

UCLA

National Black Law Journal

Title

Panel Number Three: "Search for Solutions"

Permalink

<https://escholarship.org/uc/item/1501665q>

Journal

National Black Law Journal, 5(1)

Authors

McGee Jr., Henry W.
Carr, Glenn
Carr, Glenn
et al.

Publication Date

1977

Copyright Information

Copyright 1977 by the author(s). All rights reserved unless otherwise indicated. Contact the author(s) for any necessary permissions. Learn more at <https://escholarship.org/terms>

Peer reviewed

PANEL NUMBER THREE

“SEARCH FOR SOLUTIONS”

Moderator—Henry W. McGee, Jr.,
Professor of Law, University of California at Los Angeles

McGee: The title of this panel discussion is Search for Solutions. This should be the most stimulating part of the conference. I think many people are aware of what some of the problems are, but they are looking for some leadership and many of the people on the panel today have supplied that leadership or have made substantial contributions to whatever solutions have been forged already. The first speaker will be Glenn Carr, who is the Director of the Reginald Heber Smith Fellowship Program. The other panel members are David K. Robinson, Vice-Chairman, Committee of Judicial Evaluation, Los Angeles County Bar Association; Peter J. Liacouras, Dean, Temple University Law School; Richard S. Barrett, Director, Laboratory of Psychological Studies, Stevens Institute of Technology; and Craig Polite, Professor of Psychology, New York University at Stonybrook. We will then be talking with Linda Greene of the N.A.A.C.P. Legal Defense and Education Fund; Morris Ballerd of the Mexican American Legal Defense and Education Fund; and Lennox S. Hinds of the National Conference of Black Lawyers. Mr. Carr, will you begin our discussion?

Glenn Carr: I am very pleased to be here. I was struck with mixed emotions when I was asked to speak on the diploma privilege. First of all, I was pleased because it is an easy subject to discuss and probably that's because there is so little subject matter on the area. But I am a little disappointed because I had hoped to have the opportunity to discuss the other issues relating to the bar examinations which hopefully I will get a chance to do when the question and answer period begins. I was first pleased because it was easy, but when I got the preliminary agenda and saw that it was to be discussed within the context of a "search for solutions" I was a little bit stunned because I was reminded of the inmates of a concentration camp who were called together and advised by the commandant that because of the Geneva Convention ruling there would be a change of underwear for everyone. Everyone was pleased until the commandant said, "You will change with you and you will change with you." In other words, obviously everything that looks like a solution may not be a solution at all. Let me say one more thing. Before I get into the other prepared comments, I sincerely hope I don't say anything that offends anyone who has been on the panel before me and anyone who is on the panel now. I certainly don't want to impugn anyone's honesty or integrity, but I think my position may differ in some respects with some of the comments you heard earlier.

As I have said, I am the Director of what is known as the "Reggie" Program at Howard University School of Law. Some of you may know that the "Reggie" Program has employed more minority lawyers than any employer in the country possibly with the exception of the United States Government. We have employed over 600 minority group lawyers over the past six years. Approximately 67 percent have been purportedly unsuccessful on bar examinations. At the same time, the percentage of our white fellows who have been successful has been approximately double that of our minority groups. For example, last year we hired 135 Smith Fellows, 85 of whom were members of minority groups. Twenty-five passed the bar in the state of their assignment on their first attempt. Coincidentally, during that same period last year, of some 60 Howard Law School graduates who took the District of Columbia bar only 6 passed. Therefore, my experience with bar exams has been rather extensive and rather devastating as it relates to the people with whom I relate.

My subject, as I indicated earlier, is the diploma privilege. I was not fortunate enough to go to school in a state that has a diploma privilege, although I was born in one. Therefore, I was forced to take the bar exam in the state of Wisconsin which is one of the three states that has the privilege. The diploma privilege as it is presently implemented may provide an apparent solution for a limited number of persons. The privilege is predicated on a very sound theory that every person who graduates from a law school in a particular state is qualified to practice law in that state. That is the same theory for which some people feel that the bar exam should be eliminated. Now remember that the privilege only extends to graduates from certain designated law schools within that state. In other words, if you graduate from one of the law schools qualified under statute, you are not required to take the bar exam. All others are required to take the bar exam.

Now I have said that there are three states that have the privilege: they are Wisconsin, West Virginia, and surprisingly to me Mississippi. The latter two states grant the privilege to graduates of only one school. In the state of Wisconsin the privilege extends to a Wisconsin law school "approved by the A.B.A.," and there are two of those in the state, the University of Wisconsin and Marquette Law School. Wisconsin allows admission on diploma if the candidate is a resident of the state, a citizen of the United States, of good moral character, and if he/she has completed at least 84 semester hours, 30 of which must be in certain specified areas. It is interesting to note that Wisconsin does not specify that a certain number of hours be completed at the law school. Both West Virginia and Mississippi have residency requirements, but they don't require specific courses. To the best of my knowledge none of the three jurisdictions in question require that a specific number of credit hours be earned, and therefore, the feasibility of transfers to a law school in a diploma privilege state could be of importance to those of you who could conceivably take advantage of the privilege.

It is very important to note the generally restrictive nature of bar admission obtained by diploma privilege. However, generally reciprocity is granted only to other individuals who have been admitted to the bar in jurisdictions where the rule for admission is similar or the same as the rules for

the state where you are seeking to go. Therefore, a jurisdiction not itself a diploma privilege jurisdiction would not admit diploma privilege admittee absent satisfaction of one or more of the receiving state's requirements such as the bar examination or practice over a specific number of years. By that I mean if you are admitted by a state on diploma privilege in the state of Wisconsin and you apply to the District of Columbia for admission which enables people who are members of other bars to be admitted on motion, you would not be eligible in the District of Columbia because the District of Columbia, as most other jurisdictions, requires that you be admitted in that first state in the same manner as the D.C. bar is accomplished. In other words, you have to be admitted by examination. Therefore, if you are admitted in a diploma jurisdiction you are pretty much tied to that jurisdiction for at least five years, generally. The same is true, I might add, in terms of reciprocity from one diploma jurisdiction to another. You could not get admitted in the state of Wisconsin and transfer to the state of Mississippi, and vice versa, without having first satisfied the five-years-of-practice rule or whatever period of time is in that particular state.

Many of you experienced the effect of rather peculiar admissions policies at your respective law schools. Obviously, these policies generally implemented by an admissions committee or some other quasi-official body have been established and applied in ways that have adverse effects on the interests of many minority candidates. For the most part this is true of the candidates who applied for admission and were denied. I am sure that won't include anyone in this room, but many believe that the rapid decline in meaningful affirmative action and minority programs is a prelude to even more stringent and discriminatory admissions policies. Needless to say, law schools in diploma privilege states now exercise and have exercised for some time admissions policies that are predicated on the apparently sound position that admission into those states is tantamount to giving one a license to practice law and therefore should be done with the greatest amount of scrutiny available. What I am saying is that it is probably more difficult to get into a law school in a state where graduation means that you would obtain a license to practice. Likewise, you can assess the prospects of a minority student transferring from a law school that does not have the diploma privilege into one that does, to complete his last year in law school.

In conclusion, it can be definitely stated that the diploma privilege is not a viable solution to the bar examination problem at this time. As the minority students slip through into the practice of law, diploma privilege states have begun to reconsider the practice. This is especially true in the state of Mississippi where a number of Black students were admitted to law school and licensed upon graduation. In their view, too many minority students have turned out to be chameleons after graduating rather than the slow plodding conservative lizards that they were when they admitted them. So obviously it has become evident now to some people in the state of Mississippi that a bar exam may be the lesser of two evils. The numbers of minority students that have been admitted by the diploma privilege in the states of Mississippi and West Virginia began to rise in the late sixties and raise to the peak in 1972 when 12 were admitted. It started to diminish to

approximately to half that number in 1975. To the surprise of many the bulk of these students were in the state of Mississippi. West Virginia has had very few minority students and even fewer graduates. The two Wisconsin law schools had a peak graduation of approximately fourteen minority students in 1973.

It is clear that the diploma privilege is not a solution to the bar examination problem, as I have said. It is only a partial answer for those who can successfully run the admissions gauntlet, who are residents of that state, who attend law school in that state, and intend to practice in that state for at least five years. For anyone else it is not a viable alternative and the country and other jurisdictions do not appear to be going in that direction. The problems of the bar exams must therefore be met head on and cannot be circumvented. Ideally they should be eliminated. In the alternative they should at least be a reasonable reflection of the law school experience without a trace of sociological or psychological bias in design or evaluation. The former solution seems improbable and the latter, in our present racial climate, inconceivable. I hope that I am mistaken.

McGee: Thank you Mr. Carr. Our next speaker will be David K. Robinson of the Los Angeles County Bar Association. Mr. Robinson.

Robinson: Thank you. The reason I have been asked to appear here is because I was on the state bar commission to study the charges of discrimination, racial discrimination, insofar as minorities were concerned. I think to understand the findings of our commission you need to know a little bit about the history of the commission and what we did. I might say at the onset that our commission has been dissolved, so I am not speaking in any official capacity. I am just speaking as a lawyer and I have certain opinions, and I will briefly review what our commission did. I am sort of a substitute for someone who could not be here—Charles Jones. Charles, a Black lawyer, was on the commission. He was head of the legal aid organization in Los Angeles County. A few months ago he was taken back to Washington by the National Corporation on Legal Services.

First of all by way of history, the Espinosa case was filed in early 1972 and was decided in favor of the bar examination in that year. The Board of Governors of the State Bar, however, because of the allegations that were made with regard to the charges, appointed a special commission of fifteen people. Actually we were to study whether or not the bar exam was culturally biased. There was no charge in the Espinosa suit or in the task given our commission with regard to any discrimination. It was just that minorities had not been passing the bar examination on the same percentages as the non-minorities, and therefore isn't there something wrong with the bar examination, and therefore isn't it culturally biased?

The Commission was made up of a broad group of lawyers. There were two Blacks on it, two Chicano lawyers, so that there were four minority people on the commission. We had one woman lawyer, we had a law school professor from U.C.L.A., Mr. Maxwell, and three judges—one of whom is now on the Supreme Court of California. We had a lawyer in charge of legal aid, a public interest lawyer, and nine lawyers in private practice. They came from all parts of the state.

Now I think it is important for us to remember that California has the lowest educational requirement of any state in the United States. You not only don't have to take any certain courses, you don't even have to go to law school. You can take a correspondence course or study in a lawyer's office. So the problem we have in California is very unique, and it is different than it is in Pennsylvania or Wisconsin.

As I think Ken McCloskey told you this morning, we now have 58 law schools in California of which less than half are accredited. Until this year when the California Supreme Court adopted some rules with regard to unaccredited law schools so that the state bar would have some control, there were no controls over the unaccredited law schools. All that was needed was \$50,000 to set one up and that was basically it. There were no requirements as to who taught, the library, or anything. So we have had unaccredited law schools in California for years and they are powerful politically. The idea of attempting to eliminate them in California, which the State Bar tried to get the legislature to do, met with total failure. So unaccredited law schools are a factor that we have to recognize here and that goes to the question that Mr. Carr mentioned: Are you going to have diploma privilege from every California law school? I want you to think a little bit about that.

Now, our commission established a definition of cultural bias and that was "any bias produced by a person being a minority of a racial or ethnic group, but not one solely produced by a person's socio-economic status." It is true, as Mr. Hinds pointed out, that our task was much broader. It included the matter of cultural bias in law school as well as in the bar examination. It also included whether the bar exam is relevant to the practice of law. Because of a limitation of funds and a limitation of time, we could not do all those things. So we limited ourselves—we did not attempt to determine whether the bar is job related. Also, I might say that I know of no text at all on that subject and it has been previously pointed out that the bar exam does test whether you have certain legal skills, knowledge of the law, and the ability to analyze, although it does not test many of the things that are absolutely essential to being a good lawyer. We just didn't know how to do it. Hopefully some of these days somebody will come up with the answer to that.

Now we investigated the preparation, administration, and grading of the bar examination. As a result of that work, we were convinced that there was no deliberate discrimination. No evidence was presented on that score at all. So California differed a little bit in this regard than Pennsylvania: I believe Pennsylvania did have evidence of discrimination on a racial basis. We interviewed experts on testing. We also interviewed people who were connected with the plaintiffs in the Espinosa case. A suggestion was made by one of the attorneys who was involved in representing the plaintiffs in the Espinosa case, Stan Levy, who was with the Beverly Hills Law Foundation, that we employ Steven Klein then with the Institute for the Study of Evaluation here at U.C.L.A. So that research could be done on the task we had ahead of us, we followed that suggestion and I must say that he did an excellent job.

Bear in mind that we had no information at all on minorities because the State Bar keeps no records with regards to a persons race. So we went to the law schools and asked them to tell us from their records what their records and statistics were on their minorities in addition to their record on the bar exam on the last four years. Then, we put together statistics received from the law schools from 1970 through 1973 from both accredited schools and unaccredited schools. The results showed that there was a substantial increase in the number, not percentage, of minority lawyers admitted to practice over these years in California. For instance, in 1970-this is only from California schools-there were only 27 minority lawyers admitted; in 1973 there were 86; and in 1974 ten law schools of the 58 had 110 lawyers. Therefore, the minority program which Dean Warren told you about this morning was successful.

Now, it is also true that even though the number of minority lawyers was going up the percentage of minority candidates passing was going down. We had many more candidates. Not only were they not passing at the same rate as non-minority candidates, their percentage was going down until 1973 and then it started to go up remarkably. From the ten schools from which we had information the rate was 46.4 passed-that was a substantial improvement. Bear in mind that the overall pass rate varies between 50 and 55 percent, so the minority situation is improving. Statistics show today that minority students are much better prepared than they were in the early days, so they are going to have a much better chance of passing the bar examination. Minority candidates at U.C.L.A. are passing at a very good rate.

We didn't have any data to do our research so a questionnaire was devised and permission received to send it to every person who took the July 1973 bar examination. We wanted to determine what the race of each candidate was, certain opinions with regard to the bar examination, and certain information about their background. The questionnaire was sent out before the results came in, but after the examination. We got a return of 70 percent which was remarkable. All questionnaires were held on a confidential basis and were not opened until the bar results were in.

Of the things we asked them on the questionnaire, in addition to their race, we wanted to know the educational background of their parents. We wanted to know how they viewed the essay questions versus the multi-state bar exam questions. How was their attitude toward the bar examination? Did they think it was fair or not think it was fair? We were going to analyze the questions overall and then by race and background to see if there was a distinction between minorities and non-minorities. We asked if they took a bar review course and if it was an intensive course or one of these hurry-up ones. Did the candidate have to work while he was studying for the bar exam? We thought that might have an effect on his ability to be successful on the bar exam.

Once we had the information to our questions and we knew whether the person was a minority or not, we went to the exams and looked at various questions. We wanted to find out if the minorities did worse on certain questions than the non-minorities. We then made some studies—Dr. Klein did—to find out if there was any cultural bias on those questions. We

wanted to find out if there was any discrimination in the grading process or not; therefore, we inserted certain graders in the July, 1974, examination who were minority graders. There were Chicano and Black graders who read the actual papers to see if there was any difference in the way they were graded. Uniformly, regardless of the racial characteristic of the grader, they would grade the best papers the highest and the poor papers the lowest. There wasn't any distinction in how they graded a minority paper or a non-minority paper. There was a distinction, however, in the overall grades that they gave. Now that would have a little bit of an effect because if you have higher grades you are going to have more people getting that 70 mark which is the thing you have to have to pass. So that was one of the recommendations that we had. We also had this business about whether people had enough time to answer the questions.

I would like to read the Commission's findings and conclusions. I am going to read the exact wording because I must say, with all due respect to Mr. Hinds, I think the conclusions he referred to I don't find: The report reads:

"First, the Commission found that there was no practically significant cultural bias as it had previously been defined in either the essay portion or the multi-state portion of the California State Bar Examination of July 1973 or in the examination as a whole. In light of this finding, the Commission recommends that the Committee of Bar Examiners create a permanent subcommittee to receive complaints of bias, monitor the performance of minority candidates, and recommend corrective action where needed."

So far as I know that recommendation has not been carried out, although Mr. McCloskey may have some more recent information. To get the statistics bear in mind that you have to send out a questionnaire because the bar exam application doesn't show race. I think that if they had kept those statistics there would have been a showing of substantial improvement in minority performance in the last two or three years in California.

"Second, the Commission found that there was no evidence of statistically or practically significant cultural bias in the grading of the essay portion of the July 1974 bar examination. Thus the racial characteristics of the graders should not matter in determining how various ethnic groups perform on the bar examination. However, the work of the Commission uncovered a general lack of confidence in the bar examination among minority candidates that came from the questionnaire. More of the minorities said that they thought the bar was unfair: more of them said that they didn't have a chance to pass. One way to increase confidence in the bar examination would be to increase the number of graders who are members of minority groups. The Commission is aware of the Committee of Bar Examiners effort to increase the number of graders who are minority and the Commission encourages the continuation of this effort."

In other words, the Committee of Bar Examiners had realized this problem and I believe it has speeded up its efforts. I believe they have graders from Los Angeles and San Francisco; graders used to be from San Francisco only.

"Third, the Commission found that on the July 1973 exam a much greater percentage of the Anglo candidates chose to answer the optional questions than the minority candidates on that examination. However, the Commission is committed to abolishing optional questions in 1975

so that that factor will be out. We recommend that they continue study on that."

"Fourth, the Commission found that minority candidates that took the July 1973 bar exam came from a background characterized by a lower socio-economic status than anglo candidates and that minorities were more likely to have worked in the month preceding the examination. Both findings are indicative of a need for financial assistance to made to minority candidates while they are studying for the bar. Thus, the Commission urges the Board of Governors to adopt a program to offer financial assistance to needy candidates while they are studying for the bar examination."

The Board of Governors has taken that step to provide financial assistance and they have instructed their legislative representative to support in every way possible the Mead Bill, which will provide funds for that purpose. Ninety percent of the anglos that took the exam took bar review courses, and they took the long ones. I think the minority percentage was about 70 percent. That puts minorities at a disadvantage, and the reason for that is primarily economic. They needed to work and couldn't spend necessary time to study. Therefore, the Commission made the recommendation to handle the problem.

"Fifth, the Commission found also that minority candidates and a substantial portion of the anglo candidates felt under extreme time pressures in taking the essay portion of the July 1973 exam. The Commission thus recommends considering increasing the feasibility of increasing the amount of time the candidates are given to answer those questions."

Our expert, Dr. Klein, said that even though you give more time the ones that get the best marks will still get the best marks, and the ones who get the poor marks will still get those. But what the increase will do is that it will tend to raise the scores overall which one again gets people over the 70 mark. The Committee of Bar Examiners did not recommend change be made in that respect.

"Finally, during the course of its existence the Commission heard one additional complaint about the bar examination process which it feels has merit. That complaint relates to the inability of a successful candidate to determine why he or she received a certain grade on a certain question. The Commission thus recommends that the Committee of Bar Examiners study the feasibility of providing each unsuccessful candidate with some type of model answer or outline of the issues of each essay question."

I understand that the Committee of Bar Examiners had done some things along this line; I am not sure they have gone so far as to provide the model answers. They are making exam papers available. I believe that there is something the student can get from that, but our commission thought that a student who would take it again had a right to know what he did wrong.

McGee: Thank you Mr. Robinson. We will now hear from Dr. Barrett.

Barrett: I deeply appreciate the opportunity to talk to you today about bar examinations in general and the California Bar Examination and in particular, I speak from the point of view of someone who believes in tests, who has developed and used tests, and who hopes to contribute to the valid and socially useful applications of tests. I also speak from the point of view of

one who has seen tests that were poorly conceived, inappropriately used, and unfair to many talented Blacks.

My test for the day is the *Final Report to the Board of Governors of the State Bar of California*. The report indicates that the Board of Governors of the State Bar of California made a sensible charge to the Commission to Study the Bar Examination Process. I quote the Commission's report of August, 1975:

The Commission, in considering its charge was faced with two special problems which they describe in these terms:

- (1) the extent to which it would be possible to determine the effectiveness of a person after he or she had passed the Bar, and
- (2) the extent to which the Commission would be able to determine the existence of a "cultural bias" in legal education which would hinder a person's work in law school.

These statements are reasonably sensible descriptions of some of the issues raised by the charge of the Board of Governors. The Commission then ignored the charge, ignored its own statement of the problem, and conducted a study unrelated to the issue which concerned the Board of Governors. Here is how they described their thinking:

As to the first of these problems, 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.

Let's stop right here for a moment and contemplate the meaning of that statement. The Commission is saying that the means do not exist for determining which attorneys are performing adequately, and which are performing inadequately and should not be practicing. But, the very purpose of the examination is to protect the public by denying the right to practice to those would-be attorneys who are so ill informed regarding the law that their clients will suffer because of their ignorance.

This is an example of general principle that lies behind all licensing of professionals. The reasoning runs like this. The layman is not in a position to judge the quality of professional service, because the knowledge and experience required to evaluate performance in the professions are so complex that only the fellow members of the profession have the necessary background. Thus, it is the duty of the profession to protect the public by keeping the poorly trained aspirants from practicing. It is not the purpose of licensing or certification to inform the public which practitioners are better than the others, and rightly so. All the bar examination is supposed to do is to eliminate those who are inadequately prepared from practice.

A bar examination made sense back in the days when the budding lawyer read law and clerked with senior lawyers, who might be tempted to permit their unqualified apprentices to practice. This use of the bar examination is by now an anachronism, since virtually all lawyers take formal training in law school. The Bar is saying, even to the law schools it has accredited, "You are not doing an adequate job of preparing our students. You may know them for two or three years, work with them, read their papers, discuss the law with them, and examine them endlessly. But you cannot be trusted to award degrees only to those who have received ade-

quate preparation. So we impose our three day examination on your judgment." I cannot understand why the law schools stand for it.

I particularly do not understand why the law schools stand for the examination when, in the sample studied, almost half, 45.4% of those taking a given examination failed it. Either something is wrong with the examination or something is wrong with the law schools. Or perhaps there is something wrong with the system. If, as has been alleged, the purpose of the bar examination is to restrict the number of lawyers with the consequence of long hours of work but high income for lawyers, then the public interest is not being served. If, as an accidental or purposeful outgrowth of the system, the number of qualified black lawyers is unduly restricted, then the procedure is blatantly illegal.

Let's get back to the Commission's statement that "it was practically impossible to arrive at an acceptable measure of one's effectiveness as an attorney." If this statement is indeed the case, why is there a bar examination in the first place? If a person can't tell good beer from bad, why should he pay a premium for imported beer? If the Bar cannot tell good lawyers from bad, why screen them at all? Since the purpose of the examination is to protect the public from lawyers who will perform poorly because they do not know enough law, and the Bar cannot tell who is performing poorly there is no legitimate purpose being served by the examination.

The counter argument might be made that the Bar Examination is so effective that all the inadequately trained law school graduates are eliminated. No test is that good. If physicians cannot tell with certainty whether a person on the brink of death is dead or alive, the bar examination cannot tell with certainty who does not know enough law to practice effectively. If in fact the bar examination does eliminate all the inadequately prepared law school graduates, it can do so only by setting standards so inordinately high that many truly qualified lawyers are eliminated. It is as if the physicians established that the standard that proof of a person's being alive is that he can do ten push ups. There are no dead people who can do ten push ups, but a lot of living people, including me, would be prematurely buried if that standard were used in the signing of death certificates.

Now back to the Commission's report. Once they agreed among themselves that they did not know an effective lawyer from an ineffective one, they ignored the charge of the Board of Governors and researched a different question. Here is what they say:

Thus rather than attempt to measure bar performance against one's subsequent performance as an attorney, the Commission instead included in its proposal a study which would measure bar performance against three known predictors of that performance, Law School Admission Test (LSAT) score, under-graduate grade point average (UGPA) and law school grade point average (LGPA).

Instead of ascertaining whether the examination has any thing to do with performance as a lawyer, the Commission decided to attack a much easier problem, that of determining the relationships grade point average in law school and the bar examination. However, since the bar examination can only be justified if it somehow provides a screen that is better than Grade Point Average, what is the earthly use of comparing the two

measures? The circularity of the reasoning would be funny if it were not so sad.

The rationale for this extraordinary research design is elaborated in the next paragraph which says, in part:

The Commission then solved its second problem by deciding not to study bias in law school performance (Sic) directly, since it believed that the task would be too great in cost and too large in scope for the results that it could reasonably expect to receive. Rather it decided, as noted in the previous paragraph, to use performance in law school as a measure against which Bar performance would be correlated, in determining whether there was cultural bias in the Bar Examination.

This plan is a brilliant illustration of a principle laid down by Darrell Huff in *How to Lie with Statistics*. "If you can't prove what you want to prove, demonstrate something else and pretend that they are the same thing." p. 74. The plain fact is that the Commission ignored the charge that was given to it by the Board of Governors and they undertook an unrelated study dealing with different issues. Protecting the public from ill trained lawyers, and showing some relationship between school grades and the bar examination scores are not the same thing, no matter how hard the Commission pretends that they are.

I shall not dignify the report of the Commission's expert, nor will I waste your time and mine, by examining the report in detail. It finds that, although of the research sample studied, 54.6% passed the examination but only 21.7% of the Blacks passed, there is no bias in the procedure.

Instead of the empty exercise of discussing the inadequacies of a report based on a study which systematically examined the wrong questions, I shall now give you some background, based on the *Standards for Educational and Psychological Tests* of the American Psychological Association. Clearly, the bar examination must be justified under the procedure known as content validity. The *Standards* say of Content Validity:

Evidence of content validity is required when the test user wishes to estimate how an individual performs in the universe of situations the test is intended to represent. Content validity is most commonly evaluated for tests of skill or knowledge . . .

To demonstrate the content validity of a set of test scores, one must show that the behaviors demonstrated in testing constitute a representative sample of behaviors to be exhibited in a desired performance domain. Definition of the performance domain, the user's objectives, and the method of sampling are critical to claims of content validity. An investigation of content validity requires that the test developer or test user specify his objectives and carefully define the performance domain in light of those objectives.

I think that this definition of the nature and purposes of a content valid test is clear and to the point, but I must make one explanatory comment. Content validity is often used to determine whether a test of educational achievement is a good test. Thus, one application of content validity is to determine whether a standardized test of American History is in fact a good test of what was taught in American History courses. But academic achievement is not the issue here; academic achievement is attested to by the law schools that give grades, and flunk out of the poor performers. Con-

tent Validity applies to the bar examination with reference to the potential performance of the examinees as lawyers, not their past performance as students.

The statement of the *Standards* clearly requires that "the test developer or user specify his objectives." I have never seen a clear specification of the aims of a bar examination, so I will present what I believe to be the legitimate goal of the examination:

It is the purpose of the bar examination to eliminate from the legal profession those persons who would practice law, but who have an inadequate grasp of the law that they want to practice.

The test must minimize two costs to society. The first is the admission to the bar of lawyers who are so poorly prepared that they will provide inadequate service to their clients because of the lack of preparation. The second is the denial of admission to the bar to those who are adequately prepared.

The problem of minimizing costs is a complex one, particularly if the cost of eliminating qualified candidates is borne most heavily by blacks or other minorities, including the black law student and his potential black client. This issue is central to the whole question of the bar examination, but so far as I know, no one has even conducted a systematic study which shows that clients get bad service because of their lawyers' ignorance of the body of the law.

I shall now describe one of the basic principles set forth in the *Standards* governing the validation of a test by content validity. It says:

E12. If test performance is to be interpreted as a representative sample of performance in a universe of situations, the test manual should give a clear definition of the universe represented and describe the procedures followed in the sampling from it. Essential

E12A. When a test is represented as having content validity for a job or class of jobs, the evidence of validity should include a complete description of job duties, including relative frequency, importance, and skill level of such duties. Essential

The first step in developing a content valid bar examination is to study systematically the work done by lawyers. This description should tell what they do, how they do it, and the frequency and importance of various parts of the job. Because there are so many lawyers and they do so many different things, it is necessary to collect information from a large and representative sample. So far as I know, no bar examination is based on such a description of the work of lawyers.

There are many principles in the *Standards* that relate to the bar examination, but I shall cite only one more, which says:

If specific cutting scores are to be used as a basis for decisions, a test user should have a rationale, justification, or explanation of the cutting scores adopted. Essential

The arbitrary use of 70% as a passing score is utterly indefensible. I could easily write a test of the law that an average 12 year old could pass, with items such as, "It is illegal to ride on the New Jersey Turnpike at 110 miles per hour on a rainy night with no headlights." Or, with a little help, I could write one that the Supreme Court would fail en masse, with item such as "Quote verbatim, Revised Statutes, 123S Section 802 and trace

the history, judicial decisions, and social consequences of the section with special regard to the military career of Richard S. Barrett.”

I have recently submitted an article on content validity to one of the professional journals, in which I set forth eleven principles which I think should underlie the claim of content validity. I do not have the time here to discuss them all, but a few are so directly relevant that I shall quote them and elaborate briefly.

1. Journeymen, except for those clearly not meeting present performance standards pass the test.

If the bar examination truly reflects what lawyers must know in order to practice, it follows as the night follows the day that practicing attorneys must know it. It is true that lawyers specialize after passing the bar examination. Generally they learn things that were not taught in school, and which the new graduate should not be expected to know, and they probably forget things that they once knew that are essential to the practice of some other form of law. Nevertheless, the principle can be applied. Examinees should not be required to expound on trivial points which in real life they would look up, or learn from consultation with their colleagues.

I expect that the adoption of this principle would send a chill through the hearts of many successful lawyers. It implies that lawyers should be recertified throughout their careers. Why not?

2. Convincing efforts must be made to reduce or eliminate bias against minorities and women.

This point is obvious. It is equally obvious that the Commission's study does not establish the freedom from bias of California Bar Examination.

3. The test must meet reasonable psychometric standards.

I will not dwell on the intricacies of the psychometrist's craft, except to mention one point. The grading of essay examinations notoriously unreliable. Graders grading the same answers often disagree dramatically. Furthermore, the examinees could easily give varying answers to the same questions depending on their thoughts of the moment. Also, the attempts to write similar, but not identical questions for successive examinations probably yield questions that differ more widely than the examiners realize. The state of the art has not progressed to the point where we can say with confidence that the bar examination is sufficiently consistent to meet minimum statistical standards.

To revise the bar examination so that it serves its purpose of eliminating the unqualified will take time, and even worse, will require the rethinking of old and established truths. It will also require a change in the lives of people who have pictured themselves as Horatio at the bridge defending the profession from on-rushing hordes of unprepared lawyers. But the examination must be revised; it is indefensible in its present form, and the law, the social climate and the test builder's art have all developed over the years without having the appropriate impact on the examination.

Revision of the bar examination will cost money, lots of money, because it will be necessary to do a systematic survey of what lawyers do, what kinds of things lawyers do wrong, and of those that they do wrong, which

ones are detectable in advance by the examination. It then will be expensive to devise, produce, evaluate, use, validate and update a new procedure. There will have to be hard decisions based on a cost benefit model which balances off the cost of poorly trained lawyers against the cost of failing potentially competent lawyers who have invested many years and thousands of dollars, and who have a deep personal commitment only to be denied fulfilment of their ambitions by an anachronistic test.

But the law is an affluent profession, and it owes itself and the public a better entrance requirement than it has now.

McGee: Thank you Dr. Barrett. And now Dr. Craig Polite.

Polite: Reading the report of the Commission to study the Bar Examination Process and the study by Dr. Klein that provided its quantitative bases left me in a state of extreme agitation. Indeed, it did violence to my psychometric soul to see such wanton inadequacy posited as a scientific investigation of test bias. Now that Dr. Barrett has established that the Commission never addressed itself to the issue of test bias, I need not go into my long-winded, point by point criticism of the study that provided the bases of the Commission report. I, too, find it unthinkable that a group can study bias in a test without ever having defined that criterion (adequacy of attorney functioning) that the test is to predict.

Instead, I would like to speak to an issue that was broached, however inadequately, by Dr. Klein in his efforts to research factors related to the bar examination performance.

Sub-study 7 of the Klein report addressed a pivotal issue in the problem of test bias and the bar examination. The question that it asked, and ostensibly answered, was does the ethnicity of a grader influence the score that the grader assigns to an essay answer on the bar examination? Indeed, it has been argued, by those who maintain that the bar is biased, that since the majority of the examiners are Anglo that "anything in an answer that might slow the grading process, such as unfamiliar writing or linguistic style, might thereby lead to unjustly penalizing the candidate who wrote the answer" (Klein, 1975, p. 21). Therefore many people assert, if more non-Anglo graders were employed in the grading process the possibility for this form of bias would be attenuated.

The author conducted a reasonable experiment to test the effects of grader's ethnic group on the quality or grading of the essay exams. In the study, three Anglo, three Black, and two Chicano attorneys served as graders. The selection of these individuals as graders was because these people had recently passed the bar and generally were representative of the kinds of people normally selected by the state bar commission for grading the essay portion of the bar. Typed copies of the answers to questions 1 and 2 were forwarded to the graders along with the "model answers" that were exactly the same as these used by regular bar examiners. No identifying information of any sort was given to the graders and they were only told that this was a study of grading practices, not that they would be scoring answers written by Anglo, Black, and Chicano candidates. The purpose of this procedure was to replicate the procedures that would have been em-

ployed had the graders in the study actually been a part of the normal cadre of graders employed by the bar commission.

After the exams were graded and the data analyzed, it was found that for all intents and purposes there was little difference in the grading as a function of the race or the grader. In fact, it was noted that all four kinds of graders agreed that Anglos generally wrote better answers to both questions 1 and 2 than did minority candidates. The author, then, goes on to note, "This finding is consistent with the overall higher scores received by the Anglo candidates on the bar examination. Further, the absolute magnitude of the differences between Anglo and minority candidates (approximately six points per question) is very consistent with the size of the difference in their overall essay scores" (Klein, 1975, p. 27).

This study appears, on its face, to be a very viable procedure for examining the effects of ethnicity on grading practices. However, there is a methodological problem that makes the entire study and its results null and void. Simply put, the problem is that all graders employed knew that they were involved in a study and specifically in a study on grading practices. This fact of knowledge, on the part of the graders, creates a demand characteristic that tends to alter the normal pattern of responding to essay questions (Crano, 1973). The specific demand inherent in this procedure is that the graders be "extra fair" because they are involved in a study. This alteration in response, that is, being possibly "extra fair" because of their involvement in a study, and not just being their normal "fair" is well documented in the research literature. It is called the "Hawthorne Effect," and I'm sure that many of you remember this from your under-graduate research days. It can, therefore, be safely concluded that this study does not represent a test of the effects of ethnicity on grading practices. What we have here is a dynamic non-test.

While the aforementioned study does not really address the problem of differences in linguistic style, the problem remains a subtle but, I think, significant issue in minority performance on essay examination. That minorities have a distinct linguistic style is a fact that is perhaps more obvious to the ear when heard than to the eye when written. It is my contention that minorities have a writing style that is sufficiently unique from that of the majority Anglo population so as to be recognized as different and improper thereby resulting in inappropriately lowered scores when presented in an examination.

The position I take here is similar to that presented in expert testimony in the case of Tyler vs. Vickery (1975). Dr. J.L. Dillard, a linguist and author, maintained that many Black persons tend to speak an English variant, characterized by structures such as the pre-verbal use of "been" which has been coined *Black English*.^{*} It is a well documented psychological fact that when under stress people tend to revert to old (original) patterns of reacting. Under the stress of the bar examination it is safe to conclude that there is a tendency to revert to original language patterns.

Dr. Dillard further indicated that the incidence of dialect was not limited to Blacks, but is a major factor in "Southern Dialect." Regarding dialect recognizability, Dr. Dillard testified that "it was highly unlikely that an

individual untrained in linguistics would recognize the use of Black English as a Black characteristic, or indeed as anything other than incorrect standard English" (p. 7392). The significance of this position takes on increased import when we realize that this subtle bias (linguistic snobbery) could conceivably result in minorities being penalized by a significant number of points at the very beginning of each essay. Indeed I'm sure you know of people who failed the examination by five or ten points.

Though the court in this case found no issue of fact here, there is additional experimental evidence apparently not presented to the court, that substantiates Dr. Dillard's position and my position here.

Harms (1961) found that the SES of a speaker is positively correlated with listeners' ratings of the speaker's credibility status and Ellis (1967) found that SES is correlated with how well the listener likes the speaker. It has also been found that listeners can accurately match speakers with summary sketches of the speakers' personalities (Cantril and Allport, 1935; Wolff, 1943); that greater accuracy is obtained with summary sketches than with single personality variables and that personality traits are more accurately judged than physical characteristics (Cantril and Allport).

Still other investigators have shown that the attitudes expressed by listeners toward the same speaker vary as a function of the speaker's language. A series of these studies have been conducted by Lambert and his colleagues at McGill University. They used recordings of bilinguals or bidialectals reading a prose passage in one language or dialect and then in the other. The listeners were asked to make judgments about various personality characteristics of the speaker believing that each reading was done by a different individual. Comparisons were made of the ratings of the same speaker when they spoke one language or dialect and the ratings received when the other language or dialect was spoken. Generally, the results show that differential perceptions take place, depending on which language or dialect is spoken.

In one study (Lambert, Hodgson, Gardner and Fillenbaum, 1960), using four French-Canadian adult bilinguals, English-speaking male and female listeners and French-speaking male listeners, the investigators had the four French-Canadians read a two-and-one-half minute philosophical prose passage in both English and French. The speakers were then rated on a variety of personality traits by the 64 English-speaking male and female, and the 66 French-speaking male listeners. The listeners were asked to rank all the traits according to the degree of favorableness. In order to measure the listener's preference for French-or English-Canadian, they were asked to rank the two groups in terms of their desirability as marital partners, friends, neighbors, tenants, colleagues, and political candidates. The investigators used fourteen incomplete sentences as a measure to obtain the attitudes of the listeners toward the two groups.

Speakers using English were more favorably rated on most traits by both English-and French-speaking listeners. However, the speakers using the French dialect were rated more favorably by the English-speaking listeners on ten of fourteen traits. The authors spoke to this by saying that "the comparatively unfavorable perception of French speakers is essentially independent of the perceiver's attitudes toward French and English groups."

In another study, Anisfeld, Bogo, and Lamber (1972) played recordings of four Jewish speakers who spoke standard English and English with a Jewish accent to 64 Jewish and 114 non-Jewish listeners. The authors obtained ratings on the speakers on fourteen personality traits. They also asked the listeners to identify the speaker's religion. Listeners' attitudes were measured using ethnocentrism, anomie, and anti-Semitism scales.

An analysis of the data indicated that non-Jewish listeners rated speakers using Standard English significantly more favorably on several traits and did not rate the speakers using an accented English or dialect favorably on any trait.

The two groups of listeners did not differ on any of the attitudinal measures. No relationship was found between listeners' attitude scores and differential ratings of speakers, nor was the degree anti-Semitism related to the number of speakers identified as Jewish.

In the study done by Tucker and Lambert (1969) in which they looked at listeners' reactions to American-English dialects, 150 Black male and female freshmen from a Southern Black college, forty White male and female students from a New England college, and 68 White male and female students from a Southern college rated speakers on a bipolar adjective scale covering fifteen personality traits. All listeners rated speakers using Standard English most favorably. The speakers rated as second most favored by northern White and southern Black listeners were educated southern Blacks. Southern White listeners favored educated southern White speakers as the second favorable group. Both northern and southern Whites rated non-college, southern Black speakers least favorably.

These studies have shown consistently that the language spoken influences attitudes expressed by listeners toward a speaker. It has been shown that less favorable attitudes are expressed toward speakers using the language or dialect characteristic of a minority group. It has also been shown that attitudes toward various ethnic groups, when measured by conventional attitude scales, do not necessarily correspond to attitudes expressed by listeners toward speakers using the dialect of those particular ethnic groups.

It should be noted here that the aforementioned less-than-favorable feelings manifested themselves sometimes irrespective of the ethnic group of the respondent. There appears to be an ideal manner of speaking to which people ascribe very positive characteristics. These findings take on additional import when we realize that one of the prime arguments that minority groups make to ensure fairer treatment at the hands of bar examiners is that more minority group attorneys should be graders on bar panels. It is indeed possible that many of those who would be readers may have feelings similar to their non-minority counterparts, particularly since, in California, the individuals who are selected to grade the essays are recent law graduates who themselves scored very well on the bar exam. They are people whose writing style personifies standard English, and as a result they may be particularly sensitive to writing styles unlike their own.

In conclusion, I'm sure that there are those among you who are thinking that certain level of English proficiency is necessary to be an at-

torney and that if people are not in possession of such ability, then they shouldn't be permitted to practice law. To this issue I have two responses:

1. The degree of English proficiency necessary to practice in the different fields of law has yet to be determined. We see in the report of the Commission that they are unwilling or unable to define what attributes constitute an adequately functioning attorney.
2. It should be noted the "Black English" does not necessarily mean an English deficiency but refers to a stylistic difference.

McGee: Thank you. And now Ms. Linda Greene. [Editor's Note] Ms. Greene's entire presentation with footnotes inserted as indicated is reprinted below.

INTRODUCTION

The recent decision of the Fifth Circuit in *Tyler v. Vickery*, 517 F.2d 1089 (5th Cir. 1975) *cert. pending*, counsels thoughtful re-examination of the premises which led lawyers to believe that through litigation the number of bar-admitted black lawyers could be increased. The *Tyler* plaintiffs¹ on appeal² alleged that the Fourteenth Amendment to the United States Constitution had been violated.

First, by the failure of the defendant bar examiners to validate in accord with Title VII³ standards the bar examinations in view of its disproportionate adverse effect on black takers, and second, by the failure of the Georgia bar examiners to afford a post examination hearing at which an examinee might contest the decision adjudging him incompetent to practice law. Both arguments were squarely rejected, the former upon the appellate court's judgment that statistics showing adverse impact did not demonstrate a racial classification making, appropriate judicial review guided by the strict scrutiny equal protection standard, and the latter upon the view that an opportunity to retake the examination satisfied Fourteenth Amendment Due Process standards.

For several reasons the *Tyler* decision has disturbed civil rights litigators. *Tyler* was argued against a rich background of favorable decisions involving employment tests with discriminatory impact: litigation upon the

1. The decision sub nom *Tyler v. Vickery*, 517 F.2d 1089 (5th Cir. 1975) (actually involves three actions filed in the United States District Court for the Northern District of Georgia, all of which alleged arbitrariness and racial discrimination in the administration of the Georgia bar examination, *Tyler v. Vickery* (District Court C.A. No. 15866) and *Banks v. Vickery* (District Court C.A. No. 15866) filed November 12, 1971, and *Perry v. Sell* (District Court C.A. No. 17688) filed January 19, 1973. The cases were consolidated.

2. The district court granted summary judgment in favor of the Bar Examiners of the State of Georgia.

3. The standard by which a test with adverse impact is judged under Title VII are codified at 29 C.F.R. § 1607.3, the 'EEOC Guidelines on Employee Selection Procedures.' The Guidelines provide that

[t]he use of any test which adversely affects hiring, promotion, transfer or any other employment of membership opportunity of classes protected by Title VII constitutes discrimination unless: (a) the test has been validated and evidences a high degree of utility as hereinafter described, and (b) the person giving or acting upon the results of the particular test can demonstrate that alternative suitable hiring, promotion or transfer procedures are unavailable for his use.

basis of Title VII⁴ the post-Civil War civil rights statutes,⁵ and the Constitution alike⁶ had almost uniformly resulted in the striking down of tests not validated in accordance with the EEOC guidelines. Moreover, *Tyler* was argued to a portion of the judiciary probably more familiar with statutory and constitutional challenges to governmental actions alleged racial discrimination than any other. Finally, concern has been expressed with respect to the potential impact of unfavorable bar examination precedents upon non-Title VII challenges of discriminatory tests in other contexts. While the voice of one dissenting judge from the majority's decision with respect to the testing issues does indicate that the claims of racial discrimination and their attendant pleas for strict judicial scrutiny have not totally fallen upon deaf ears,⁷ the harsh manner in which the claims of racial discrimination in Georgia were treated casts a cloud upon hopes for favorable litigation results.

It is appropriate, then, that a fresh, objective look be taken at the precedents, and a new judgment made whether it is possible to increase the ranks of black lawyers through bar examination litigation. The paper explores the following issues briefly: whether the continued rejection of race discrimination claims based primarily upon statistics can be expected; whether, in view of the rejection of race discrimination claims based primarily upon statistics, there is any prospect for 'active' rather than 'passive' judicial review of bar examination testing instruments and attendant procedures under the 'rational relationship' Equal Protection standard; and, whether the decisions holding that due process is satisfied by an opportunity to retake an examination are legally supportable. The hope is that some insight into the decisions can be had, and as a result of the prospect for favorable decision increased.

2. THE REJECTION OF STATISTICS SHOWING ADVERSE RACIAL IMPACT AS PRESENTING A PRIMA FACIE CASE OF RACIAL DISCRIMINATION

A most difficult debate in bar examination litigation has arisen over the proper standard to be utilized by the judiciary when scrutinizing a state's defense of racially disparate bar examination results. The crucial question is by what standard the court must review the propriety of the examination and the manner in which it is used. Where differential treatment is afforded by government upon the basis of certain classifications termed 'suspect' race, lineage, and alienage, or where interests termed 'fundamental'

4. *Griggs v. Duke Power Company*, 401 U.S. 424 (1971); *Albermarle Paper Co. v. Moody*, *United States v. Jacksonville Terminal Co.*, 451 F.2d 218 (5th Cir. 1971) cert. denied 406 U.S. 906 (1972); *United States v. Georgia Power Co.*, 474 F.2d 906 (5th Cir. 1973); *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974); *Rogers v. International Paper Co.*, 510 F.2d 1340 (8th Cir. 1975).

5. *Bridgeport Guardian Inc. v. Civil Service Commission*, 482 F.2d 1973; (§§ 1981, 1983); *Castro v. Beecher*, 459 F.2d 725 (1st Cir. 1972) (42 U.S.C. §§ 1981, 1983); *Chance v. Board of Examiners*, 458 F.2d 1167 (2nd Cir. 1972); (); *Carier v. Gallagher*, 452 F.2d 315 (8th Cir. 1971) (42 U.S.C. §§ 1981, 1983).

6. *Davis v. Washington*, 512 F.2d 956 (D.C. Cir. 1975) (Fifth Amendment); *Douglas v. Hampton*, 512 F.2d 976 (D.C. Cir. 1975) (Fifth Amendment).

7. See *Tyler v. Vickery*, 517 F.2d at 1105 (Adams, J. dissenting).

are affected,⁸ a "very heavy burden of justification"⁹ is required. A classification deemed suspect must bear a higher degree of relevance to purpose than other non-suspect classifications and although differential treatment of these protected classes is not absolutely forbidden,¹⁰ they are much more likely to be found impermissible or non-compelling. Where disparaging treatment is imposed, a state must not only demonstrate that its objective may not be attained by a measure which did not draw racial distinctions, but also that the public interest involved outweighs the detriment that will be incurred by the affected private parties. The test was stated in *Loving v. Virginia* thusly: racial classifications "must be shown necessary to the accomplishment of some permissible state objective."

On the other hand, where the court finds no suspect classification to have been made, review proceeds with the question whether the classification made bears a "reasonable" or "rational relationship" to the purposes advanced for the classification made. The usual judicial course is to determine whether the classifications drawn are reasonable in light of their most probable purpose. The conflict is, then, between 'strict judicial scrutiny' and a more "restrained review."¹¹

The selection of the appropriate standard for review in *Tyler* was factually complicated by the absence of an explicit decision by the Bar Examiners to exclude blacks from the ranks of admitted attorneys. Therefore, invoking numerous decisions which appeared to permit proof of a *prima facie* case of racial discrimination through statistics,¹² the plaintiffs urged that the court require from the defendants substantial evidence that the bar examination was a valid measure of ability to practice law, and, if such evidence was forthcoming, proof that compelling reasons existed for the use of a valid examination was discriminated racially.¹³

In so arguing, plaintiffs urged that the court adopt as appropriate the compelling state interest standard the rule articulated in *Griggs v. Duke Power Co.*,¹⁴ which endorsed the "EEOC Guidelines on Employee Selection Procedures,"¹⁵ which guidelines appear to adopt a strict scrutiny model for the evaluation of tests statistically shown to have an adverse affect upon classes protected by the Act and require a demonstration, at minimum, that a test having such an impact has been professionally validated in accord with standards prescribed at another part of the Guidelines.¹⁶

8. *Loving v. Virginia*, 388 U.S. 1, 9 (1967).

9. *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

10. See *Korematsu*, *supra* n.9.

11. "Developments in the Law, Equal Protection" 82 Harvard L. Rev. 1077 (1969).

12. See, for example, *Yick Wo. v. Hopkins*, 118 U.S. 356 (1886) (denial of all applications by Chinese for laundry licenses and grant of all applications by non-Chinese could be explained on no other basis than racial discrimination); *Norris v. Alabama*, 294 U.S. 587 (1935), (statistical patterns of exclusion of blacks from juries demonstrates *prima facie* case of racial discrimination); *Accord, Smith v. Texas*, 311 U.S. 128 (1940) and *Turner v. Fouche*, 396 U.S. 346 (1970).

13. Brief of Appellants, *Perry, et al. v. Sell, et al.* (decided *sub nom Tyler, et al. v. Vickery*, *supra*), p. 11.

14. 401 U.S. 424 (1971).

15. 29 CFR § 1609.3 (1970).

16. The Guidelines provide that

Upon the basis of what the Fifth Circuit called a "clear body of law" the court rejected the argument "that a differential pass rate for whites and blacks" demonstrated *prima facie* that racial classification required to invoke strict judicial scrutiny of the examinations¹⁷ and use. One decision in that "clear body" was *Jefferson v. Hackney*,¹⁸ where litigants advanced an argument of unconstitutionality with respect to a state's decision to fund an AFDC program at a lower percentage of recognized need than other categories of assistance because of the higher percentage of minority recipients in the AFDC assistance category. The Supreme Court, upon a finding that the number of minorities in all category of aid was substantial rejected the assertion that a racial classification had been demonstrated requiring strict judicial scrutiny. The other decision relied upon was *James v. Valtierra*, 402 U.S. 137 (1971) where the Supreme Court held that a California statute mandating referendum approval of ordinances authorizing low income housing did not create a racial classification merely because minorities would more likely be the inhabitants of such housing. The court purported not to reject decisions such as *Gomillion v. Lightfoot*,¹⁹ and *Yick Wo v. Hopkins*,²⁰ which stand for the proposition that facially neutral classification may be subterfuges for racial discrimination. Its finding was simply that statistical evidence of adverse racial impact was not compelling proof of intentional racial discrimination where bar examiners proved the existence of an anonymous grading system. The *Tyler* court, finding no intentional discrimination, applied the 'rational relationship' standard of *Schwartz*, and upheld the examination's content and use.

While the *Tyler* court recognized that numerous circuit courts in non-Title VII cases sanction the application of the EEOC guidelines as the standard for review of tests with discriminatory impact irrespective of the test givers motive,²¹ the court chose for two reasons to limit the persuasive weight of those cases. First, the court observed that under Title VII as originally enacted an exception existed for governmental entities such as police and fire department, but that prior to the time of all the appellate decisions mentioned the anomaly exempting this class of employers from Title VII's reach had been removed. Thus the court argued that the application of Title VII standards may have been appropriate in those limited circumstances but not in the case, *sub judice*. It should be noted that only one of the numerous circuit courts mentioned this issue in connection with

[t]he use of any test which adversely affects hiring, promotion, transfer or any other employment or membership opportunity of classes protected by Title VII constitutes discrimination unless: (a) the test has been validated and evidences a high degree of utility as hereinafter described, and (b) the person giving or acting upon the results of the particular test can demonstrate that alternative suitable hiring, promotion or transfer procedures are unavailable for his use.

29 C.F.R. § 1607.3.

17. *Tyler v. Vickery*, *supra*, 517 F.2d at 1099.

18. 406 U.S. 535 (1972).

19. 364 U.S. 339.

20. *Yick Wo v. Hopkins*, 118 U.S. 356.

21. The decisions cited by the court included *Douglas v. Hampton*, 512 F.2d 976 (D.C. Cir. 1975); *Davis v. Washington*, 512 F.2d 956 (D.C. Cir. 1975); *Walston v. County School Board*, 492 F.2d 919 (4th Cir. 1974); *United States v. Chesterfield County School District*, 484 F.2d 70 (4th Cir. 1973); *Castro v. Beecher*, 459 F.2d 725 (2nd Cir. 1972); *Carter v. Gallagher*, 452 F.2d 315, mod. 1972 452 F.2d 327 (en banc) cert. denied 406 U.S. 950.

the application of Title VII testing standards²² and none of them held out this 'anomaly' as a basis for the application of Title VII standards.

The second reason advanced to justify the disregard of the decisions applying Title VII standards to non-Title VII litigation centered upon the Fifth Circuit decision *Allen v. City of Mobile*,²³ a Fourteenth Amendment case where the Fifth Circuit approved *per curiam*, an Alabama district court decision²⁴ which did not require validation in accord with the EEOC guidelines. The district court however, purported to apply the 'test of job relatedness' of *Griggs v. Duke Power Co.*,²⁵ but in reality engaged in a sort of 'lay analysis' of the tests job relatedness and determined that the test was job related.^{25a} Had Justice Goldberg omitted his scathing *Allen* dissent urging that Title VII standards be applied, the *Tyler* court may not have been able to assert that *Allen* embodied the law of the circuit with respect to the nonapplicability of Title VII standards to constitutionally-based test challenges. This is so, especially in view of the district court's recognition that *Griggs* was applicable, notwithstanding its erroneous application of the *Griggs* standard.

As anomalous as the *Tyler* court's refusal to utilize the Guidelines may appear in light of the strong Supreme Court testing decisions,^{25b} such as *Griggs* and *Albermarle*, as well as, the circuit court's decisions, and the non-Title VII testing decisions which preceded *Tyler*, (see note 1 p. 19 *supra*), the court's refusal to utilize the guidelines as the standard by which discriminating tests are reviewed may be upon solid ground. If the Alabama bar examiners had excluded blacks from admission explicitly upon racial grounds, it would be clearly appropriate for the court to require in accordance with the compelling-interest-test professional validation but the inavailability of less discriminatory means to accomplish the goal of insuring attorney competence. On the other hand, if only proof of intentional discrimination involves the strict standard, then the EEOC Guidelines, which speak not only of validation by certain methods but require the inavailability of alternative less-discriminatory means—are properly rejected in that they incorporate fully the strictest equal protection standard.

Although the law is by no means settled by the decision of one circuit, it can be expected that courts will adhere to these legal principles:

- 1) Intentional discrimination must be proved against bar examiners if an equal protection claim is to succeed; racial discrimination will not be inferred from statistics demonstrating adverse impact alone.
- 2) Professional validation of bar examinations in accord with the

22. *Castro v. Beecher*, 459 F.2d 725 (1st Cir. 1972).

23. 466 F.2d 122 (5th Cir. 1971).

24. 331 F. Supp. 1134 (S.D. Ala. 1971).

25. 401 U.S. 424 (1971).

25a. 331 F. Supp. at 1145 (The sergeant's test used by the Board meets the test of job relatedness of *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S. Ct. 849, 28 L. Ed. 158 (1971). The test has 155 multiple choice questions. It is not an aptitude test; fifteen of the questions obviously have to do with supervisory duties a sergeant would be charged with. An additional 28 questions relate to knowledge desired of a qualified sergeant. One hundred twelve of the questions should be known to a good experienced patrolman.

25b. *Albermarle v. Moody Paper Co.*, 422 U.S. 405 (1975).

EEOC Guidelines is not required where constitutional claims are advanced; the proper judicial stance is deferral to the 'considered judgment' of bar examiners as to examination content and use.

III. 'ACTIVE' RATHER THAN 'PASSIVE' REVIEW OF BAR EXAMINATION TESTS AND PROCEDURES UNDER THE 'RATIONAL CONNECTION' STANDARD OF REVIEW

The question treated in this section is whether, in the absence of intentional discrimination proof, a testing-principle-oriented standard for judicial review of tests is supportable within *Schwartz v. Board of Bar Examiners*²⁶ rule that "any qualification . . . have a rational connection with the applicant's fitness or capacity to practice law." Such an inquiry is appropriate because proof of intentional discrimination based solely upon statistics may be insufficient to invoke the compelling-state-interest standard.

If support for a more 'rigorous rational basis' test can be adduced, the deferral-oriented approach of *Tyler* may be avoided: the proposition to be advanced, through the testimony of testing experts, is that the requirement that law graduates take bar examinations constructed without regard to accepted professional testing standards bears no rational connection to the state's purpose of assessing fitness to practice law. The focus of litigation would shift from the question whether the examination has been validated in accord with the *Griggs* standard to the question whether the bar examination measures accurately an applicant's knowledge of law and his ability to analyze facts and to these facts apply the law. The American Psychological Association *Standards for Educational and Psychological Tests*,²⁷ which are intended to apply to "any assessment procedure . . . [and] to any systematic basis for making inferences about characteristics of people,"²⁸ herein competency to practice law, ought be the watermark by which a bar examination is measured.

The *Tyler* court's view was that whether the examination could be improved was not at issue under the 'rational basis' standard of review. The plaintiffs had argued that the bar exam was not rationally related to competency because the bar examiners failed to prove it covered a broad enough range of subjects, no model answer was available, and no pre-determined standards were set prior to the grading process. These arguments were rejected as mere suggestions that the examination be improved, but it is arguable that the failure of the *Tyler* plaintiffs to adduce expert testimony with respect to their 'rational basis' contentions resulted in a characterization of their arguments as 'improvement' ones rather than objections to the ability of the test to measure what it purported to measure. Having not been urged to accept professional testing standards apart from those incorporated in the Guidelines to guide its determination whether the test was related to the states' interest in assuring competent lawyers. As

26. 353 U.S. 232, 239 (1957).

27. *Standards for Educational and Psychological Tests*, The American Psychological Association, American Educational Research Association National Council on Measurement in Educational, American Psychological Association, Inc. (1974).

28. *Standards*, p. 2.

a result, the court filled the void extant after its rejection of the compelling-state interest test with a level of "means" scrutiny equivalent to deferral.

Of course, it can never be argued conclusively that an attempt to urge the incorporation in the 'rational basis' of professional testing standards would have counselled a different result, but *Armstead v. Starkville Municipal Separate School District*,²⁹ rejected in part by the Fifth Circuit in *Tyler*, does lend some authority to this view. A reading of the district court's opinion in that case clearly indicates that its decision to strike down the test was based in part upon the failure of the school district to professionally validate the test or cut off score;³⁰ there is no mention of the Guidelines. Moreover, the circuit court opinion explicitly refers to the absence of *professional* validity studies in connection with the tests.³¹ It is important to note that the lower court's decision striking down the test was upheld, not on the basis of the "compelling state interest" equal protection standard that the lower court thought applicable after it found that the test created a racial classification,³² but upon a finding that equal protection was violated in that the test "was not reasonably related to the purpose for which it was designated."³³ (emphasis added). *Armstead* supports, notwithstanding *Tyler*, a stronger standard of judicial review than deferral to the 'considered judgments' of bar examiners.³⁴

While several non-Title VII circuit court decisions approve the use of professional testing standards to measure test acceptability,³⁵ only one decision explicitly discusses the appropriateness of this approach under the 'rational basis' test. In *Chance v. Board of Examiners*, the plaintiffs were applicants for supervisory positions in the New York City School System who failed a licensing examination for which the pass rate for white applicants was 'almost 1½ times the rate [for] black and Puerto Rican Candidates'. The lower court in *Chance* thought that *Griggs* and its progeny were applicable in an equal protection challenge to a licensing examination and applied a test closely resembling the 'compelling interest' test in spite of the absence of intentional discrimination proof.³⁶ But the Second Circuit opinion reminds that the important difference between the compelling state interest test and the 'rational relationship' test is that when the latter test is invoked the State need not demonstrate that a means less discriminatory than validated examinations is available. Put another way, in this context *Chance* would not sanction the abolishment of bar examinations if a less discriminatory means of insuring competent attorneys were available, but would merely require that examinations be validated in accord with professional testing standards. Upon established equal protection principles, this view is theoretically more acceptable than the argument that the EEOC Guidelines be incorporated into the Fourteenth Amendment since

29. 461 F.2d 276 (5th Cir. 1972).

30. 325 F. Supp. 560, 566 (N.D. Miss. 1971).

31. 461 F.2d at 276.

32. 325 F. Supp. at 570.

33. 461 F.2d at 279.

34. *Tyler v. Vickery*, *supra*, 517 F.2d at 1102.

35. See note 2, page 13, *supra*.

36. 330 F. Supp. 203 (S.D.N.Y. 1971), *aff'd* 458 F.2d 1167 (2nd Cir. 1972).

that portion of the guidelines requiring a demonstration of the unavailability of alternative means adopts the compelling state interest standard—a standard only appropriate if a court finds a racial classification to have been intentionally made.

Chance has been interpreted by one court to require an affirmative showing by bar examiners that the examination used assesses competency in a manner calculated to advance the state's end of protecting the public. During the course of a pre-trial opinion in *Pacheco v. Pringle*, the Colorado District Court spoke of the old version of the rational basis test, and then the new.

"As the test was originally conceived, a state actor was not required to affirmatively defend its classification-creating actions: Instead, "if any state of facts [might] be conceived to justify [the classification] . . ." *McGowan v. Maryland*, 366 U.S. 420 (1961) (emphasis added), then its constitutionality would be *presumed*. The burden was upon the challenger of the classification to rebut this presumption by proving a lack of "rational relationship," in fact, between the classification and any legitimate, even hypothetical, state interest. [See also, *Morey v. Doud*, 354 U.S. 457 (1957); *Williamson v. Lee Optical*, 348 U.S. 483 (1955); *Railway Express Agency, Inc. v. New York*, 336 U.S. 106 (1949)]

But modern applications of the test have abandoned this "presumption of validity" and have adopted instead what one court has labeled the "rigorous rational basis test." [*Samuel v. University of Pittsburg*, 375 F.Supp. 1119, 1133 (W.D. Pa. 1974); see also, *Sugarman v. Dougall*, 413 U.S. 634 (1973); *James v. Strange*, 407 U.S. 128 (1972); *Reed v. Reed*, 401 U.S. 71 (1971); *Jackson v. Indiana*, 406 U.S. 715 (1972); *Aiello v. Liansen*, 359 F.Supp. 792 (N.D. Cal. 1973) (three-judge court); but see, *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973) In the context of *de facto* discrimination, once the plaintiff proves that state action has resulted in a "gross unexplained disparity, in the treatment of identifiable classes of persons, the defendant must come forward and affirmatively show a "rational basis" for his actions. This is precisely the approach suggested by the circuit court in *Chance*."³⁷

The court interpreted the cases approving a more rigorous test to require,

[i]f plaintiff's evidence demonstrates that the bar examination causes an "invidious *de facto* classification", even though inadvertently, . . . [that] the defendants affirmatively prove that the examination is rationally related to some legitimate state interest. Should, for example, defendants assert that the examination serves to protect the public from incompetent attorneys, then they must show that the examination's content and degree of difficulty are fairly calculated to achieve that end."³⁸

This approach requires an inquiry into the reasonableness of the decision to determine competency by bar examination as well as the appropriateness of the particular examination utilized. The opinion does not explicitly require that the bar examiners' affirmative showing include proof that the examination meets professional testing standards. But proof that an examination prepared and used without regard to professional testing standards

37. C.A. C-5219 (D.C. Col. June 19, 1975).

38. Slip. Op. at p. 10.

will not accurately assess competency should be relevant, if not pervasive, on the question of rationality.

IV. "THE REQUIREMENT OF A HEARING ON THE QUESTION OF INCOMPETENCE"

Two recent circuit court decisions holding that procedural due process is satisfied by an opportunity to retake the examination hark back to the days when the entitlement to due process depended on whether the status sought was characterized as a right rather than a privilege. Neither *Whitfield v. Illinois Bar Examiners*, 504 F.2d 474, 478 (7th Cir. 1974) nor *Tyler v. Vickery*, 517 F.2d 1089 (5th Cir. 1975) offer persuasive authority for the conclusion that a hearing is not required. These decisions appear wholly inconsistent with a line of authority decided within and without the context of licensing litigation supporting the requirement of a hearing where the state determines not to grant a benefit.

Three Supreme Court decisions involving attorney licensing appear to settle the question whether persons denied admission to the bar are entitled to a hearing with respect to the determination that they are unfit for admission. The earliest is *Goldsmith v. United States Board of Tax Appeals*,³⁹ wherein the Court rejected the assertion that the Board might refuse admission without explanation and squarely required a hearing with respect to a determination of unfitness to practice.⁴⁰ *Willner v. Committee on Character and Fitness*,⁴¹ decided in 1963, applied *Goldsmith*, *supra*, and held that a hearing is required when a candidate's exclusion is premised upon character grounds.

The 1972 Supreme Court decision of *Board of Regents v. Roth*⁴² supports *Goldsmith* and *Schwartz* and *Willner*, holding that a hearing is required where professional employment may be foreclosed. The Supreme Court distinguished between being made "somewhat less attractive to some other employers" and a 'foreclosure of opportunities amounting to a deprivation of 'liberty' citing both *Schwartz* and *Willner*.⁴³ More important, however, Roth makes it clear that while there is flexibility with respect to the form of hearing afforded, the hearing requirement itself cannot be weighed or balanced away.⁴⁴

Goldsmith, *Schwartz*, *Willner*, and *Roth* suggest that the *Whitfield-Tyler* no-review rule will be rejected by the remainder of the circuits.⁴⁵

39. 280 U.S. 117 (1927).

40. There can be no doubt about *Goldsmith's* holding.

We think that the petitioner having shown by his application that . . . he was within the class of those entitled to be admitted to practice under the Board's rules, he should not have been rejected upon charges of his unfitness without giving him an opportunity for notice and for hearing and answer. The rules adopted by the Board provide that "the Board may in its discretion deny admission, suspend, or disbar any person." But this must be construed to mean the exercise of a discretion to be exercised . . . with such notice, hearing and opportunity to answer for the applicant as would constitute due process. 270 U.S. at 123.

41. 373 U.S. 96 (1963).

42. 408 U.S. 564 (1972).

43. 408 U.S. at 574.

44. 408 U.S. 567 (1972). See also footnote 13, at the same page.

45. See *Application v. Peterson*, 459 P.2d 703, 39 ALR 2d 708 (1969) where the Alaskan

CONCLUSION

The paper has focused on the major Fourteenth Amendment issues in litigation over bar examinations with adverse racial impact. With respect to the proof necessary to establish that disproportionate failure by black bar examinees has resulted from racially motivated grading decisions, courts will probably require more compelling proof of intentional discrimination than statistics demonstrating the adverse racial impact. There is Supreme Court authority for this result, although the greater weight of lower court authority is *contra*. Contentions that a failing candidate, whatever his race, must have an opportunity to review his graded examination and challenge the result will probably be received more sympathetically by courts in view of supportive Supreme Court holdings and dicta, notwithstanding *Tyler* and *Whitfield*.

McGee: Thank you. And now Dean Liacouras will react to the foregoing presentations.

Liacouras: I want to make a few of my own brief points, and thereafter react to the other panelists.

First of all, why 70? Consider the perennial policy question: what are the empirical standards I am applying? "Seventy" means nothing in the abstract. If you happen to be the kind of examiner I am, you first read all of the exam answers and place them in three or four "performance" piles; you then decide, with more particularity, what each pile means empirically (unsatisfactory, satisfactory, good, excellent; or "repeats the same logical error;" "volunteers;" "does not understand 'offer'"; etc.). I then re-read everyone's answer to question #1; thereafter, everyone's answer to question #2; and so on. In this second process, I assign numerical or other symbolic scores to each paper, having determined in advance what each number or symbol means empirically. Eventually, I re-read each paper with this question in mind: why is this paper a "pass"? why is this one "unsatisfactory"? why does this one get "no credit" or "borderline credit"? and so on.

The burden is on the person who is making the measurement—the examiner—to justify that a particular numerical index or symbol empirically and fairly justifies passing or failing this paper (or, where more distinctions are used, assigning it an A, B, C, D, F). For the Bar exam, the proper standard is "minimum competence," and the question becomes: what does 70 have to do with that standard? The link is not self-executing.

Now Professor Polite, I would like to react to part of your analysis. On page 209 in 44 *Temple Law Quarterly* (Winter 1971), the "Pennsylvania Bar Admissions Procedures Report," in footnote 14, we describe some of the points you make about the effects on essay exams of different types

Supreme Court set forth the requirements for a fair hearing where a determination of incompetency has been made.

. . . Our focus is upon the character of the hearing which the Board of Governors granted to appellant after he had been denied admission to practice on the grounds of failure to achieve a passing examination grade. In order for such a hearing to have attained the characteristics of a fair proceeding, the applicant, must sufficiently in advance of the appellate hearing, be given access to his examination question, his answers thereto, the model answers, and an adequate sampling of both passing and failing examination papers. 39 ALR3d at 717.

of English, etc. Our Committee rejected all of those points as applied to the group of Bar examinees we were studying in the 1955-1970 period. Not that we necessarily disputed your major premise; we did include this long footnote. But we made a factual finding, as to the Black persons who failed the Pennsylvania Bar exam between 1955-1970: as to those examinees, there was no cultural differentiation when they were compared with the total examinee population. (Indeed, all of the Blacks did pass the Pennsylvania Bar exam on the very next time around, immediately following publication of our Report!)

Our Committee thought there was a simpler, more basic explanation about the Bar exam and the failure rates of the unsuccessful Black applicants. There may be a comparable explanation for the California Bar exam performance although I have not yet been shown a copy of the California Bar Exam Study, and I have not independently studied your processes. I would be surprised, however, if the relevant cultural backgrounds of persons taking the Bar exam today in California and Pennsylvania are substantially different, as a group, from those who took the Pennsylvania Bar exam in January 1971. A propos this, Dr. Polite, I have observed no differentiation in your sentence structures today as compared with those of Dr. Barrett. Moreover, on the merits, I tend to agree on some matters with both of you while sometimes disagreeing with one or both of you. Each of you raises issues that we should consider, but my assessment of your contributions has virtually nothing to do with race or cultural differences between you.

Dr. Barrett raises the question of the purposes of the exam, which we looked at in some detail in the so-called Liacouras Committee, and to which some of my earlier comments were addressed. The sophistication of the Pennsylvania Bar exam (1955-70) which we studied in 1970, was in the Stone Age when compared to those in Pennsylvania in 1976. There was no conception of whether the Pennsylvania Bar exam was an "achievement test" or an "aptitude test," whether the examiners were measuring substantive law or procedural law, whether they were trying measure implication, co-implication or syntax, whether they were trying to find out if an applicant had the skill to follow up on a series of given factual data for the purpose of creating a "lead" for investigative purposes, or whether they were simply trying to measure if an applicant could communicate in standard English syntax and sentence structure. Some examiners denied trying to measure. Pennsylvania in 1970 was a very different situation than we find today in Pennsylvania (and probably California).

Dr. Barrett, at the risk of undermining some of my earlier criticism and partially from professional pride and skepticism: in your injunction about test validity, you and other social scientists may be asking for the impossible. I know of no available Bar exam, law school exam or law school admissions test that would meet all of your validity requirements for job-relatedness in legal practice. You may be asking for too much although the goal is good. We lawyers may not know what we are doing all the time, but we certainly know what we do some of the time!

I happen to know who is a good lawyer and who isn't, and I can identify those characteristics in individuals. I am hardly unique in this ability.

Think about it. All of us who teach in law school are faced with this assessment task when a student comes by our office. This may be the best academic student produced by any law school, but we nonetheless predict that this student is not going to become a good lawyer. Why can we make such a prediction with conviction and decent accuracy? The answer is: because we are consciously or unconsciously aware of what it takes to be a good lawyer, and further because this academically top student lacks such aptitude! All we need, then, to construct a valid examination of these lawyering attributes, is to make our judgment rational, explicit, conscious, objective, and systematic. This is no mean feat.

On this point as related to law school admissions: during each of the past two years, I have requested the LSAC and AALS to ask each law school to put up \$10 per student to help finance and conduct such a study (and to accelerate the completion date). There is a study by Carlson and Evans commissioned by ETS and LSAC on what are the attributes of a good lawyer, with a six-year target completion date. Earlier in our discussion, I listed nearly a score of lawyering attributes; the remaining ones should not be difficult to fathom, but the "specialists" wring their hands in dismay bemoaning the uncertainty of what constitutes a good lawyer: I would feel more sanguine about the Carlson-Evans study if the funders and investigators were not part and parcel of the ETS-LSAC axis—a factor which may also help explain why my proposal was so resoundingly defeated by admissions officers in 1974.

Bar exams do not become directly involved in the comprehensive question of what is a competent lawyer; instead, they focus on only parts of this broader inquiry. Whether what is tested in the Bar exam is sufficiently representative of all important lawyer's skills so as to meet the "validity" requirement suggested by Dr. Barrett, and whether the Bar exam as actually applied does measure "minimum competence," is a question.

We may now turn to Mr. Carr's "diploma privilege" discussion. The "diploma privilege" leaves the job of deciding who should be lawyers not to the public or even the Bar and Bench, but primarily to the law schools. Can law schools, reasonably be entrusted to make such Bar admissions decisions? Will they make them in the abstract? Especially in the state law schools, how will they handle political pressure? The "diploma privilege" would bring useful pressure to bear on law schools to begin adopting more sensible admissions standards than they presently have (taking into account some of my earlier criticisms). But law faculties would find certain areas of jurisdiction where present day insulation and exclusivity are replaced by more direct intervention by, and jurisdictional scoring with the Bench, Bar and legislatures (e.g., the size of classes, faculty workloads, subject-matter coverage). I do not want to be interpreted as speaking against the legal profession's involvement in legal education. I am not. Law schools have much to learn from the Bar and Bench. Indeed, the legal profession, when compared to the medical profession, has been a progressive force even as "gate keepers"*

* The Bar has virtually tripled in size during the past dozen years. As you know, we have very good law schools with only 40 full-time faculty members training 1100 law students,

A final word: as you search for solutions in California, you must work with Bar representatives like Mr. Robinson. He represents a point of view with which you can work. He, in turn, must support you in asking the California State Board, and getting answers to, the question: why have you set the passing figure at 70? This may be a short term question, but it has long term implications leading directly to the questions we earlier raised about Bar exams and law school admissions. To answer such questions, we can consider what each panelist has recommended. Then, take a cram course to pass the Bar exam!

McGee: Thank you, Dean Liacouras. We will now hear from Morris Ballerd of MALDEF.

Morris Ballerd: I was asked to discuss litigation and other forms of challenges to the California bar examination. It is helpful in being brief that there simply hasn't been much litigation. There has been only one case filed to date against the California bar on grounds that are relevant here, the Espinosa petition. Before discussing that I would like to mention a case lurking in the background which I think is relevant to any other litigation efforts that might be made against the California Bar. The case is *Cheney v. State Bar of California*, a Ninth Circuit decision dating from 1967. Cheney was a Section 1983 suit, not a discrimination case, but rather an attack on the essay form of examination and the subjective uncontrolled method of grading essays. The Ninth Circuit held that it did not present a federal question in that the complaint had not first been presented to the California Supreme Court, and any such complaint would have to be first directed to the California Supreme Court; and it held, in very strong dicta that the State of California clearly has the right to give an essay exam and grade it subjectively. The case was not considered in light of claims of discrimination, but I think that it should be a considered an obstacle to be taken into account.

The Espinosa petition was filed in the California Supreme Court, and not in any lower court, on June 20, 1972: it was denied in a one line order on November 9, 1972. There was no opinion, and only one Justice would have granted the petition for a full hearing. It was a petition for writ of review and/or writ of mandate and/or application to exercise rulemaking power.

The legal theory behind the petition was a fairly standard employment discrimination type of complaint against the bar. The plaintiffs were recent law graduates, all minority applicants who had taken and failed the bar at least twice each. They did not allege overt racial discrimination, but that a facially neutral examination procedure had a disproportionate screen-out effect on minority candidates; and that it was not an accurate measure of capacity or ability to practice law and therefore should be eliminated and an alternative method of judging capacity to practice law adopted. The prayer for relief was that the bar should be eliminated, at least for minority

while comparable medical schools may have 500 full-time faculty training 700 medical students. There is no valid reason why medical schools couldn't take two or even three times as many students except for very effective roadblocks by the AMA gate keepers and medical school faculties.

applicants to the bar, and that non-discriminatory procedures should be substituted. In the brief the petitioners suggested a number of other methods such as the diploma privilege, substitution of the bar exam with training and apprenticeship programs, and in the long run, the development of a valid test.

From the briefs that were exchanged, and I would stress there were no evidentiary proceedings in the case, a number of points should be made. The petitioners claimed the Black and Chicano applicants failed at a much higher rate than Anglo candidates. That was denied by the Bar examiners. The statistics, as we heard earlier were a little bit unclear and in any event a clear and reliable statistical showing was not made although it was pretty clear that reliable statistics would show a disparate passage rate. The petitioners further claimed that the examination had not been shown to be a valid predictor of job performance as an attorney. The respondents replied by saying that the bar examination was rationally a measure of ability to practice law and that it had by stressing the procedures it had developed a fair, careful, and professional examination preparation procedure.

The petitioners relied upon the legal theory of *Griggs v. Duke Power Company* and the public employment discrimination cases of which *Chance* is the leading decision. They urged that a Title VII analysis was appropriate and that the Equal Employment Opportunities Commission guidelines were proper standards for evaluation of the job-relatedness of the bar exam. The respondents in replying urged and supported with some affidavits and surveys that success on the bar examination was correlated to law school standing or grades and that there was a particularly significant correlation between law school grade point average and bar examination results for both Anglo candidates and minorities. Very important I think, the respondents asserted that it was not feasible to test for those personal qualities that are important to the success in the practice of law and that one could only test for knowledge of the law.

Some observations about the *Espinosa* case are pertinent to a consideration of challenges to the California bar now. It was not an ordinary law suit; there was no evidentiary hearing, no trial. Whatever facts are in the record are in as assertions contained in the petition or in a few cases as affidavits. This was of concern to the California Supreme Court which apparently denied the petition mainly because of its feeling that it didn't have jurisdiction to rule on the matter in the absence of an evidentiary record. No such record was ever made in that case and following the denial there has not been a law suit filed against the California bar where the kind of proof and evidence that is customary in similar cases is attempted.

The second observation about the *Espinosa* case is that the statistics then in 1972 were not as clear as they are now. As a result of the challenge of the *Espinosa* case and the general concern with the bar examination problem, there has been a pretty good series of surveys of bar exam results and it can now be shown with a high degree of reliability what the disparate rates of passing are. It may be more difficult for courts to avoid that now that it was in 1972.

Finally, the *Espinosa* litigation was conducted in a vacuum. There was little or no involvement of Black or Brown students; there was little or no

involvement of minority group organizations. There were no protests, no demonstrations, very little publicity about the bar examination problem as distinct from the narrow litigation. It was conducted very much in isolation as a legal proceeding.

As a result of the Espinosa case the California Commission to Study the Bar Examination Process was appointed and reached the results that have previously been summarized to you and I am not going to go through them again. I would just like to make a couple of observations about that study which I think particularly crucial to the question of challenges to the bar. One is that this commission recognized that the most relevant criterion against which the bar exam should be measured is performance as an attorney. However, the Commission concluded that it was practically impossible to arrive at an acceptable measure of this criterion and therefore, it didn't even try. Instead it conducted a study which purported to test correlations between success on the bar examination and other test type measures such as LSAT scores, grade point averages, and law school grades. It assumed without even trying to justify it, that these criteria were not themselves biased and then by statistical procedures (which are methodologically subject to debate as you have heard) said that since bar examination results correlated with other measures which it assumed were not biased, and therefore there was a rational reason for thinking that the bar examination results were not being caused by racial or ethnic differences or cultural bias. The Commission's study was limited to the narrow areas that have been examined in the past. In terms of a legal analysis that Linda Greene has presented, what this means is that if the courts apply to the bar examination process the kind of legal analysis that has been used in the strict scrutiny cases, the public employment cases, or any of the Title VII cases the bar examination must fail because there is a disparate pass rate and there is no way under any acceptable, professional standards that the bar exam can be shown to be related to the criterion of performance as a lawyer.

Since the publication of the report by the Commission in 1975-which was received by minority organizations and students as a whitewash-people around California have been considering the possible avenues to challenge the California bar examination. One of these avenues involves planning and initiating litigation to get the bar eliminated. The second is an attempt to secure some kind of voluntary changes from the bar examiners. On the litigation front there has not yet been a case filed. There has been a lot of discussion about it. The issues involved are whether to file a suit at all in light of the discouraging decisions that have come down recently in which judges simply appear on an arbitrary basis to say that the bar is not going to be subject to the same kind of legal analysis that all other examinations are; whether they go into state or federal court; what kinds of plaintiffs to have; and most fundamentally, how to convince the courts to apply an analysis that requires that the bar examination be scrutinized in light of professional standards and not some standard unique to the legal community requiring much less of the bar examination than any other professional examination.

In terms of securing voluntary changes of the bar exam by the bar examiners, there has been a lot of ferment. I think that the most significant development is probably the proceedings of the Third World Coalition and

that there have been some indications that the examiners are open to some changes through negotiations. I would therefore like to turn the discussion over to Lydia Sanchez, who is active member of the Third World Coalition, to explain to you what that organization has been doing and what kind of response it has been receiving.

Lydia Sanchez: The Third World Coalition was first created in January, 1976, specifically to deal with the issues of under-representation of minority communities in the California bar. Through some fact findings we discovered that there is a 25 percent minority population in the state of California, but yet there is only a little over 1 percent minority attorneys in the state. Also, we found that the passage rate for third world minorities has been going down, especially with the July 1975 bar exam. From the northern California schools it was discovered that the passage rate had decreased to 39 percent so the Coalition was formed. We formed into sub-committees, some of which include the Law Suit Committee for the purpose of considering litigation possibilities and the Negotiations Committee whose responsibility was to work with the Board of Governors of the State Bar of California to see if they would accept some alternatives to the bar exam.

From our initial meetings we decided to have a march on March 26th. The Coalition had received a call from the Board of Governors indicating its concern about this matter and that the Board had wanted to meet the night before the march. We met with the members of the Board the night before the march, but they had also wanted us to "call off our Parade." We told them that was close to impossible because we already had speakers-Assemblyman Willie Brown was flying in from Sacramento and several other Black and Chicano attorneys were going to speak at the march. The Board of Governors said that they were very concerned with our problems and that they would bring up at their next meeting that a committee should be set up to deal with them. We said that was fine but that we were going to march the next day.

The next day at the Third World Coalition march we presented a list of demands at the State Bar Building and expressed our desire for the Board of Governors to work with us through a committee of some sort. I would like to read to you the demands put forth that day:

- Demand 1—Eliminate the underrepresentation of third world applicants to the bar by increasing the overall pass rate on the bar exam and/or adopting alternative methods of certifying competency that will integrate the bar with third world attorneys in proportion to the third world population in California.
- Demand 2—The Board of Governors should review and make explicit the test for moral character so that it not be arbitrarily used to exclude or harass political activists or rehabilitated ex-offenders from the bar.
- Demand 3—The Board of Governors should establish a permanent, independent review and appeals commission to work in conjunction with the bar examiners in administrating the

above changes and to provide procedural due process rights to applicants denied admission to the bar.

Today, May 1, 1976, the Third World Coalition negotiations team had its first meeting with the committee specifically set up by the Board of Governors. From that meeting it seemed very favorable that something might be done.

However, the committee members indicated that they had no policy making power, that they would take our recommendations to the Board of Governors and possibly effectuate some changes in the bar exam itself. One of the alternatives that the committee was considering was to add subject areas to the bar exam that third world people would be practicing, poverty law and labor law for example. Another thing mentioned was lowering the passage score. As was indicated earlier this was done in Pennsylvania five years ago and since then there have been no complaints of a disproportionate number of minority people practicing law there.

Close to half of the graduates from law schools flunk the bar examination, so are the bar examiners saying that over half of the graduates are incompetent?

McGee: I am going to ask Mr. Hinds to close and then perhaps recognize the first speaker.

Hinds: As I sat here this morning I felt compelled to share with you my thoughts. I'm convinced at this time that before there can be any meaningful resolution of this problem we must begin to coordinate our resources and information. There is a tremendous need to more precisely define the magnitude of the problem. I stated some statistics this morning which are probably more comprehensive than what is published, but yet it is inadequate. Simply put the numbers as well as the percentages of Blacks who are sitting for-passing and/or failing-bar examinations in each state must be compiled. Each bar examination should be compiled for each state for as many years as possible.

Linda Greene and her predecessor at the NAACP Legal Defense Fund, Elaine Jones, are two individuals who probably have the most up-to-date information on the status of litigation in the country, and yet nowhere is there a list of all the possible litigation actions that have been taken in the country. There has been a plethora of suits. Actions before administrative agencies, actions before state and federal courts, what have been the dispositions of all of these litigation thrusts? We find law school graduates filing suits in jurisdictions where suits are in fact pending before the courts. We find many individuals filing untimely suits and thereby resulting in bad law. There is a need for us to coordinate and develop strategies in light of the composition of the "Berger" Court. Perhaps we ought to discuss whether there should be litigation remedies or whether we should be exploring other remedies.

I would suggest that a national resource center be established which would at the very least begin to compile and coordinate this sort of information for not only lawyers who are interested in litigating in this field, but also applicants to the bar. I also believe that the type of analyses that were alluded to today by Craig Polite and Richard Barrett ought to be explored

and developed. We ought to be developing alternative models that make some sense. Perhaps out of the center these types of models could be generated.

I was asked specifically to speak about litigation concerning bar examinations. There is a bill that is before the Congress of the United States, H.R. 2276. California Congressman Augustus Hawkins introduced this bill and it was referred to the Committee on Education, Labor, and the Judiciary. In my opinion this bill does very little, if anything, to resolve the basic problem; in fact, it may have just compounded it.

Congressman Hawkins, in trying to respond to a legitimate need and pressure from his constituency and with very little guidance from any of us, drafted a bill that really speaks to federal intervention in the state accreditation process. Basically, without asking the questions of what we are testing and what we are purporting to test, he sets up another mechanism assuming that federal appointees might be less biased than state appointees. However, the fact is that the proposed bill doesn't deal with the central issue which is that there is an insufficient number of jobs. If we have to deal with legislation it seems to me that we have to create more jobs for lawyers.

Those of us who are trying to get into the elite profession of law are simply struggling to get into the door, and we are not dealing with what the other political dynamics are. We want a bar exam so that more of our group can gain entry into the profession, but we're not recognizing that the economic dynamic in the United States today speaks to bar associations setting up limiting, exclusionary procedures so that the total number of lawyers available to clients in each state remains basically the same. This is really the narrow scope of things in which we are working. Out of the national resource center that I have proposed we could begin developing legislative approaches not only toward remedying some of the intrinsic race biases within bar procedures, but more importantly we have to consider the creation of more jobs for lawyers. We must deal with that question otherwise we will be taking a myopic view of the situation.

Question: The gentleman just speaking, just spoke about a need for compiling statistics and getting together minds to attack a problem. What we are here to say is that we are doing this in northern California. Lydia and I caught a plane one hour after leaving the state bar negotiating with the Board of Governors about this very problem. We are down here to ask, and my question is: Are there people down here in southern California with whom we might coordinate so that all of the litigation, research, and negotiations doesn't occur in northern California? These efforts are going on right now, so we are interested in getting some people to actively participate from southern California.

McGee: I would like to respond to that by saying that there are several possible resources for that combined effort. There is the Black Law Journal which Mr. Hinds has pointed to and is an ongoing resource here at the university. There is a chapter of the National Conference of Black Lawyers here in Los Angeles and I would suggest that when we adjourn that some of the people from NCBL Los Angeles meet with you and the Black Law Journal.

Robinson: With regard to the statistical point that was just raised, and I certainly agree with Mr. Hinds, I think we should get some statistics and I think we should keep them from year to year. They should be done so that they are absolutely accurate because there have been some that are somewhat suspect, and I raised a question on statistics on this report. This morning Dean Warren said UCLA had over a 60% pass rate in 1975. It appears in another report that it was 31% for 1975 and I don't know maybe they are using a different group. I think there should be a coordinated effort on statistics that are used so that everybody is collecting the same information and then we know they are accurate.

McGee: The problem is how you divide that up. I mean are you counting your class? Are you counting your second and third time people taking it? The point you make is well taken Mr. Hinds that here is a need for statistics scientifically gathered and the state bar is not collecting on racial grounds is I think no longer tenable.

Comment: We have come here today to listen to your statements. There is a vast number of nonminority students who have failed the bar repeatedly for reasons which may be similar or identical to the same reasons that you have been passed. The issues of relevancy, the psychological aspects, and all of the other things that have been raised today could be the real reasons why we are not passing. There are quite a few of us in this group and we would like to coordinate with your groups as a means of dealing with the state bar. Perhaps we could approach it from a little different perspective—"WASPS" dealing with "WASPS" so to speak—and taking into consideration the fact that if there is a type of ethnic or racial discrimination it is possibly carrying over into nonethnic or nonracial groups also. It seems they have gotten themselves so screwed-up with this thing that you have got a lot of people failing the bar who did quite well in law school and undergraduate school irrespective of whether they were Black, brown, American Indian, or white anglo saxon. It seems that the issues here go much farther than just ethnic or racial. I think it apparently has something to do with the validity of the test in general, and I think that these are really things that have to be pursued.

McGee: I would welcome that. I said at the last break that if there is any change it is likely to come from whites who have been excluded more than from blacks or browns for the simple reason that with the changing climate, as Mr. Hinds has pointed out, people are much less likely to be receptive to the demands of Blacks or browns that the bar be made relevant. So I think it is very important. The only other thing I can say is that the court have been hostile, as pointed out by the NAACP today, to claims made on socioeconomic grounds. It is too bad, but I think the combined effort is very important.

Tiggs: In sponsoring today's program the Black Law Journal with the support of legal organizations, sought to provide information about the bar examination process, engage participants in discussion of the reasons for bar examination failure of minority candidates, and involve interested parties in the consideration of possible solutions to bar examination problems. Beyond providing a forum for collective examination of the bar exam prob-

lem, the *Journal* hopes that this conference will inspire members of the legal community to engage in concerted action to handle the issues discussed today. This now concludes the program. I again thank you all for coming. One more comment?

Marilyn Ainsworth: As Linda's predecessor I can appreciate the problems that she has just running the Black Law Journal, but to put together a program like she put together, all by herself, I think she deserves a round of applause.

Tiggs: Along with the attendance I appreciate the acknowledgment.

