to pay for law school or to assume heavy debts to earn a law degree. Passing a bar exam requires expensive bar-exam study courses and exam fees, to say nothing of the costly applications and paperwork that must be completed in order to be eligible to sit for the exam.

The average student-loan debt for graduates of many American law schools now exceeds $150,000, while half of all lawyers make less than $62,000 per year, a significant drop since a decade ago.

Recent law school graduates do not have the privilege of reducing this debt after they receive their diploma; they must first spend three to four months studying for a bar exam and then, having taken the exam, must wait another three to four months for their exam results.

More than half a year is lost on spending and waiting rather than earning, or at least earning the salary of a licensed attorney (some graduates work under the direction of lawyers pending the results of their bar exam).

When an individual learns that he or she has passed the bar exam, the congratulations begin with an invitation to pay a licensing fee and, in some states, a fee for a mandatory legal-education course for newly admitted attorneys. These fees must be paid before the individual can begin practicing law.

The exam is working, but for whom?

What's most disturbing about this system is that it works precisely as it was designed to operate. State bar associations and bar exams are products of big-city politics during the Progressive Era. Such exams existed long before the Progressive Era—Delaware's bar exam dates back to 1763—but not until the Progressive Era were they increasingly formalized and institutionalized and backed by the enforcement power of various states.

Threatened by immigrant workers and entrepreneurs who were determined to earn their way out of poverty and obscurity, lawyers with connections to high-level government officials in their states sought to form guilds to prohibit advertising and contingency fees and other creative methods for gaining clients and driving down the costs of legal services.

Establishment lawyers felt the entrepreneurial up-and-comers were demeaning the profession and degrading the reputation of lawyers by transforming the practice of law into a business industry that admitted ethnic minorities and others who lacked rank and class.

Implementing the bar exam allowed these lawyers to keep allegedly unsavory people and practices out of the legal community and to maintain the high costs of fees and services.

Protecting the consumer

In light of this ugly history, the paternalistic response of Erica Moeser to *The New York Times* is particularly disheartening. Moeser is the president of the National Conference of Bar Examiners. She says that the bar exam is "a basic test of fundamentals" that is justified by "protecting the consumer."

But isn't it the consumer above all who is harmed by the high costs of legal services that are a net result of the bar exam and other anticompetitive practices among lawyers? To ask the question is to answer it.

It's also unclear how memorizing often archaic rules to prepare for standardized, high-stakes multiple-choice tests that are administered under stressful conditions will in any way improve one's ability to competently practice law.

The legal community and consumers of legal services would be better served by the apprenticeship model that prevailed long before the rise of the bar exam. Under this model, an aspiring attorney was tutored by experienced lawyers until he or she mastered the basics and demonstrated his or her readiness to represent clients.

The high cost of law school was not a precondition; young people spent their most energetic years doing real work and gaining practical knowledge. Developing attorneys had to establish a good reputation and keep their costs and fees to a minimum to attract clients, gain trust and maintain a living.

The rise in technology and social connectivity in our present era also means that reputation markets have improved since the early 20th century, when consumers would have had a more difficult time learning by word-of-mouth and secondhand reports that one lawyer or group of lawyers consistently failed their clients, or ripped them off.

Today, with services like Amazon, eBay, Uber and Airbnb, consumers are accustomed to evaluating products and service providers online and for wide audiences. Learning about lawyers' professional reputations should be quick and easy, a matter of a simple Internet search.

With no bar exam, the sheer ubiquity and immediacy of reputation markets could weed out the good lawyers from the bad, thereby transferring the mode of social control from the legal cartel to the consumers themselves.

Criticism of the high costs of legal bills has not gone away in recent years, despite the drop in lawyers' salaries and the saturation of the legal market with

too many attorneys. The quickest and easiest step toward reducing legal costs is to eliminate bar exams.

The public would see no marked difference in the quality of legal services if the bar exam were eliminated, because, among other things, the bar exam doesn't teach or test how to deliver those legal services effectively.

It will take more than just the grumbling of anxious, aspiring attorneys to end bar exam hazing rituals. That law school deans are realizing the drawbacks of the bar exam is a step in the right direction.

But it will require protests from outside the legal community—from the consumers of legal services—to effect any meaningful change.

Allen Mendenhall is the author of Literature and Liberty: Essays in Libertarian Literary Criticism *(Rowman & Littlefield/Lexington Books, 2014). This article first appeared on the Foundation for Economic Education site.*

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Wow, is this article full of tortured logic. The bar exam is (a) the cause of high student debt and (b) the cause of high cost of legal fees? A law graduate is going to pay off or even make an appreciable dent in the $150k average LAW SCHOOL student debt (not accounting for individual undergrad debts) in the first three months after graduation? When 50% of graduates WILL NEVER PRACTICE A DAY OF LAW IN THEIR LIFE? Consumers can judge the competency of lawyers because Uber? No, really, we're experts. Experts, frankly, need to be judged by experts. Most of my clients have no idea what I do.

You did point out one thing: The law is filled with all sorts of barriers and costs that lock out the poor from participating, either as lawyers or as clients. Guess where that cost starts? Law School.

Let me sum it up in Internet speak for you: Go home. You're drunk.

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