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THE REPORT OF THE PHILADELPHIA BAR ASSOCIATION SPECIAL COMMITTEE ON PENNSYLVANIA BAR ADMISSION PROCEDURES—RACIAL DISCRIMINATION IN ADMINISTRATION OF THE PENNSYLVANIA BAR EXAMINATION †

EDITOR'S INTRODUCTION

This report of the Special Committee on Pennsylvania Bar Admission Procedures to the Philadelphia Bar Association is published by the Temple Law Quarterly as a public service and in response to

† December 19, 1970.

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the interest which both the public and members of the Bar have evidenced in it.

The report is herein published in full without addition or deletion except that the Editors have made with the consent of the committee deletions and additions to the original text as follows: 1) The section entitled "Summary and Recommendations" which appeared at the beginning and at the end of the report as submitted is published here only at the beginning; 2) Appendices II and III have not been published herewith; 3) Appendix I has been abridged; 4) Footnotes containing materials, or reports of materials, contained in the appendices have been added by the editors at various appropriate places in the text and are marked Ed. Note; 5) Minor corrections of typographical errors.

The Editors assume no responsibility for any facts stated in the report nor for any conclusions drawn, and are merely publishing the text as it was submitted to the Philadelphia Bar Association. The Editors invite comments by responsible parties for consideration for publication.

Finally, the Editors wish to thank the Honorable Roy Wilkinson, Chairman of the Board of Law Examiners, and John R. McConnell, Esq., Chancellor of The Philadelphia Bar Association, who generously have responded to our request for their comments on this Report. Their comments are presented in two Forewords and were not, of course, a part of the original Report.

FOREWORD †

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At the request of the Editor-in-Chief, Mr. Alan S. Fellheimer, there is noted the following history of the subject report.

In 1970, the Honorable Robert M. Landis, Chancellor of the Philadelphia Bar Association for that year, appointed Judge Paul A. Dandridge, Judge Clifford Scott Green, Ricardo C. Jackson, Esquire, W. Bourne Ruthrauf, Esquire, and Peter J. Liacouras, Esquire, members of the Association's Special Committee on Pennsylvania Bar Admission Procedures. Mr. Liacouras was made Chairman.

On December 19, 1970, that committee filed its report which was at the same time made available to the press.

On January 7, 1971, the Board of Governors of the Philadelphia Bar Association adopted unanimously the following resolution:

RESOLVED, That the Chancellor of the Philadelphia Bar Association enter into immediate discussions and negotiations with the Pennsylvania State Board of Law Examiners so as to eliminate any possibility that there will be racial discrimination in connection with the bar admission procedures.

† Letter of February 3, 1971, John R. McConnell, Esq., Chancellor, Philadelphia Bar Association to Alan S. Fellheimer, Editor-in-Chief, Temple Law Quarterly.

The undersigned thereupon met with the Chairman of the Board of Law Examiners, the Honorable Roy Wilkinson, and following that meeting reported back to the Board of Governors.

Thereafter, on January 21, 1971, the Board of Governors adopted the following resolution:

WHEREAS, the Board of Governors, upon its study of the report of the Special Committee on Pennsylvania Bar Admission Procedures, undertook to discuss with the Board of Law Examiners the steps necessary and advisable for the removal of any possibility of discrimination in the Bar examinations; and

WHEREAS, in the course of those discussions, the Board of Law Examiners indicated to the Board of Governors that the following changes and procedures would be effectuated:

1. That commencing in 1972, the Bar examination in substantial part will be composed of an examination prepared by a committee of law school faculty members from various parts of the United States, will be a multiple choice examination and will be marked electronically by an independent testing service in Princeton, New Jersey; and

2. That by reason of the time required to prepare the above system of conducting the examination, it will not be possible to effectuate it in 1971 and that therefore the 1971 examinations will be conducted under the following conditions:

(a) The examinees' numbers will be determined by lot;
(b) The examinees will, as far as possible, be seated as they choose;
(c) There will be only one copy of the list of numbers and names and that list, upon its completion, will be placed in a locked vault where it will remain until all examination marks have been finalized;
(d) Every paper will be reread by a marker who will read the entire paper;
(e) All photographs of each examinee will be returned to him immediately upon the conclusion of the examination;
(f) The papers will be marked by the same markers and examiners as heretofore less only those, if any, unable to perform their duties by reason of illness; and

WHEREAS, the Board of Law Examiners has advised the Board of Governors that it intends to take no action with respect to those examinees who failed to pass the last examination,

Now, THEREFORE, the Board of Governers resolves as follows:

1. The Board of Governors commends the action of the Board of Law Examiners in effecting the above changes.

2. With respect to the examinees who did not pass the last Bar examination, the Board of Governors recommends to the Board of Law Examiners that the subject of any possible discrimination in the Bar examinations be removed from the realm of speculation and unverifiable debate and that this be accomplished by a specific method of reevaluation to be agreed upon in discussions between the Chancellor and the Board of Law Examiners.

As of this writing, this matter has not yet been concluded.

JOHN R. MCCONNELL,
Chancellor

FOREWORD †

The Editor of the Temple Law Quarterly has asked me to comment on the report of the Philadelphia Bar Association's Special Committee which asserted that its "thorough and comprehensive investigation of the entire Bar examination processes raised the strongest presumption that the Pennsylvania State Board of Law Examiners indeed discriminated against the blacks."

With specific reference to accusations that the Board devises questions, administers the examination, marks the papers or determines who passes in a manner calculated to discriminate against any applicant, black or white, or any law school, I say categorically, unequivocally and emphatically, based on twelve years' experience on the Board, such accusations are utterly without basis in fact.

I do not consider it necessary to defend the Board against such charges of discrimination. Certainly the individual member's reputation and standing in the profession and in the community belie such charges. Nor do I feel any good purpose would be served, and indeed perhaps the focus on the main problem only diverted, by pointing out the many inaccuracies in the report. For example, (2)(b)(3) of the summary of the report states: "In the July 1969 examination, a majority of black candidates, all of whom were repeaters, were seated consecutively in the same row." On page 49 of the report, it is stated that in the July 1969 examination, "seven blacks were seated consecutively along the same row."

This was a most serious charge which could only be checked if the names of the black applicants were supplied. I asked and was assured the names could and would be supplied immediately. To date, I have been given four names. One named individual did not take the July 1969 examination, having passed in January, 1969. The others did not have successive numbers and, therefore, if they sat in their assigned seats, could not have been seated consecutively.

Let's get to the heart of the problem and not have tempers flare or emotions aroused, because professional people may have acted in an unprofessional way, both in preparing the report and in publicizing it in the press, on the air, and on TV, prior to bringing it to the appointing authority.

For several years the Pennsylvania State Board of Law Examiners has been concerned with the failure of black applicants as such failures

† Letter of February 17, 1971, Hon. Roy Wilkinson, Jr., Chairman, State Board of Law Examiners, Judge, Commonwealth Court of Pa. to Alan S. Fellheimer, Editor-in-Chief, Temple Law Quarterly.

have been brought to its attention. I have tried to find some specific causes that would account for so many blacks failing the examination after graduating from an accredited college and an accredited law school. It is no satisfaction that the same problem exists in many other states and no satisfactory solutions have been offered. Further, I am reluctant to accept that the cause might be lack of proper primary, secondary and college training. This could possibly account for the very small percentage of black law students but, having graduated from an accredited law school, at least a more substantial percentage should pass the Bar examination. They do not.

Several years ago, on a personal basis, a friend of mine, well-known in the circles of higher education and psychology, spent many hours reviewing with me, and later with the full Board, the methods used in preparing the essay questions and in marking them. He advised us that the procedures used were appropriate and he could not offer suggestions for improvement other than an attempt to develop multiple choice questions. He recommended Educational Testing Service (ETS) of Princeton, New Jersey, as a consultant. We secured its services and after review, we were advised that our present system was appropriate for essay questions, and that it would take several years and a great deal of money to develop a multiple choice examination.

Two years ago, when I was elected to the Board of Governors of the National Conference of Bar Examiners, I was placed on a special committee to make an in-depth study of bar examinations. We obtained a $100,000 grant from the American Bar Endowment, and we retained the services of ETS. We obtained the services of Joe E. Covington, former Dean of the University of Missouri, Columbia School of Law, as NCBE Director of Testing.

We determined that the multiple choice examination would cover five subject areas: torts, contracts, criminal law, real property, and evidence. We named five committees, one in each subject area. Each committee has three nationally-known law professors and two bar examiners. Each is now working to develop questions. ETS has advisors with each committee.

We addressed the National Conference of Chief Justices at its meeting in St. Louis last summer, advising them of our plans. We met with forty-five of the fifty state boards in the last four months.

The result is that I am happy to announce with some confidence that on February 23, 1972, and on July 26, 1972, a one-day multiple choice examination will be given in several states, including Pennsylvania. A second day of essay questions will be given. With several states giving the examination, a broad base for statistical analyses will

be available to compare the multiple choice examination with the essay type. If my best evidence and my high expectations prove correct, there will be a 1-1 general comparison, and individuals disadvantaged in writing and expression skills will show greater proficiency in the multiple choice examination. Indeed, if everything goes well, I will urge that passing either day will be sufficient for admission.

The Pennsylvania State Board of Law Examiners, together with many other groups and individuals, has long been concerned with determining what, if any, changes could be made, hopefully to improve the Bar examination. Indeed, some very thoughtful and scholarly papers have been published recently on this subject, notably one in the May 1970 University of Pennsylvania Law Review, questioning the necessity for a Bar examination, and recommending changes or its abolition. (See London, Lord, and Schaeffer, *Admission to the Pennsylvania Bar: The Need for Sweeping Change*, 118 U. OF PA. L. REV. 945 (1970).)

Unfounded charges of discrimination against individual Board members will only polarize those most concerned. Surely, responsible professional men and women can responsibly and professionally attack this difficult problem. I submit the Pennsylvania Board, joined by many other state boards and the National Conference, has been and is taking active steps to improve the Bar examination process.

SUMMARY OF THE REPORT AND RECOMMENDATIONS

A. At the outset, this Special Committee was made aware of a practice of the State Board of Law Examiners by which examination data, including answer booklets, are systematically destroyed. As a result, we could not focus on a search for evidence of discrimination as to individual candidates. Nonetheless, we have conducted a thorough and comprehensive investigation of the entire Bar examination processes.

B. *We have ascertained that the following practices raise the strongest presumption that Blacks are indeed discriminated against under procedures used by the State Board of Law Examiners:*

1. In the final procedures before determining whether papers shall pass or fail, the State Board of Law Examiners, despite repeated denials of some members, has access to and makes use of personal data on some candidates which can reveal the race of the candidate.

2. Other procedures used in the examination process unnecessarily create opportunities to ascertain the race of candidates. These are:

   (a) A photograph of every candidate together with his signature, his preceptor's signature, and his file number is in the custody of the Board at all pertinent times.

   (b) At the time of the examination, the following procedures permit immediate racial identification of candidates:

      (1) Each candidate's examination number (which is assigned alphabetically except for repeaters) is displayed prominently on his desk.

      (2) Master lists pairing each candidate's name and number are present in the examination rooms on the desk of each chief proctor.

      (3) In the July 1969 examination, a majority of Black candidates, all of whom were repeaters, were seated consecutively on the same row.

3. Statistical evidence demonstrates that a grossly disproportionate percentage of Blacks fail each examination and there is lacking any available hypothesis other than race by which to explain these proportions. (See Tables 1-8 in Part I for presentation of data and analysis.) Even candidates who qualify to take the Bar examination by the combined law

school-clerkship route (and who are therefore not even graduates of an *un*approved law school) have passed at a higher rate than Blacks who are graduates from an *approved* law school. Significantly in this regard is the fact that while 98% of all those taking the Bar examination pass eventually, only 70% of Blacks taking the examination pass eventually. The only group "weeded out" by the Bar examination, which can be identified, is Blacks.

4. All of the above, coupled with staff authoritarianism, and the Blacks' reasonable perceptions that they were being singled out for special treatment, places unreasonable and undue pressure on Black candidates. The absence of any procedures or reviews which Blacks may use to discover if the process, as to them, was tainted with racial discrimination, only reinforces the reasonableness of this belief.

5. The State Board has failed to take any affirmative action to alter this gross racial imbalance notwithstanding the facts that: (a) no Black was admitted to the Bar for a 10 year period (1933-1943); (b) the "Hastie Committee" Report of 1953-1954; (c) there are only 130 Black lawyers out of nearly 1 million Black persons in Pennsylvania, while there are in excess of 12,300 non-Black lawyers out of a non-Black population of 10.4 million in Pennsylvania; and (d) Pennsylvania ranks near the bottom of industrial states on the ratio of Black lawyers to Black population and even rivals those of the Old Confederacy.

C. *We have also ascertained that the following examination practices (standards and procedures) raise a serious presumption that a not insubstantial number of all candidates (without regard to race) have been delayed or deprived of admission to the Bar through unequal or arbitrary and capricious actions of the State Board of Bar Examiners.*

1. In the final procedures before determining passing and failing, the State Board has access to and make use of personal data revealing at the minimum, *inter alia:* college, law school, degrees and dates awarded, date of birth, number of times examined. In addition, present in the room during these deliberations is a list containing: names of candidates and their preceptors, and the county in which they intend to practice. (Board members deny having used this list.)

2. Before any papers are graded, 17 papers are selected on a predetermination based on background data of each candidate that the papers will represent a probable distribution of superior, average and inferior performance.
3. Despite its published Regulation that the minimum passing grade is 70%, the Board systematically passes papers scoring less than 70. Through the use of "discretionary points," a substantial number of papers with grades lower than 70 (66.458 for the July 1969 examination) is, by motion, raised to 70 and thereby passed. It is estimated that, until recently, 75% of all passing grades recorded were precisely that same 70.
4. Despite Board affirmations that all papers are treated equally and that when the Board reaches down to raise one paper it invariably raises all papers with equal or higher scores to a passing grade, the facts are contrary.
   (a) In the July 1969 examination, 22 papers with a final grade of 66.458 or higher were failed, but paper #644 scoring 66.458 in its final reading, was raised by the Board to 70 and passed at the Final Meeting where personal data on the candidate was available and used. Evidence suggests other arbitrary or inconsistent treatment of papers to the same effect.
   (b) Notwithstanding an increment of a substantial number of points as a result of re-reading, the Board has arbitrarily and systematically created a classification called "borderline papers." Such papers are awarded second, third and even fourth readings on the basis of differences which are not rationally defensible. In addition, only those so classified are eligible to have their grades raised.
   (c) The Board has not utilized the same pass-fail discretionary standards on the various exams. Thus, the effective passing grade (e.g., 66.458 in July 1969, and 67.291 in July 1970) varies from Bar examination to Bar examination.

D. *Our thorough review of the Bar examination process (participants, standards and procedures) raises grave doubts concerning the validity of the Pennsylvania Bar examination for graduates of law schools on the approved list of the American Bar Association. The following factors give credence to these doubts.*

1. There is no consensus among the Board or its Examiners as to what the test is intended to measure. Particularly, the Board has been unable to identify or differentiate between a test measuring "achievement" and a test measuring "aptitude" for graduates of approved law schools.

2. Notwithstanding repeated assurances, and a Board Regulation requiring that "marking will be based primarily upon whether the candidate has the ability to analyze," no one connected with the Board has been able to identify any element of analytical ability actually tested. All deny that a principal purpose of the test is to measure a candidate's knowledge of substantive law (such as Pennsylvania idiosyncracies).

3. At no critical phase in the examination process (question preparation, establishment and implementation of grading procedures and standards) has the Board included or attempted to include experts. They have deliberately avoided using law professors or testing experts in any phase of the examination.

4. No validation study, prospective or retrospective, has been conducted in order to determine whether the State Bar examination accurately predicts the ability of applicants to perform adequately as lawyers.

5. Additional specific criticisms as found in Part Two, Section E of this Report including: (a) use of non-professional and part-time examiners at every stage of the examination process; (b) substitution of quantitative (arithmetic mean averages) standards for qualitative standards: e.g., no consideration is given to the test as a whole; each question is graded separately by a particular examiner, and the entire test is not read, as a rule, by a single examiner.

E. *Recommendations.*

Our investigation into the allegation of racial discrimination in the administration of the Bar examination led, by natural stages, to a review of the examination process as a whole. The investigation revealed and the Report has detailed that the Bar examination is demonstrably inadequate to the purposes that it must serve. The Bar examination fails to meet the legitimate expectations of the public, the legal profession, and candidates without regard to race, but particularly Blacks.

Two criteria are paramount in any valid Bar admission process: (1) procedures and standards must effectively assure that those admitted to the Bar are prepared to assume the duties and obligations that practicing lawyers owe to the public; and (2) standards and procedures must meet the requirements of equal protection and due process.

We therefore recommend:

1. Those candidates who have heretofore unsuccessfully taken the Bar examination be admitted by motion for the reason that the Bar examination as developed and administered is invalid and discriminatory. (There is ample precedent for admission on motion in special circumstances, as for example the approximately 500 admissions under the so-called "war measures orders" of the Supreme Court. The members admitted on motion have contributed greatly and include some of our most respected lawyers.)
2. That if some form of additional Bar examination is deemed necessary, that such an examination meet the objections of discrimination, invalidity and lack of review detailed in this report.

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APPENDIX FOUR. (Memorandum to the Members of the Special Committee) "Evaluating Bar Admission Procedures Under Standards of Equal Protection." *Robert J. Reinstein*

INTRODUCTION

1. *The mandate*

By letter dated June 23, 1970, the Chancellor of the Philadelphia Bar Association, Robert M. Landis, Esquire, designated the signers of this Report as a Special Committee on Pennsylvania Bar Admission Procedures "to investigate the claims of possible discrimination against Black law students in these procedures." Neither subpoena power nor a staff was made available to us.[1]

2. *The charges*

Oral and written complaints to the Bar Association and to this Special Committee, as well as to the public through the news media, have bluntly suggested that the State Board of Law Examiners has practiced racial discrimination in the Bar examination process. It has been alleged that the State Board deliberately has fostered an atmosphere hostile to Black candidates for admission to the Bar, and has consciously created or otherwise tolerated procedures which cumulatively have resulted in a systematic exclusion of Blacks from the Bar. The State Board of Law Examiners is a duly appointed agency of the Supreme Court of Pennsylvania which claims and exercises the exclusive right to regulate admission to the Pennsylvania Bar.

3. *Our commitment to the "right to know"*

In executing their mandate, the undersigned have gone about their business as a solemn obligation to investigate aggressively, to appraise fairly, and to recommend wisely; otherwise, erosion of public confidence in the integrity of the Bar would be justified. Our commitment is not only to the candidates and to the State Board of Law Examiners but to the Supreme Court, the Bar and the public. Each should be protected from reckless charges, and from arbitrary, incompetent and biased action. Each constituency has the right to know the truth.

4. *Those consulted*

The Special Committee has sought and received assistance from a wide spectrum of the legal community. The State Board of Law Examiners, its Chairman and members, its Secretary-Treasurer and staff, and its eleven graders, have cooperated with us courteously. All

1. We wish to thank Chancellor Robert M. Landis and Executive Director Jay Strassberg of the Philadelphia Bar Association for their unfailing courtesy; Maxine Stotland, a third year law student at the University of Pennsylvania Law School, for administrative assistance during the early phases of our investigation while she was a summer intern at the Philadelphia Bar Association; the editors of Temple Law Quarterly for valuable editorial assistance; Kathy Boyle and Ann Myers Liacouras for herculean efforts in rendering the manuscripts to final form, and to Edward J. Sulick for completing a massive duplicating task.

have supplied us with valuable information and insights. We were met at the outset, however, with the unavailability of certain key documents. Many records of the State Board of Law Examiners, including almost all answer booklets of the candidates, are regularly destroyed after an examination. The Board has honored a majority of our requests for available data, however.

Similarly helpful have been the inputs of present and past candidates for Bar admission: law school deans and faculties; lawyers, judges; law students; "Bar review" directors; national legal education groups (e.g., the Association of American Law Schools, A.A.L.S.; the American Bar Association, A.B.A.; the National Bar Association; the Council on Legal Education Opportunity, C.L.E.O.); law alumni units; and state and local Bar groups and individuals who have heretofore studied these and related issues.

We have met with representatives of these groups once and in some cases several times. In addition to more than a score of meetings, physical on-site inspections, thorough research of public and private documents (official as well as unofficial), and survey techniques (including interviews), we conducted a public hearing in City Hall Annex on September 17, 1970, at which some thirty-five persons appeared.

5. *The Bar examination as the last hurdle for Bar admission: focus of this Report*

The Bar examination looms as the last major hurdle to a candidate's admission to the Pennsylvania Bar. Except for an attorney from another state who has practiced law there for a substantial period of time, for a full-time law professor in a Pennsylvania law school who has taught law for a substantial period of time, for a war veteran who was exempted by an extraordinary order of the Supreme Court during or just after the last two World Wars and the Korean War, one expects to and does take the Bar examination.

The Pennsylvania Bar examination is given twice a year in January (at Philadelphia and Pittsburgh) and in July (at Philadelphia, Pittsburgh and Carlisle). It lasts two days and consists of four 4-hour sessions (two daily). According to the State Board Regulations, the examination includes questions from 16 subjects. The "marking will be based primarily upon whether the candidate has the ability to analyze and to apply the law to the facts set forth in the questions."

This Report focuses on the Bar examination. That requirement is, however, only one of the several major hurdles a candidate encounters enroute to Bar admission. In addition to graduation from college and an approved law school, a candidate must also: (1) have registered,

with the State Board, as a law student when he began his law studies; (2) have submitted to a "character investigation" by the State Board and County Board of Law Examiners, including two interviews with his citizens sponsors; (3) have applied for, and been determined qualified to take this particular Bar examination; (4) have taken and passed the Bar examination; and (5) have served a law practice clerkship after the Bar examination. Each is a costly and time-consuming hurdle. It is only because the other requirements have recently been critically analyzed, that we in this Report focus on the Bar examination—a process that lawyers recall from first-hand experience, but about whose procedures less may be known factually than about any other critical phase in legal process.

PART ONE

Context of Conditions in Which Pennsylvania Bar Admission Procedures—and the Bar Examination Process in Particular—Must Be Evaluated

An appraisal of Pennsylvania Bar Admission procedures cannot be made in the abstract. All procedures operate in a context; none are neutral. Procedures help achieve certain goals and retard others depending on the context of conditions in which they operate. The first step, therefore, in any meaningful evaluation of Pennsylvania Bar admission procedures—and the Bar examination in particular—is to identify the pertinent context of conditions in which the procedures have been operating. The pertinent context of conditions set forth in Part One of this Report constitute findings of fact.

Part One presents pertinent historical patterns relating to Bar admissions and the Bar examination.

Section A answers such questions as: how many lawyers are there in Pennsylvania and elsewhere? how many of these are Black? what are the population-lawyer ratios in Pennsylvania and elsewhere?

Section B reveals a 1953-54 study by another Special Committee of the Philadelphia Bar Association ("The Hastie Committee") on alleged discrimination against Blacks in the Bar examination.

Section C presents estimates on the number and percentage of Bar candidates who, even after repeating, never passed the Bar examination.

Section D shows the changing profile of the Bar candidate, and stresses the high qualifications of today's candidates. It also reveals

that upwards of five hundred military veterans—including some of our Bar leaders—were admitted to practice without a Bar examination. It then describes the types of law schools (approved and unapproved) from which today's Pennsylvania Bar examination candidates gradulate.

Section E contains eight Tables which compare various aspects of Black and non-Black passing and failing rates on the Pennsylvania Bar examination.

Section F describes the "climate" in Pennsylvania for Black candidates seeking admission to the Bar: factors such as the impact of previous Bar examination results and authoritarianism displayed by some staff of the State Board.

Section G deals with the shifting of burdens in proving racial discrimination, the manner in which law schools took affirmative action to overcome racial imbalance, and the State Board's inaction in a comparable setting.

* * *

The State Board of Law Examiners makes, interprets, and applies the procedures for Bar admission. It and its members have had reason to know and to act on the facts contained in Part One, individually and collectively.

A. Historical Patterns: The Legacy of Too Few Black Lawyers in Pennsylvania, and the Numbers Admitted in Various Periods

1. *Legacy of too few Blacks in Pennsylvania*

Historically and traditionally, lawyers are the most effective leaders in any peaceful community. Every new lawyer potentially services an additional group in society whose rights are thereby better understood and protected. That group is usually one from which he sprung. Since law and lawyers act not only in "peace-keeping" functions but also in creative roles in the shaping and sharing of better health, jobs, education, respect and leisure for clients, the abundance or lack of abundance of lawyers in any community is a mirror of its realization of these ends. The scarcity of Black lawyers in Pennsylvania—just 130 for a Black population base of nearly 1,000,000 persons—is scandalous to a Commonwealth professing to serve all its people. This shortage of Black lawyers has undeniably decreased the effectiveness of the Black community in seeking to achieve equality of opportunity through traditional legal channels. And while the Black community is principally harmed by what has amounted to an exclusion of Blacks from the Pennsylvania Bar, the entire Commonwealth and nation suffer irreparable harm.

2. *Lawyer-population ratios and the number of Blacks admitted to Pennsylvania and Philadelphia Bars.*[2]

The paucity of Black lawyers in this Commonwealth can be demonstrated with several population data. (There are, incidentally, no known Puerto Rican lawyers in the Commonwealth despite a Puerto Rican population of some 75,000 persons.)

a. *Ratio of lawyers to population*

(1) *State wide and elsewhere*

There are in Pennsylvania some 12,300 lawyers in a total population in excess of 11,400,000, or one lawyer for every 925 persons. No other major industrial state has such a small ratio of lawyers to general population. For instance, in Illinois, the ratio is about one lawyer for every 550 persons; in California it is about one for 680; in Ohio, one for 620; in New York, one for 340.

(2) *Philadelphia*

In Philadelphia there are some 5,000 lawyers in a total population of about 2,000,000, or about one lawyer for every 400 persons.

b. *Numbers of Blacks admitted to Pennsylvania and Philadelphia Bars*

(1) *State wide*

During the past forty years, the average annual number of Blacks admitted to the Pennsylvania Bar has been less than four. Between 1933 and 1943, however, no Black was admitted to the practice of law in Pennsylvania. Since 1955, a total of eighty-five Blacks have been admitted to the Pennsylvania Bar, or about five per year. Meanwhile, since 1955 some 7,300 non-Blacks have been admitted to the Pennsylvania Bar, or about 456 per year. Since 1955, the net increase in the average number of Black lawyers in Pennsylvania has been just above three persons a year to the current level of about 130. For example, in 1969 seven Blacks were admitted state wide, and the number for 1970 is probably the same.

(2) *Philadelphia*

During the past forty years, some 130 Blacks have been admitted to the Philadelphia Bar, or an average of three a year. Since 1955 a total of 69 Blacks have been called to the Philadelphia Bar.

2. See E. B. Toles, "Report of Black Lawyers and Judges in the United States, 1960-1970," in *Congressional Record*, Sept. 2, 1970, E 7996. (Mr. Mikva), and the other sources cited in Part I, Section E, below, for the data in the present section.

c. *Ratio of Black lawyers to Black population; and ratio of non-Black lawyers to non-Black population*

(1) *State wide and elsewhere*

There are in Pennsylvania some 130 Black lawyers in a total Black population of nearly one million or about one Black lawyer for every 7,600 Black persons. By contrast, the ratio of non-Black lawyers to non-Black population in Pennsylvania is one in 850, or about nine times more favorable than the Black ratio.

Although Blacks are vastly under-represented in every state's Bar, Pennsylvania's record is poorer than most and rivals those of the old Confederacy. Among major industrial states, Pennsylvania is near the bottom in rates of Black lawyers to Black population. That ratio, in a representative grouping of states, is:

State	*Approximate number of Black persons in population "serviced by" one Black lawyer [ratio of Black lawyers to Black population]*
District of Columbia	820
* New York	1,000
Illinois	1,500
Ohio	1,900
California	2,200
Massachusetts	2,300
Michigan	2,900
Wisconsin	4,100
Pennsylvania	7,600
Virginia	8,000
Texas	12,600
Florida	15,000
Maryland	16,000
Delaware	20,000
Alabama	40,000
Mississippi	40,000

* As to New York, we have relied on data supplied by Austin Norris, Esquire, of the Philadelphia Bar.

(2) *Philadelphia*

There are in Philadelphia some ninety practicing Black lawyers in a population of 700,000 Black persons, a 7,700-1 ratio. By contrast, there are some 5,000 non-Black lawyers in Philadelphia in a non-Black population of 1,300,000, which is a 260-1 ratio. The Black rate is thus twenty-nine times less favorable than the non-Black rate.

B. THE "HASTIE COMMITTEE" REPORT OF 1953-54: TRENDS, PROCEDURES, CONTINUING PROBLEMS

The charge of systematic exclusion of Blacks from the Pennsylvania Bar is not new in 1970. Indeed, on February 18, 1953, Chancellor Bernard G. Segal of the Philadelphia Bar Association appointed a Special Committee "to investigate alleged discrimination in the grading of Bar examinations in Philadelphia County by the State Board of Law Examiners." The Special Committee consisted of Abraham L. Freedman, Esquire (now Judge of the U. S. Court of Appeals for the Third Circuit), G. Ruhland Rebmann, Jr., Esquire, Theodore G. Spaulding, Esquire (now Judge of the Pennsylvania Superior Court) and Judge of U. S. Court of Appeals for the Third Circuit, the Honorable William H. Hastie.

On July 7, 1954, the Special ("Hastie") Committee reported *inter alia* (the subject headings are not those of the "Hastie Committee"):

1. *The inordinantly high failure rate among Blacks on the Bar examinations*

> "[An] extraordinary high percentage of failures of Negro candidates from Philadelphia County on recent Bar examinations . . . from July 1950 to the end of 1952, thirty Negro candidates from Philadelphia County took a total of 43 examinations, some individuals being examined two or more times. Only six candidates passed, three of them with very high grades . . ." (page 1).

2. *"Discretionary points" given by the State Board to some "marginal" papers*

> "It is only in a final procedure, applicable only to those papers which after grading and regrading are not passing but very close to passing, that we find that the candidate is identified. We are advised that as a matter of grace, before finally entering a failing grade for papers which are still just below passing after regrading, the Board considers the record of the candidate to determine whether there is anything there, such as a very high law school average, which might justify the Board in recording a passing grade even though a candidate's paper is not quite passing. This procedure is not derogatory in any way since it cannot result in a lowering of the just below passing grade already tentatively determined from the examination above. The individual record which comes before the Board at this final recommendation of borderline failure cases does identify the candidate by name. His perceptor is also revealed. The Board is informed where the candidate went to school. Thus, he is identified in a number of ways which may or may not suggest his race. However, we are advised that certain items, including the identification card

which bears the candidate's photograph, are not in the record which the Board examines." (Pages 5-6)

3. *Breach of anonymity does not necessarily preclude fairness in grading*

"We have no reason to believe that any member of the Board of Law Examiners would be reluctant to give a candidate the full benefit of this discretionary re-evaluation because of any aspect of this personal identification . . ." (Page 6)

4. *Equality of treatment for all papers with same scores*

". . . [We] are assured that when this final evaluation results in a passing grade for any paper, all marginal papers which theretofore had the same or a higher grade are also regarded as passing. Such procedure is an appropriate means of presenting any discriminatory advantage from accruing to any candidate." (Page 6)

5. *Use of photograph creates suspicion*

". . . [The] use of a photograph as a device for facilitating racial discrimination is so familiar in so many fields, and therefore is so generally suspect, that it would seem to be sound policy, wherever practicable, to use some other device for the person of ensuring that the person who takes an examination is the eligible candidate." (Pages 6-7)

6. *Dramatic increase in Black "pass" rate during the investigation of 1953-54*

". . . [A] high percentage of Negro failures continued [in 1953, but] the January 1954 examination was taken by 11 Negro candidates, 6 of whom passed" (Pages 2, 4)

The "Hastie Committee" Report of 1953-54 was reported only in the archives of the Bar Association. The Minutes of the Board of Governor's Meeting for October 1954, which have been supplied us, contain the following entry [the Chancellor at the time was Mr. C. Brewster Rhoads]:

"The Chancellor then referred to a committee appointed in February of 1953. At that time Mr. Segal, then the Chancellor, appointed a special committee of the Association to investigate the matter of grading bar examinations in Philadelphia, it having been charged by Austin Norris that there was discrimination against Negroes in the Philadelphia area. The committee consisted of Abraham L. Freedman, G. Ruhland Rebmann, Jr., Theodore G. Spaulding, and the Hon. William H. Hastie. The Committee has made a complete investigation and reports that there were no discriminatory practices. Mr. Austin Norris was informed of and read the report and thereafter printed a release that the committee had found no racial discrimination. The Chancellor feels that

> the matter is now closed and he has on behalf of the Association expressed to the committee great appreciation for the task they undertook and discharged so well. The report of the committee is appended to these minutes."

On October 6, 1970, Mr. Norris categorically denied that he ever saw the text of the "Hastie Committee" Report.

C. THOSE PERSONS "WEEDED OUT" BY THE BAR EXAMINATION: HOW MANY CANDIDATES EVENTUALLY "PASS" DESPITE ONE OR MORE FAILURES ON EARLIER TRIES?

The only group "weeded out" by the Pennsylvania Bar examination is Blacks. The "eventual pass" rate of groups of candidates makes that point.

a. *All candidates*

State Board members and Secretary-Treasurer David E. Seymour estimate that more than 98% of those persons who take the Bar examination *eventually* pass it. (If a candidate fails the examination but passes on a subsequent try, he has "eventually passed" it.) From this perspective, the Bar examination does not "weed out" many persons. Less than 150 of some 7,450 candidates have been weeded out during the past 16 years, and this number includes candidates who qualified for the examination by completing a "combined law study-clerkship" rather than graduation from an approved law school. Accordingly, the "weed out" rate for graduates of A.B.A.-approved law schools (discussed below) has all but vanished.

b. *Black candidates*

But Black candidates as a group do not approach that 98% "eventual pass" rate. To begin with, Table 3 in the next section reveals that, while 67.6% of all papers graded on the Bar examination since 1955 have been passed, only 27.7% of papers submitted by Black candidates have been passed. During the past 30 years, the "eventual pass" rate for Blacks has been below 70%. Under that reckoning, the Bar examination has "weeded out" Blacks at a rate 15 times greater than non-Blacks.

D. THE CHANGING PROFILES AND QUALIFICATIONS OF BAR EXAMINATION CANDIDATES

1. *From "reading law" in a law office to studying in a law school*

When in 1903 the State Board of Law Examiners was established by the Supreme Court, the Bar examination became formalized as a requirement for Bar admission. The earlier practice of admission simply "on motion" then became the exceptional rather than usual

route for Bar admission. During the early years of the twentieth century, the average new admittee to the Bar had not attended law school. He had merely "read" law for two or three years in a law office under the tutelage of a lawyer or judge; then, he appeared at the Bar examination. In those days, the Bar examination served the important function of measuring what the "reader" had learned; it was his only real "achievement" test before going out to service clients. (In later years, the Bar examination became an effective vehicle for restricting, for economic and social reasons, the number and kinds of persons admitted to the legal profession. Every State Board member has had reason to know this. A comparison of the state wide and county "passing" rates and total persons passing both state wide and in any particular county over four decades helps reveal this trend.) To repeat, however, before the third decade of this century, the Bar examination's principal legitimate function was as an "achievement" test to measure the candidate who had not gone to law school but had learned his lessons at the "knee" of the old barrister.

By 1965, however, less than 1% of the papers in the January and July Bar examinations were those of candidates who had not graduated from an A.B.A.-approved law school. In the intervening years, the legal profession and public had demanded and received a new institution—the law school. And a new breed of lawyer, liberally educated through four years of college and three years of law school, had emerged as the Bar candidate. The Pennsylvania Bar examination, however, which had become a formal requirement when not more than 1 in 10 candidates were law school graduates, remained virtually unchanged (except that the "passing" rate has increased during the past generation).

Today, the Bar examination's legitimate purposes and functions are unclear. Criticism of the Bar examination and the demand for the "certificate privilege" (discussed below) have reached such proportions that the present Chairman of the State Board, Judge Roy Wilkinson, writing in 1969, observed: "Law schools have become highly qualitative, intellectually exciting, and professionally challenging places of learning." But the Bar examination requirement has been continued except in Wisconsin, Mississippi, Montana, and West Virginia. Those four states admit to their Bars graduates of certain approved law schools under the "certificate privilege." Their Bars, incidentally, compare favorably with those of the remainder of the country.

In Pennsylvania, the Bar examination has been waived in three periods of time for substantial groups of persons. As a result of three emergency orders (the so-called "war measures") of the Pennsylvania Supreme Court during and after the Korean War and the past two

World Wars, upwards of 500 military veterans became lawyers in Pennsylvania without taking and passing the Bar examination—to the detriment of no one. Indeed, some of our most respected lawyers came to the Bar without the Bar examination (e.g., Arthur Littleton, Esquire).

2. *Three kinds of law schools in the United States: the A.B.A.-"approved list," and qualifications for taking the Bar examination*

The principal modalities for seeking and maintaining excellence in law school quality are the informal peer pressures resulting from membership and interaction in the Association of American Law Schools (A.A.L.S.). Certainly not all law schools afford an identically excellent level of educational opportunity for their students. Yet, there are only three formal accreditation classifications: (1) law schools on the American Bar Association's "approved list," (2) law schools on the A.B.A.-"approved list" which are also members of the prestigious Association of American Law Schools (A.A.L.S.); and (3) law schools not on the A.B.A. "approved list."

a. *A.B.A.-approved law schools, members of the A.A.L.S., and unapproved law schools*

Of some 173 law schools in the United States, 145 are (and 28 are not) on the "approved list" of the A.B.A., which is the principal accrediting agency of the American Bar. Of the 145 law schools "approved" by the A.B.A., 119 are also members of the Association of American Law Schools (A.A.L.S.). The A.A.L.S. doubles as the principal forum of interaction among the member schools, and as the accrediting agency for maintaining among the members, a higher standard of quality than does the A.B.A. for its "approved list" schools. Indeed, 26 law schools on the A.B.A.'s "approved list" are not in the A.A.L.S. It bears repeating that accreditation standards and peer pressures among members of the A.A.L.S. are more rigorous and exacting than are the A.B.A.'s.

Among the 119 A.A.L.S. members are the seven law schools in this area: Dickinson Law School, Duquesne University Law School, Rutgers University Law School (Camden), University of Pennsylvania Law School, University of Pittsburgh Law School, Temple University School of Law, Villanova University Law School, and from outside this immediate area such institutions as: Harvard University Law School, Howard University Law School (a predominantly Black institution), Miami University Law School, Michigan University Law School, University of Chicago Law School, University of Virginia Law School, and Yale University Law School.

b. *Is graduation from A.B.A. "approved" law school a requirement for taking a Bar examination?*

A candidate may qualify for the Bar examination of some states (e.g., Maryland, California) even though he has not graduated from an A.B.A. "approved" law school. Instead, he may qualify for such a state's Bar examination by graduation from one of the "*un*approved" schools, e.g., University of Baltimore (Maryland) Law School, John Marshall University (Georgia) Law School; San Francisco (California) Law School. During 1969, for instance, some 335 of the 2,335 candidates who passed the California Bar examination were graduates of *un*approved law schools. In Maryland, the 1969 Bar examinations were passed by 103 graduates of *un*approved law schools, out of the grand passing total of 396 persons. For such states where *un*approved law school graduates are eligible, the present Bar examination may serve an "achievement" test function as it did in Pennsylvania generations ago when law was ordinarily "read" in a law office.

3. *Qualifications for the Pennsylvania Bar examination*

In Pennsylvania there is today no substantial problem of the "unapproved law school" graduate. As to Black candidates for the Pennsylvania Bar, there is no unapproved law school graduate problem at all. Of course, the "combined law study-clerkship" route (which does not even require graduation from an *un*approved law school) is curiously still open; it produced three candidates for the July 1970 Bar examination. And the Supreme Court apparently has issued, during the past year, four *ad hoc* orders each of which permitted a graduate of the University of Paris (France), University of Baltimore (Maryland) Law School, Eastern College of Commerce and Law (Maryland), and Oxford University (England) to take the Pennsylvania Bar examination, thus relaxing the State Board's "approved law school" graduation requirement. But the overwhelming majority (e.g., 652 of 657 in July 1969) of candidates for the Pennsylvania Bar examination, and all the Black candidates, *are* graduates of *approved* law schools. Moreover, the overwhelming majority of these candidates are also graduates of A.A.L.S. member schools. Such a Bar candidate has already completed some 1080 class hours and 120 hours of expert testing in law school before he even qualifies to take the Bar examination.

State Board Regulations have also limited the access of a repeater to the Bar examination. Although precise conditions have varied, there were until recently limits placed on the number of times one might take the Bar examination; "waiting" periods and "further study" requirements were also imposed on multiple repeaters, many of whom were

Black. While a recently adopted Regulation imposes no limit on the number of times a candidates may take the Bar examination, it does provide for a mandatory waiting period of one year between each additional try following the third failure.

4. *The "cram schools"*

So mechanical or unrelated to law school experience has the Bar examination become—or is it vice versa?—that a specialized institution, euphemistically called the "Bar Review" school but descriptively a "cram school," has developed during the past generation.

After graduating from law school, upwards of 95% of the candidates for the Pennsylvania Bar examination now attend a "cram school." For six weeks and at an additional cost of more than $275 in tuition, the candidate is inundated at the "cram school" by an informational review of some sixteen legal subjects, which he usually has already taken in depth in law school. He is also alerted to the peculiarities of Pennsylvania law, and he receives many "insights" into how to write an essay for the Pennsylvania Bar examiners (e.g., the styles of essay answers which various examiners seem to prefer according to these "Bar Review" experts). Despite the State Board's official non-recognition of "cram schools," candidates who do attend them consistently pass the Pennsylvania Bar examination at a rate higher than those who do not, with no perceptible improvement in anyone's qualifications to be lawyers.

E. Comparing Black and Non-Black Pass-Fail Rates on the Pennsylvania Bar Examination

A recent issue of the *American Bar Association Journal* features an article by Dean George Neff Stevens, entitled "Bar Examinations and Minority Group Applicants." In it, Professor Stevens discloses a paucity in generally available racial data on Bar examination results. The present section of this Report, containing eight Tables, may help fill a part of that factual void. But these facts were available to the State Board of Law Examiners if its members and staff were genuinely interested in gathering them.

The data in these Tables are based on official and unofficial records from a variety of sources including the State Board of Law Examiners, law schools, Philadelphia Bar Association, *The Bar Examiner*, and private collections. The data on Black candidates are derived from those sources and interviews conducted with: law school deans, professors and students; members of the Bench and Bar; former candidates for Bar admission; and members and administrative staff of the State Board of Law Examiners.

A Note on Interpreting the Tables

Our data in the Tables do not distinguish between "first-time takers" of a Bar examination and "repeaters." Useful for some purposes, that distinction is at most marginally relevant in this study. We examine "success" rates during various time periods. Such periods may include holdover candidates from earlier periods, just as the period 1971-1975 would include some papers of persons who took the examination in 1970 but were unsuccessful. Precisely how many candidates who submitted papers in any particular period but were not *eventually* sucessful is not therefore a datum found as such in these Tables. Where a candidate within the pertinent period took the exam and passed on his second try our Table would reflect (as to that candidate):

Time Period

Total Number of Papers Examined	*Number Failed*	*Number Passed*	*Percentage of Papers Passed*
2	1	1	50%

Table 1

Number of Black Papers in the Bar Examination: 1955 to Present

Between 1955 and 1970 the total number of Black papers in thirty-two examinations was 306 out of 10,790 total papers for all candidates. The average number of Black papers for a full year (counting both January and July exams, and not distinguishing between "first-time takers" and "repeaters") was twenty, while the average annual number of non-Black papers has been 674. In 1970, there were twenty-five Black papers and 747 non-Black papers. The percentage of Black papers on the two Bar examinations during an average year has therefore been about three per cent.

Table 2

Black vs. Non-Black "Pass" Rates on the Past 32 Bar Examinations, 1955-1970

a. *1955-1970: 32 Bar examinations (16 years)*

The mean average "pass" rate for all papers on the last thirty-two Bar examinations (January 1955-July 1970) is 67.6% (7,300 passed out of 10,790 papers). During that identical period, the Black "pass" rate has been 27.7% (85 passed out of 306 papers).

b. *July 1968-July 1970: 5 Bar examinations (2½ years)*

Focusing on only the last five Bar examinations (July 1968-July 1970), the mean average "pass" rate for all papers has been 81.8% (1,778 passed out of 2,232 papers). During that identical period, the Black "pass" rate has been 25.4% (15 passed out of 59 papers).

TABLE 3 *

COMPARING RESULTS ON THE PAST 32 BAR EXAMINATIONS (JANUARY 1955-JULY 1970) OF PAPERS WRITTEN BY 15 GROUPINGS OF CANDIDATES

"PASS" RATES OF: (1) ALL CANDIDATES, (2) ALL BLACK CANDIDATES, (3) HOWARD LAW SCHOOL GRADUATES, (4) NON-HOWARD BLACK CANDIDATES, (5) COMBINED LAW STUDY-CLERKSHIP CANDIDATES (THOSE WHO HAVE EITHER NOT STUDIED OR NOT GRADUATED FROM ANY LAW SCHOOL), (6) DICKINSON GRADUATES, (7) DUQUESNE GRADUATES, (8) PENN GRADUATES, (9) PITTSBURGH GRADUATES, (10) TEMPLE GRADUATES, (11) VILLANOVA GRADUATES, (12) HARVARD GRADUATES, (13) VIRGINIA GRADUATES, (14) ATTORNEYS FROM OTHER STATES, and (15) ALL LAW SCHOOL GRADUATES OTHER THAN THOSE COUNTED IN #(6) through #(12) and #(14).

	Total Number of Papers Examined	*Number Failed*	*Number Passed*	*Percentage of Papers Passed*
(1) All candidates	10,790	3,490	7,300	67.6%
(2) All Black candidates .	306	221	85	27.7%
(3) Howard	97	82	15	15.5%
(4) Non-Howard Blacks	209	139	70	33.5%
(5) Combined law study-clerkship (not graduates of any law school	74	53	21	28.4%
(6) Dickinson	1,180	373	807	68.4%
(7) Duquesne	751	189	562	74.8%
(8) Penn	1,599	316	1,283	80.2%
(9) Pittsburgh	968	296	672	69.4%
(10) Temple	2,035	709	1,326	65.1%
(11) Villanova	847	207	640	75.5%
(12) Harvard	423	54	369	87.2%
(13) Virginia	94	28	66	70.2%
(14) Attorneys from other states	244	83	161	65.9%
(15) Papers of other law school graduates except those in (6) through (12) above .	2,713	1,242	1,471	54.2%

* See "A Note on Interpreting the Tables," on page 172 above. With the exception of categories (2) and (4), this Table is based solely on State Board data.

TABLE 4

COMPARING RESULTS ON THE PAST 32 BAR EXAMINATIONS (JANUARY 1955-JULY 1970): PAPERS OF BLACK CANDIDATES VS. PAPERS OF "COMBINED LAW SCHOOL-CLERKSHIP" (NON-GRADUATES OF A LAW SCHOOL) CANDIDATES

A startling statistic is that non-Black candidates who have not even completed an unapproved law school have apparently fared better on the Pennsylvania Bar examination than Black candidates who have graduated from approved law schools.

All Black papers ..... (85 persons eventually passed)	27.7%
Combined law school-clerkship (not graduates of law school) papers	28.4%
(21 persons eventually passed, only 2 of whom we know are Black)	

Indeed, the results of the past 12 Bar examinations (January 1965-July 1970) are comparable. In that period, the records are:

All Black papers	30.7%
Combined law school-clerkship *	34.2%

* Includes 2 "Law study—clerkship" candidates who passed the Bar examination even though they apparently did not even *attend* any law school.

TABLE 5 *

COMPARING RESULTS ON THE PAST 12 BAR EXAMINATIONS (JANUARY 1965-JULY 1970): "PASS" RATES OF CANDIDATES FROM A REPRESENTATIVE GROUP OF NON-PENNSYLVANIA LAW SCHOOLS VS. "PASS" RATES OF BLACK CANDIDATES VS. SOME OTHER GROUPINGS

	Examined Number	*Failed Number*	*Passed Number*	*Percentage Passed*
(1) Howard	44	39	5	11.4%
(2) T.C. Williams Law School (Univ. of Richmond, Va.) **	14	6	8	57.1%
(3) Virginia **	28	2	26	92.8%
(4) Harvard	126	8	118	94.0%
(5) Case-Western Reserve (Ohio) **	48	29	19	39.6%
(6) Miami (Fla.) **	20	10	10	50.0%
(7) George Washington (D.C.) **	70	24	46	66.2%
(8) Georgetown (D.C.) **	86	14	72	83.7%
(9) Combined law school-clerkship (not graduates) ***	38	25	13	34.2%
(10) All candidates for the examination	4,400	973	3,427	77.9%
(11) Black candidates only	104	62	32	30.7%

* See "A Note on Interpreting the Tables" on page 172 above. With the exception of category (11), this Table is based solely on State Board data.

** Does not include July 1970 examination.

*** Includes 2 "law study—clerkship" candidates. Such a candidate does not even *attend* an unapproved law school, but "reads law" in the office of a lawyer or judge.

TABLE 6 *

COMPARING "PASS" RATES OF BLACK AND NON-BLACK GRADUATES OF THE LAW SCHOOLS OF (1) TEMPLE, (2) PENNSYLVANIA, (3) VILLANOVA WHO DID PASS THE BAR EXAM, (4) ALL OTHER BLACK CANDIDATES, WHETHER OR NOT THEY EVENTUALLY PASSED THE BAR EXAM: 32 EXAMINATIONS (JANUARY 1955-JULY 1970)

	Total Number of Papers Examined	*Number Failed*	*Number Passed*	*Percentage of Papers Passed*
(1) *Temple Law School*				
All graduates	2,035	709	1,326	65.1%
Blacks (who eventually passed the Bar exam)	68	42	26	38.3%
(2) *Penn Law School*				
All graduates	1,599	316	1,283	80.2%
Blacks (who eventually passed the Bar exam)	13	6	7	53.8%
(3) *Villanova Law School*				
All graduates	847	207	640	75.5%
Blacks (who eventually passed the Bar exam)	8	4	4	50.0%
(4) All other Black candidates (whether or not they eventually passed the Bar exam)	217	169	48	22.1%

* See "A Note on Interpreting the Data" on page 172 above. This Table is based on data supplied by Deans and Faculties of Law Schools, public State Board records, interviews with members of the Bench and Bar, former Bar candidates, and legitimate inferences based on factual trends and patterns.

TABLE 7 *

COMPARING "PASS" RATES OF BLACK AND NON-BLACK GRADUATES OF PENN, TEMPLE, VILLANOVA, HOWARD LAW SCHOOLS, AND ALL BLACK CANDIDATES; 12 EXAMINATIONS

(JANUARY 1965 TO JULY 1970)

	Total Number of Papers Examined	*Number Failed*	*Number Passed*	*Percentage of Papers Passed*
Temple Law School				
All	603	101	502	83.2%
Black	10	3	7	70.0%
Penn Law School				
All	535	77	458	85.6%
Black	7	3	4	57.1%
Villanova Law School				
All	504	92	412	81.7%
Black	4	2	2	50.0%
Howard Law School	44	39	5	11.4%
All Candidates	4,400	973	3,427	77.9%
All Black Candidates	104	62	32	30.7%

* See "A Note on Interpreting the Data" on page 172 above.

TABLE 8

ESTIMATED "PASS" RATES ON SEVERAL STATES' BAR EXAMINATIONS, IN 1965-1970 PERIOD, OF GRADUATES OF HOWARD UNIVERSITY LAW SCHOOL

Because of the unusually low "pass" rate on the Pennsylvania Bar examination of graduates of A.A.L.S. member school Howard University Law School, which is predominantly Black, we have gathered data concerning Howard graduates' "pass" rates in other Bar examinations. In such fact finding, we have not had the leverage outside Pennsylvania that we did in this Commonwealth. The data we have compiled comes from three sources: (1) certification (for Bar examination eligibility) records of Vice Dean Elwood Chisholm, which exaggerate the probable

number of actual takers of a particular Bar exam since a Howard student may apply for the D.C., Maryland and Virginia Bar exam and actually take only one of them. Vice Dean Chisholm's certification records have therefore been adjusted downwards for this Table, but only by twenty per cent and only for the D.C., Maryland and Virginia exams; (2) correspondence between State Board of Law Examiners and Deans' offices and (3) interviews we conducted with the Dean and Vice Dean of Howard University Law School.

D.C.

Howard (estimated 220 papers, actual 88 passed)	40.0%
All candidates	61.5%

Florida

Howard (20 papers, 13 passed)	65.0%
All candidates	88.0%

Maryland

Howard (estimated 28 papers, actual 9 passed)	32.2%
All candidates	44.0%

New York

Howard (estimates by Vice Dean Chisholm: 30 papers, 21 passed)	70.0%
All candidates	71.0%

Ohio

Howard (16 papers, 11 passed)	68.8%
All candidates	86.6%

Pennsylvania

Howard (44 papers, 5 passed)	11.4%
All candidates	77.9%

Tennessee

Howard (6 papers, 4 passed)	66.7%
All candidates	81.0%

Virginia

Howard (estimated 27 papers, actual 13 passed)	48.1%
All candidates	73.5%

F. The "Climate" in Pennsylvania for Black Candidates for Bar Admission

The administration of the Bar examination obviously places enormous pressure on prospective attorneys. The examination is the final hurdle following years of professional preparation. Success or failure is measured in a thousandth of a point, and is currently absolutely unreviewable. Such pressure is perhaps inevitable, and would, perhaps, be tolerable, *if* the pressures were placed equally on all candidates. The psychological pressures are not equal on all groups of applicants. It is important to note in this regard that pressure is an effect of a candidate's perception of his environment. And if the Black candidate has legitimate grounds for believing the environment is hostile, he will respond to that environment differently than others for whom the environment is merely difficult or bothersome. Thus, we must review certain procedures, which even though neutral in intention, may reasonably be perceived to foster racial discrimination.

1. *The impact of Bar examination results*

Whether or not the State Board members have known or suspected that Black candidates were failing the Bar examination at a rate more than twice that of non-Blacks, the potential Black candidate knew it. Indeed, the "word has been out" in the Black community for years.

The psychological impact of a ten-year drought (1933-1943), during which not a single Black was successful in the Bar examination, was devastating to the morale of those Blacks who dared aspire to become lawyers. Nor did perceptive observers overlook the "coincidence" that it was only in the January 1954 Bar examination, while the "Hastie Committee" was investigating alleged discrimination in grading, that Blacks as a group ever fared as well as non-Blacks. Although the "Hastie Committee's" findings were not generally known to the public, the Report's six points quoted earlier in this section are certainly well-known to Blacks. The undue psychological effect on a Black candidate of the State Board's practices of breaching "anonymity" in the grading process and giving "discretionary points," based on one's non-examination record—as well as the potential use of his identification picture—was indeed predictable.

Typifying the atmosphere created *inter alia* by the Bar results is a recent public statement by the Dean of the Howard Law School: "For years we at Howard have cautioned our students considering law practice in Pennsylvania to think about it again. We have told them what we know. Blacks are not welcome in Pennsylvania, and the Bar examination is the State Board's way of making sure that the number of Black

lawyers in that state remains small."

Those Blacks who, during the past 27 years did pass the Pennsylvania Bar examination, were usually repeaters (that is, few passed on the first try). Several passed only on their fourth, fifth or even sixth attempts! But when they did pass, these Blacks, more often than their white counterparts, seemed to receive a grade higher than the barely passing mark of seventy, which was the grade upwards of 75% of all persons who did pass the examination received until very recently. The Black candidate who did not believe that, to pass, he would have to do better than a non-Black examinee, has yet to be found. The undue psychological impacts on Black candidates of these past Bar examination results, and their continuing beliefs about unfairness in the examination process, are obvious.

2. *The impact of authoritarianism communicated by the State Board's Philadelphia staff*

Every Black lawyer, judge and candidate for Bar admission has made a common point to us concerning his pre-admission dealings with the State Board's staff. (Here we are not referring to Board members, nor to the present Secretary-Treasurer, nor to the Examiners.) That common point is that staff members in the State Board's Philadelphia office communicated unequivocally to them that "to become a lawyer, you still have to get by us." This criticism is not unique to Blacks. Non-Black candidates have also experienced symptoms of the staff's authoritarianism as the following excerpts from a letter written by Deputy District Attorney James Crawford illustrate:

> "It has been my experience as well as that of Mike Rotko and Alan Davis, among others, that the personnel of the State Board fail to respond with either help or sympathy when an inquiry is addressed to them. On a number of occasions, bar admission has been delayed through no fault of the applicant yet when someone of our staff called to inquire concerning the case the Board employees' responses have been uniformly cold, unhelpful and even discourteous. An applicant for admission to the bar has gone through a long and arduous path and deserves to be treated with courtesy when he or his preceptor tries to break the technical logjam which seems to make the last short step toward admission to the bar the most painful one of all."

Exacting procedures may produce better craftsmen in many settings. That is not our point. Such extraordinary arrogation of authority by an administrative staff as, for instance, was involved in the "right of review" process which we discuss in Part Two below, produces neither better craftsmen nor institutional integrity.

These facts were readily discoverable by every State Board member during the past fifteen years, as they were to this outside Special Committee. So was many of the staff's apparent hostility towards Blacks, which sometimes was "tempered" with a patronizing attitude in the "character investigation" stage. The impact of this totally non-Black staff's authoritarianism on Black candidates, who had reason to believe that Bar examination odds were stacked against them anyway, was, and continues to be, substantial; and it certainly takes its psychological toll on a Black candidate preparing and taking the Bar examination.

G. Inaction or Affirmative Duty to Act

1. *Shifting burdens in proving racial discrimination*

What is prohibited, as Mr. Justice Black stated thirty years ago in *Smith v. Texas*, "is racial discrimination—whether accomplished ingeniously or ingenuously . . ." There is an implication in the "Hastie Committee" Report of 1953-54, reflecting contemporary experiences, that a case of racial discrimination could be made out only if photographs, handwriting or other one-to-one matchings of candidate to race were proven. And even then, discrimination might not have been made out. Today, however, we seldom even attempt to prove that a public official knowingly and consciously made a decision which he personally believed would deprive a Black person of his rights because of his race. The law has caught up with sophisticated as well as crude discrimination. A series of presumptions and shifting of burdens of proof or in going forward facilitate proof of racial discrimination.[3]

The State Board's standards and procedures must therefore be examined in light of these changes in law.

Where the symptoms of systematic racial exclusion are present (as illustrated earlier in Part One), the absence of direct proof that any State Board member knew that any particular paper or an examination was that of a Black candidate is not fatal. Indeed, the racial exclusion dilemma is not resolved, and the State Board's burdens of justifying its procedures and standards, as well as the Bar examination's validity, are not softened.

2. *How law schools have responded to racial imbalances, trends and procedures*

Professor Robert O'Neil of Boalt Hall (University of California Law School, Berkeley) estimates that the Black enrollment in predominantly white law schools was, even in the period between 1955 and 1966, "somewhat less than one percent and showed no signs of rising."

3. See Appendix 4 below for an elaboration. Compare the U.S. Brief (by Solicitor General Griswold) in *Griggs v. Duke Power Co.* (October Term 1970, No. 124, U.S. Supreme Court).

Of the some 700 Black students enrolled in the A.B.A.-approved law schools during the academic year 1964-65, for instance, one-third (267) were students in predominantly Black law schools (Howard, Texas Southern, North Carolina College, Southern University, and at that time Florida A & M). Thus during 1964-65, only 433 law students in predominantly white law schools were Black. Between 1966 and 1970, however, something happened in the law school world to change that trend. Affirmative action was taken to overcome the historic exclusion of Blacks from predominantly white law schools. Many standards and procedures previously thought to ensure "quality" were increasingly recognized as unreasonable barriers more designed to exclude Blacks than to achieve a positive result.[4]

a. *Local perspectives: how area law schools responded*[5]

The situation in Pennsylvania law schools was comparable. For instance, Penn graduated twelve of a total of only seventeen Blacks who were enrolled during the 1955-1969 period, while Villanova graduated seven of their eleven Black law students in that period. With the exception of Temple, the Black enrollment in Pennsylvania law schools was probably below the low national averages. Although Temple clearly led the state in Black enrollments after World War II (with some thirty graduates in the 1955-1965 period), the percentage of Blacks to the total Temple Law School student body was probably never as high as three percent, and by 1968 Temple had but three Blacks out of more than five hundred enrolled students.

Indeed, during the academic year ending in June 1968, there was probably a combined total of no more than ten Black law students in all six Pennsylvania law schools (Dickinson, Duquesne, Pennsylvania, Pittsburgh, Temple, Villanova) and neighboring Rutgers-Camden. Yet, two years later as the 1970 academic year opened a dramatic increase was evident: the combined number of Blacks in these same law schools while still not four percent of total enrollment, had risen tenfold—to more than one hundred. And the total number of enrolled Puerto Rican minority group students, meanwhile, had increased from zero to six.

b. *What the changes in the numbers of Black (and other minority group) students in law school means for the law schools*

Predominantly white law schools have thus taken affirmative

4. We have examined the so-called "cultural discrimination" resulting from allegedly "quality-insuring" standards and procedures (such as the Law School Admission Test), and find it to be inapplicable to the candidates under our mandate.

5. For national perspectives, see "The Law Schools and Minority Group Law Students: A Survey for the A.A.L.S. Committee on Minority Groups." (A.A.L.S. Proceedings, 1970.)

action by admitting many times the past number of Black (and other minority group) students. But they are now beginning to realize how profoundly their institutions must change for meaningful integration to evolve. Faculty and administrative appointments, curriculum content and methods of measurement through testing and grading—all of these and other parts—will change as the institution reflects and becomes a bridge for two cultures. So too must the predominantly Black law school change. And no less a challenge has been presented the State Board of Law Examiners in the Bar admission, including examination, processes.

3. The State Board's duty: inaction in the face of racial imbalances or affirmative action to achieve inclusion?

Inaction by the State Board of Law Examiners has been deliberate. The State Board, from its Chairman to clerk typist, asserts to us that no racial factors are gathered or used in the Bar admissions process (including the Bar examination). Yet, State Board members certainly have known or reasonably suspected that: (a) Blacks as a group have been failing the Bar examination at a rate substantially higher than non-Blacks; (b) the number of Black candidates has remained unconscionably small; (c) relatively few Blacks are practicing law in Pennsylvania; and (d) affirmative action was needed to reverse these trends. In the perspective of a recent history that has increasingly seen a legal duty imposed on state officials to act *affirmatively* to alter racial imbalances resulting from state practices, the State Board's asserted "neutrality" in identifying and coping with this massive problem has therefore seemed hollow indeed.

The law school community has taken affirmative action to overturn practices which blocked the proper flow of Blacks into the legal profession. Our local law schools have accomplished this change without the help of the State Board of Law Examiners, to which the Supreme Court has delegated exclusive authority to regulate Bar admission. Of the newly recruited group of Black (and other minority group) students now in law school, none has yet taken the Pennsylvania Bar examination. This "new wave" will be reaching the Bar examinations in July 1971, 1972, and 1973. When they do arrive, their numbers will probably be several times greater than the Blacks who took the Bar examination during this past generation. That prospect has not escaped Chairman Wilkinson nor should it be swept aside by the Board itself. Nor can we sweep aside the fact that the Board has not heretofore moved affirmatively to correct racial imbalances in the legal profession in Pennsylvania.

PART TWO

The Pennsylvania Bar Examination Process: Participants, Standards and Procedures

The State Board of Law Examiners consists of five busy, successful, dedicated men. Two are judges, three are lawyers. They receive no salary for their services on the State Board. Predictably, they have delegated many responsibilities to administrative staff and to part-time examiners. While the Board members participate in all phases of the Bar examination process, their participation has been quite limited.

Heretofore, the five State Board members, Supervising Examiner Storb, the two Assistant Supervising Examiners, and the eight Examiners have not conducted a thorough-going review of the purposes and functions of the Bar examination. Nor have they made a contextual appraisal of each examination. However, with the ascendancy of Judge Wilkinson to the chairmanship of the State Board, a keen interest in reforming anachronistic practices has surfaced. Thus, standards and procedures reflecting the policies and attitudes of an earlier era are now, hopefully, ripe for revision. It is in the spirit of such receptivity to constructive criticism and because no detailed report of the Pennsylvania Bar examination presently exists, that we have undertaken to report the examination process in scope and detail.

Section A describes the authority that the Supreme Court has delegated to the State Board of Law Examiners and identifies the major participants and their relationship in the Bar examination process. Almost all give only part-time to this important assignment.

Section B discusses the (expressed and implied) purposes of the Pennsylvania Bar examination. The "achievement" test of the early 1900's is compared with the "aptitude" tests. No validation study of the Pennsylvania Bar examination has been made.

Section C deals with the preparation of the questions. Testing experts and law professors are deliberately not consulted in the preparation of the questions.

Section D describes the conduct of a Bar examination in Philadelphia. The use of photograph-identification cards, the curious methods of assigning numbers in an ostensibly anonymous grading system, and the seating patterns in test room are revealed.

Section E discusses the grading of answers up to a final proceeding; procedures and participants are identified step by step.

Section F discusses in detail the "Final Meeting" of the State Board of Law Examiners at which all pass-fail motions are made and

passed. The use of "discretionary points" based on personal data of candidates is exposed, and the inequalities in treatment of papers earning the same grade are identified.

Section G deals with the nonreviewability of decisions of the State Board and the inconsistent practices within the so-called "no right to review" rule.

A. The Major Participants in the Bar Examination Process

1. *The Supreme Court's delegation to the State Board*

The Supreme Court of Pennsylvania claims and exercises the exclusive right to regulate admission to the Pennsylvania Bar. Since 1903, the Court has delegated much of the responsibility to the State Board of Law Examiners.

According to Rule 7 of the Supreme Court:

> *"State Board of Law Examiners*
>
> There shall be appointed by this Court a State Board of Law Examiners (hereinafter designated the 'State Board'). The State board shall consist of five members of the Bar of this Court. Judges are eligible for such appointment. Each member of the State Board shall hold office for a term of five years and shall be eligible for reappointment. The members shall serve without compensation, but shall be reimbursed for their expenses.
>
> The State Board shall be responsible to the Court for the enforcement of the rules and orders relating to registration and admission to the bar, and for the conduct of the bar examinations.
>
> The State Board may employ a secretary and a treasurer, an assistant secretary and an assistant treasurer, a supervising examiner, examiners, and other clerks and assistants. The State Board shall provide for the compensation of such employees, and shall pay all other expenses. One person may serve as secretary and treasurer, and one person may serve as assistant secretary and assistant treasurer."

Later in Part Two, we shall have occasion to refer to other pertinent Rules of Court containing standards and procedures ostensibly limiting the Board's freedom of action. However, at this point we undermine the comprehensiveness of the Court's delegation to the State Board in the *grading* of Bar examinations by quoting Rules 15(B) and (C):

"Rule 15

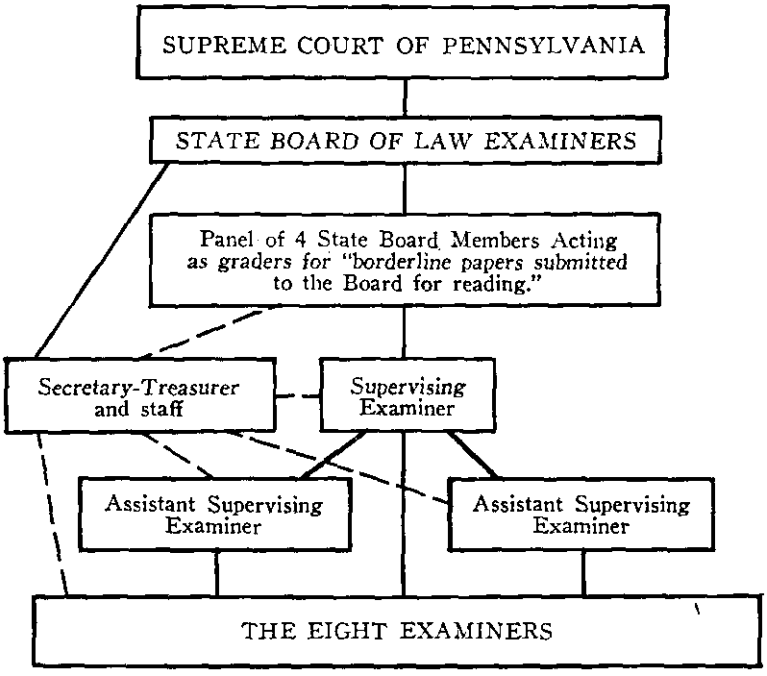
Review and Appeal

B. With the exception of the decision of the State Board that an applicant has passed or failed a bar examination, any order or ruling by the State Board, including its action on appeal under Rule 14, may be reviewed by this Court of its own motion or may be the subject of appeal to this Court by the person aggrieved. Every such appeal shall be in writing setting forth fully the facts and reasons on which it is based, and shall be filed in duplicate with the State Board within thirty (30) days of the date the State Board sends notice of said order to the applicant. The State Board shall in due course file with the Prothonotary of this Court the original appeal, together with a Statement of the State Board's Action. No copies of the Statement of the State Board's Action shall be delivered to the applicant. The State Board's marking of an applicant's bar examination paper shall be final and shall not be subject to review.

"C. The actions and records of the State Board and of the County Board shall not be open to inspection by the public or by the persons interested."

2. *The relationships among the major participants*

The relationships among the major participants in the preparation and grading of Bar examinations may be depicted as follows:



As to the Secretary-Treasurer and his staff, their relationship with the State Board is as follows:

State Board of Law Examiners

■

Secretary-Treasurer

■

Assistant Secretary Treasurer

■

Staff

3. *The present participants*

a. *The State Board of Law Examiners presently consists of:*

The Honorable Roy Wilkinson, Jr., Bellefonte
January 1959-
Vice Chairman—May 1961-March 1970
Chairman—March 1970-

The Honorable Abraham H. Lipez, Lock Haven
January 1961-
Vice Chairman—March 1970-

Desmond J. McTighe, Norristown
October 1964-

Justin M. Johnson, Pittsburgh
April 1969-

Robert Dechert, Philadelphia
November 1933-June 12, 1939
May 1970-

b. *The Supervising Examiner:*

Mr. William C. Storb, Lancaster (since 1948)

c. *The Assistant Supervising Examiners:*

Mr. Tom I. Gill, State College
Mr. George W. Keitel, Harrisburg

d. *The Eight Examiners:*

Carl R. Hallgren, Lancaster
Francis J. Leahey, Jr., Ebensburg
Edward T. Baker, Camp Hill
Harry N. Moran, Jr., Ambler
Ira Wells, Philadelphia
Gerald Spivak, Philadelphia
Dan Very, Pittsburgh
Thomas Matson, New Castle

e. *Secretary-Treasurer:*

Mr. David E. Seymour, Philadelphia (since 1965)

f. *Assistant Secretary:*

Mrs. Mizno Y. Ohuchi

g. *The staff:*

There are ten staff members in the Philadelphia office of the State Board of Law Examiners.

B. THE PURPOSES OF THE BAR EXAMINATION

1. *The Bar examination as a requirement for Bar admission: Supreme Court Rule; State Board Regulation; relationship between Bar examination and law schools*

a. *Rule 10 of the Supreme Court provides:*

"The State Board shall hold bar examinations at such times and places and in such subjects as the State Board from time to time shall prescribe.

b. *Regulation 10 of the State Board of Law Examiners provides:*

". . . *Time and Place.*

The bar examination is held twice a year, usually in the months of January and July, in the cities of Philadelphia and Pittsburgh. The examination lasts two days, with two sessions of four hours each day.

". . . *Subjects.*

The examination will include questions from among the following subjects:

Agency	Equity
Bills and Notes	Evidence
Conflict of Laws	Pennsylvania Practice and Procedure
Constitutional Law	
Contracts	Property, Real and Personal
Corporations	
Crimes	Sales
Decedents' Estates	Torts
Domestic Relations	Trusts

While the candidate should be familiar with the more important principles which prevail in this State with respect to the foregoing subjects and any aspects which are peculiar to this State, it is not required that these principles be memorized. The marking will be based primarily upon whether the candidate has the ability to analyze and to apply the law to the facts set forth in the questions."

c. *Relationship between the Bar examination and law school*

There is no direct, formal relationship between law schools (including those in Pennsylvania) and the Pennsylvania State Board of Law Examiners. Law school accreditation is not a function of the State Board.

Some form of official Bar intrusion in law school affairs is, however, inevitable in a profession which regulates the number of persons it annually admits to its ranks, and who reach that stage only if they have graduated from law school. Thus, while the Bar examination may formally be unrelated to a law school's accreditation or

daily operations, it does constitute an informal check by the State Board acting for the organized Bar on law school "quality" and "size." Law school personnel are, of course, not oblivious to such pressures or to their graduates' "pass" rates on the Bar examination.

2. *The form of the Bar examination: many options, but a law school test "model" was adopted*

The Bar examination, under the Supreme Court Rule, could consist of a post-law school internship with oral and written testing on such subjects and skills as the State Board might prescribe and whose precise scope, form and timing would depend on whether a candidate sought "certification for a general or specialized practice." But since its inception, the Bar examination has been—and continues to be—a sit-down test taken before the legal internship begins; it consists of law school-type questions that require thoughtful, lawyer-like essay answers (no "right" or "wrong" choices) on a variety of enumerated, general legal "subjects," and it simulates time and psychological pressures found in law school tests but not necessarily in many law practices. No one on the State Board suggests that the principal purpose of the Bar examination is to test in depth on subject matter content; instead, they assert that subject matter coverage is just a vehicle for focusing an Examiner's attention on what does justify this kind of test, i.e., an answer which measures a candidate's ability to "think like a lawyer."

3. *What does the Bar examination seek to measure?* [6]

a. *The ability to "think like a lawyer."*

State Board Chairman Wilkinson and his colleagues have insisted to us that, during the past 15 or so years, the Bar examination has *not*: tested deeply on any subject matter, accentuated any memorization skill, or unduly stressed peculiar Pennsylvania procedures and rules. Instead, they assert, it is primarily an attempt to determine whether a candidate can "think like a lawyer."

But what it takes to "think like a lawyer" has not officially been elaborated on by the State Board beyond its commentary on Regulation 10:

> "The marking will be based primarily upon whether the candidate has the ability to analyze and to apply the law to the facts set forth in the questions."

6. See Report of American Assembly on Law and the Changing Society (1968). Compare the "inputs" approach in Stevens, "Bar Examination Coverage, Law School Curricula, and the Applicant," Memorandum No. 9, *A.A.L.S. Bar Examination Study Project* 58-63 (1970).

Nor has there been any meaningful unofficial elaboration. Board member Robert Dechert insists that the only justification for the Bar examination is whether it forces the candidate to put things together—i.e., to apply collectively in one test answer what he has previously learned and been applying only in separate law school courses and answers. But it is clear that the Pennsylvania Bar examination does not even purport to do what Mr. Dechert insists it must do to be valid. Thus, Supervising Examiner Storb, the two assistant Supervising Examiners, the eight Examiners, as well as Chairman Wilkinson and Board member McTighe, all believe that the Bar examination has not sought to do that. They also point, for instance, to the July 1970 Bar examination in which every one of the twenty-four questions tested only *one* discrete law school subject area.[7]

Nonetheless, are there other indications of, and how we measure, what it is to "think like a lawyer"? Board members (except for Mr. Dechert) and the Supervising Examiner, Mr. Storb, agree that in principle the ability to "think like a lawyer" does not necessarily turn on an "objectively" correct form (syntax) for an answer. And no one contends that it turns on the use of doctrinal words and phrases (semantics) that can otherwise be explained (e.g., to focus attention on what consequences flow from walking on another's land, one need not employ the doctrinal phrase "trespass quare clausum fregit"). But beyond those two negative points—concerning what it does *not* take to "think like a lawyer"—no affirmative guidance is supplied.

Certainly, the abilities to read questions and to prepare and write answers under the twin pressures of a short time limit and a "make or break" psychological setting which permeate the Bar examination, do not simulate what most lawyers must do most of the time in their careers. Even if it did, a person, by the time he graduates from an approved law school, has already mastered, through 120 hours of examinations, that test-taking "skill." The positions of the Board members, Supervising Examiner Storb, and the Examiners with whom we discussed this point, are therefore reduced to this:

> We know what it takes to "think like a lawyer." We may not be law professors or testing experts, but we know from experience what it takes to "think like a lawyer." We can tell from the answers to questions whether a candidate can or cannot "think like a lawyer."

b. *"Achievement" and "Aptitude" Tests*

Another index to the purpose of the Bar examination—as a procedure for Bar admission—is whether it seeks to measure what one

7. The subject matter in each question is identified below in "Preparing the Questions," Section I (c) 2.

has already learned in law school ("achievement" test) or what one must do in law practice ("aptitude" test). These two purposes are not necessarily identical. But in the context of the Bar examination, we have found no express recognition by the State Board, Supervising Examiner Storb or any Examiner of this vital distinction in validating tests. They are unable to explain which purposes are served by their tests in general, or by any single or a group of questions. We must therefore rely on inferences in seeking an answer to whether the Bar examination is an "achievement" or "aptitude" test.

c. *"Achievement" Test?*

With the exception of a handful of candidates who have received an express waiver by the Supreme Court (on grounds that do not appear in any public record), and those who qualify under the curious "combined law study-clerkship" route, one may not even take a Bar examination unless he has graduated from a law school on the "approved list" of the A.B.A. What does the test measure for him? Are the "subject" areas tested on, representative of what a satisfactory law student should have learned? Does the Bar examination seek in twelve hours to "weed out" the incompetent that an approved law school in three years of 1080 class hours of exercises and preparation, as well as some 120 hours of examinations, was unable to detect and fail before awarding him a degree? If not, does the Bar examination exist merely to serve as an "achievement" measurement for those five or six special persons who annually are permitted to take the Bar examination without having graduated from an approved law school? If not, does the Bar examination seek to measure something "learned" in a Bar review [cram] school?

d. *"Aptitude" Test?*

We have already seen that the test does not attempt to require application, on any one question of substantive law from more than one subject area. Does the Bar examination serve principally as an "aptitude" test? Does it attempt to weed out those persons who, despite successful achievement in approved law schools, do not have what it takes to become lawyers? We have already seen that, except as to Blacks, the Bar examination weeds out almost no one (two per cent of all takers). Why is the form of another written examination in another classroom used to measure "aptitude" for lawyering?

One practical way to measure "aptitude" for law practice would be to put a law school graduate, under appropriate supervision, in actual law practice settings. At various points, his performance would

be measured. We could ascertain from his associates and clients whether he has developed the lawyer's craft skills. That, too, would be a "Bar examination." But even that form of Bar examination requires that an examiner answer the question already posed: what *are* the lawyer's major craft skills which he utilized in practice?

Neither the State Board nor its Examiners have identified what craft skills their total examination, specific questions and answers seek to measure. Their failure to do so, however, does not mean that such identification and measurement are impossible. It means simply that it is a job for joint experts in legal education, law practice and testing theory and techniques.[8]

Even as to the most readily accessible group of such experts (law professors), however, the State Board has deliberately pursued a policy of avoidance. The Board has not used them in planning, preparing and grading the Bar examination. Why? The reason given for this abstention policy is the Board's concern that an opposite practice would create the appearance of favoritism for the law schools and students of those law professors it used. In view of the appearances created by several other State Board practices relating to the Bar examination ("discretionary points," discussed below, to name just one), this concern about appearing to favor a law professor's school or his students by utilizing his expertise is inadmissible. More important, however, it is only the utilization of the kind of common expertise we earlier described which validates certain examinations. Absence of it, for whatever reasons, invalidates others.

This "aptitude test" problem is exacerbated as to Blacks. The fact is that most Black lawyers "service" Black clients. A large percentage of them are substantially engaged in a criminal law practice. If one's ability properly to counsel and defend a client depends not insubstantially on his ability to communicate with and relate to the client's experiences, then an "aptitude" test should measure that skill. Under what theory does the Pennsylvania Bar examination with its standardized "issue recognition" emphasis measure that skill for Blacks? How, when and by whom is any candidate who does pass the present Bar examination adequately measured for those essential skills which he daily utilizes in criminal law?

e. *Measuring without purpose*

Where one neither understands nor explains the purposes of the Bar examination, then how can he rationally measure (and defend) the questions he asks and the answers he receives? This fundamental

8. See the discussion in "Preparing the Questions," I (c) 2 below.

issue concerning the purposes and function of the present Pennsylvania Bar examination has not been resolved by the State Board. Judge Wilkinson acknowledged the seriousness of this "validity" issue, without distinguishing between Blacks and non-Blacks, when in 1969 as Vice Chairman of the State Board, he told the National Conference of Bar Examiners:

> "Probably the thing that impressed me the most with the urgency of the problem, was the printed report of the American Assembly on Law and the Changing Society held at the University of Chicago on March 14, 1968. Using the strongest language, this distinguished group criticized—indeed condemned the bar examinations. An example—'He (Mr. Nahstoll) points out that the bar examinations have little or no relationship to a candidate's competence to hang out a shingle and represent a client.' And again, 'It would be hard to argue that a bar examination tells us very much about a man's qualifications to be lawyer.' To me these are shocking statements. They lead me to believe that it is once again time to take another good look at a national or regional bar examination."

As Judge Wilkinson knows, however, the same "validity" issue for one State's Bar examination confronts those preparing and grading a national or regional Bar examination. And as is increasingly apparent, the issue of validity of present and prospective Bar testing is exacerbated for Black candidates.

C. Preparing the Questions [9]

1. *The State Board's Statement, July 17, 1970*

The State Board, on July 17, 1970, supplied us with the following description of the preparation of questions:

> "Preparation of Examination
>
> For the preparation of questions and the marking of answers, the State Board employs eight examiners, two assistant supervising examiners and one supervising examiner. The supervising examiner assigns to each of the eight examiners subjects for three questions. Thereafter, each examiner submits to the supervising examiner his proposed questions for the upcoming examination. The supervising examiner either accepts or rejects in whole or in part the

9. The nine memoranda prepared in 1969 and 1970 by Dean George Neff Stevens, as Director of the *A.A.L.S. Bar Examination Study Project* contain useful, preliminary inputs.

questions submitted. When the supervising examiner is satisfied with the proposals, the examiner (with the help of the assistant supervisor in charge of this section) then polishes up the questions and prepares answers thereto.

Approximately two months before each examination the entire examining group meets for two days to discuss all of the proposed questions. At this meeting, each examiner discusses and offers suggestions concerning the questions submitted by the other examiners. The questions and answers as thus corrected are then sent to the members of the Board. Approximately a month before the examination, a meeting of the Board and all of the examiners is held, at which time all of the questions are fully discussed and many corrections made. After this meeting the questions, as edited, are sent to the printers. Proofs from the questions are then sent to the examiners for re-editing and, after two to five proofs, the examination is in its final form."

2. *Non-expert examination planning and question preparation: national or provincial character on "skills" testing? representative subject matter testing? coincidence or deliberateness in measurement?*

Unlike those of some states e.g., Florida, California), the Pennsylvania Bar examinations are not even partially prepared by legal education experts (law professors). Nor are test experts employed for this purpose. Instead, a group of lawyers and judges operating also as part-time examiners, dominate all phases of the examination process. As useful as their practical experiences and insights may be in some contexts, the limitations of non-experts are highlighted in the preparation and grading of the test. State Board members have been quite candid about this dilemma. Yet, the State Board intentionally has kept its distance (as we have seen) not only from testing experts but from law professors located within and outside the Commonwealth.

That "distance" may explain why the Board has permitted variations in Pennsylvania law to creep into the test despite members' efforts to characterize it as a "national" type examination. According to Dean Edward Sell of the Pittsburgh University Law School, for instance, the candidate who reads the advance sheets of the Pennsylvania Reporter Series is in a good position to spot several questions on any Bar examination. For a test claiming a national perspective or purportedly measuring whether a candidate can "think like a lawyer," such question-spotting should not tend substantially to in-

crease a candidate's grade. But Examiners have told us the opposite as to question-spotting results in a Pennsylvania Bar examination. Such trends may reflect nonrepresentative subject coverage, overemphasis on substantive content or rote memorization of information, preoccupation with a "new" or Pennsylvania variation of a rule which could readily be found by any one in available treatises. Such questions measure no discernible lawyer's skills; they do, however, help explain why a candidate in a Bar examination may, according to Supervising Examiner Storb and others, "hit" (do well on) ten questions and "bomb" (do poorly on) ten others.

By the time he reaches the Bar examination, a candidate either has or has not developed satisfactory analytical ability. He either does or does not confuse, for instance, implication with coimplication. He either does or does not satisfactorily apply predicate logic. He either can or cannot satisfactorily seize upon "leads" in the fact-finding process and use them to acquire more data. He either does or does not know what sources to consult for authoritative guidance. He either does or does not satisfactorily perceive patterns in the fact-finding and issue-framing processes. He either can or cannot satisfactorily characterize a group of facts into a "property" or "tort" or "contract" theory depending on which theory best assists his client in ease of proof or measure of damages. He either does or does not possess other analytical skills from his law school exposure which, in a Bar examination, are measurable as "passing" or "failing." Questions measuring such skills and comprehension of *representative* subject matter, are readily preparable by experts. The type of inconsistent performance described by Mr. Storb, aside from evidence of inexpert measurement, is also an indication that the Bar examiners do not know what they are seeking to measure or that they are seeking to measure what they deny.

In addition to questions deliberately measuring those skills just identified, where are questions in the Pennsylvania Bar examination which elicit the complementary policies supporting whatever doctrines are characterized as applicable? Where are the questions that deliberately require a discussion of conditioning factors that, for a country lawyer or Philadelphia lawyer arguing to certain judges, distinguish one group of precedents from another? Where are the questions that deliberately test whether the candidate has satisfactorily integrated his textbook solution with probabilities in the planning and counseling processes? We submit that such questions, which are cornerstones for valid "aptitude" tests for lawyering, are not found in Pennsylvania Bar examinations unless coincidentally.

An earlier point on subject matter measurement bears repeating here: no single question on the present Bar examination requires that a candidate apply substantive law from more than one law school course. Thus, on the July 1970 Bar examination, questions 1 and 3 were to cover evidence; 2 was on criminal law; 4 and 6 on real property; 5 on domestic relations; 7 and 9 on decedents' estates; 8 on equity; 10 on trusts; 11 and 12 on constitutional law; 13, 16 and 18 on contracts; 14 on negotiable instruments; 15 on sales; 17 on conflicts; 19 and 21 on corporations; 20 on agency; 22, 23 and 24 on torts. But what client's problems are so discretely or neatly packaged? According to Board member Robert Dechert, it is only the required application in one question of more than a discreet law school course's subject matter that justifies any Bar examination.

Finally, in the preparation of the examination is there any sensitivity in this period of reawakened pride, to the cultural underpinnings evoked by questions on particular subject matter? Why are there, for instance, two questions on property and only one on criminal law? (This is not the same question as why the State Board has not petitioned the Supreme Court to revise the "subject" list to include, e.g., taxation.)

D. Conducting the Test in Philadelphia

The Pennsylvania Bar Examination is given twice a year—in January (at Philadelphia and Pittsburgh) and July (at Philadelphia, Pittsburgh and Carlisle). It lasts two days and consists of four 4-hour sessions (two daily).

On July 9, 1970, Special Committee Chairman Liacouras and Member Jackson, accompanied by State Board Chairman Wilkinson, attended the opening session of the July 1970 Bar examination in Philadelphia. Portions of the present section of the Report substantially draw on observations and interviews conducted at that time.

1. *Regulations of the State Board of Law Examiners*

Pursuant to Supreme Court Rule 10(c), the State Board of Law Examiners has issued Regulations (section 8) governing the "Conduct of Bar Examination." The two paragraphs of this Regulation have been in force at all pertinent times. They deal, respectively, with the eight admission tickets bearing the examination number of the candidate, and the candidate's identification card bearing his photograph. The Regulation provides:

[EXAMINATION NUMBER AND ADMISSION TICKETS]

"A candidate for the bar examination whose application and credentials have been approved in all respects will receive from the Secretary of the State Board, in advance of the date of the bar examination, a letter designating the center (Philadelphia or Pittsburgh) at which he will be examined and enclosing a set of examination instructions and four tickets of admission to the bar examination, bearing the examination number given him by the Secretary's office, the date of the bar examination, and the session at which each ticket is to be used. The proper admission ticket must be affixed to the inside cover page of the bar examination paper written by the candidate."

[IDENTIFICATION CARD AND PHOTOGRAPH]

"During the first session of the bar examination, the candidate shall identify himself by showing the examination proctor his identification card. The proctor will compare the photograph on the card with the candidate in the seat and at that time the candidate will sign his name at the proper place on the card. The proctor will witness the candidate's signature, and the card will be collected by the proctor."

There is another Regulation (paragraph 1) under the same Supreme Court Rule, which provides for the procedures in obtaining the identification card-photograph.

"Every candidate for each bar examination must file with the State Board *two* (2) identification cards not later than 45 days before the bar examination. Both cards must be properly completed and verified by the preceptor, and the preceptor's initials must also appear on each photograph itself. Both photographs must be identical, must be no larger than the space allowed and must be *pasted* on the cards. Cards with photographs which are not identical, affixed by clips, staples, or other means, are not acceptable. The State Board will return one card to the applicant before the bar examination. This card must be presented to the proctor at the first session of the bar examination. Any applicant who fails to present the identification card and admission tickets at the *first* session of the bar examination will be excluded from the bar examination."

2. Use of photograph-identification card

The sole purpose for using the photograph-identification card, according to State Board Chairman Wilkinson and Secretary-Treasurer Seymour, is to prevent "ringers" from taking a candidate's test for

him. Under their reasoning, a candidate inclined to cheat by having a "gifted" test-taker sit in for him at the exam is deterred from such mischief because he knows that his photograph is available to the Board's staff for possible matching with the person holding himself out to be the candidate.

To accomplish this objective, the State Board staff take into custody two identical photographs and glue them on two identical identification cards for each candidate. Each identification card contains the candidate's name, his file number, photograph with his signature, and his preceptor's signature. These identification cards are stored in a cardboard box in the State Board's Philadelphia office for a period up to three months after the examination grades are released. Before two and one-half years ago, however, these photographs at all pertinent times were stored in the candidate's personal file in the State Board office. (We have ascertained that the personal files of candidates who took the Bar examination as recently as four years ago, still contain their pictures.)

Valid as the purpose of discouraging "ringers" is, the method employed by the Board to achieve it is inadmissible. Historically, suspicions understandably have been aroused by requiring photographs to be brought into what purports to be an anonymous examination and preserving them until *after* grades are released. Those suspicions and the undue pressure on the Black or politically active candidate resulting from these procedures far exceed any possible benefit. Handwriting specimens, a photograph *not* in the Board's custody that could be worn as an identification badge, or other techniques to deter "ringers" are readily available. The "Hastie Committee" Report of 1953-54 underscored this same point, but the Board ignored it. Not only has there never been a recorded instance of a "ringer" taking the Pennsylvania Bar examination, but the State Board's photograph practices would have hardly deterred anyone seriously bent on such mischief. It has been well known to candidates that (except for the July 1970 exam which was conducted while our Special Committee members were physically present in the Philadelphia situs to observe) the proctors did not even look at the candidate's identification card-photograph when he entered or left the test area. And any match-up of identical identification cards-photographs was perfunctory at most. In these circumstances we find the Board's requirement insofar as it has permitted Board custody of a photograph for even an instant, misleading, ineffective and obnoxious.

The front and back of the photograph-identification card appears immediately below.

IDENTIFICATION CARD

Full Name .....
(Please print your name as plainly as possible with family name last)

Signature .....
(Please write your name as if signing a letter)

Residence .....
(Street and Number) (Town or City) (State)

DIRECTIONS

The candidate must fill out the above three lines as directed.
The certificate on the other side of this card must be signed by the candidate's preceptor.
Every candidate must fill out two of these cards and file *both* cards with the State Board at least 45 days before the bar examination. The State Board will return one card to the applicant before the bar examination date. This card must be presented to the proctor at the *first* session of the bar examination.

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Photographs must be no larger than the space allowed, and they must be pasted on the cards.

I hereby affirm that the signature on the other side of this card was executed in his customary handwriting by the candidate named, and that the photograph hereto affixed and signed with my initials is an authentic photograph of the candidate.

.....
(Preceptor's Signature)

Dated .....

I hereby certify that this card was presented by this candidate for examination at .....
(Place)
on ..... and signed by him in my
(Date)
presence.

.....
(Candidate's Signature)

.....
(Examination Proctor)

Date .....

3. *The "anonymous" grading system; the present practices of assigning examination numbers; and the distribution of Master Lists containing the name-number key*

a. *Anonymous grading*

The purpose in assigning and requiring the use of examination numbers (appearing on the eight examination tickets which are affixed by the candidate to his eight answer booklets) is to achieve anonymity in the grading process. An anonymous grading process is an "equalizer" in testing. Especially for admission to public agencies, anonymous grading is believed to facilitate social mobility by eliminating the

consideration of irrelevant personal factors concerning the candidate. He passes or fails on merit; his grade is based solely on what is contained anonymously within the answer booklets.

No public statement of the State Board of Law Examiners, its members or staff has retreated from the advertised fact that the Bar examination will be anonymously graded. Indeed, the pertinent Regulation and instructions to candidates have established specific standards and procedures to accomplish anonymity in grading. The State Board's Regulation was set forth earlier in this section: it establishes the use of examination numbers. The letter which each candidate receives from Secretary-Treasurer Seymour concerning the exclusive use of examination numbers (rather than names) is unambiguous as to purpose, scope, procedure and sanctions. It has consistently provided:

> "To preserve anonymity you have been assigned a number which will later be used to identify your examination book. The admission ticket bearing your examination and session numbers, should be pasted to the center of the inside of the blue or pink cover page of each answer book. Under no circumstances are you to write your name or any personal information, such as the name of your law school, in your answer book which might disclose your identity. Disregard of these instructions will lead to automatic rejection of your examination book and your consequent failure of the examination."

b. *The present practice of assigning examination numbers*

Examination numbers are assigned to candidates by a State Board staff clerk, Mrs. Williams. The numbers are assigned to candidates in the precise alphabetical order of their last names—from A to Z.[10] The only exceptions to consecutive numbering based purely on alphabetizing are: (1) late filers, who are usually test repeaters: they are assigned consecutive examination numbers; and (2) husband-wife candidates, who are assigned non-consecutive numbers.

One must strain to devise any "anonymous" system more breakable (in its potential for anyone to pair names and numbers) than the one employed by the State Board. In theory and practice, the present system invites suspicion and nonconfidence.

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10. At the Philadelphia Civic Center site for the July 1970 examination, Chairman Liacouras recognized the holder of examination number 1 as a person whose last name begins with the letters "Ab....." Member Ricardo Jackson corroborated the precise alphabetization of the examination numbers by examining the "Master List" on the desk of the supervising proctor in the testing room. Thereafter, Secretary-Treasurer Seymour and Mrs. Williams confirmed the long-standing practice of assigning numbers according to the alphabet.

c. *Distribution of the Master List*

According to Secretary-Treasurer Seymour, only he and Mrs. Williams have access to the Master List. However, on July 9, 1970, in the main room of the Philadelphia Civic Center test site, we observed one Master List. Each name was paired with its examination number. The Master List was prominently atop the desk of the Chief Proctor (Miss McCannan). We saw another partial list in the adjoining room where some candidates type their answers. We asked Judge Wilkinson and Mr. Seymour what possible justification there is in permitting distribution of the Master List to *anyone.* Their responses were: a Master List is made available to the Chief Proctor at each test site (Philadelphia, Carlisle, Pittsburgh) "in the event a candidate forgets his number," and "it enables the Chief Proctor to certify that the proper persons were examined." We reject both reasons. The "cost" in increased potential for breaching anonymity which results from such distributions far exceeds any potential benefit.

4. *Seating in the examination room: the "climate" for anonymity and for Blacks*

In the Philadelphia test site for the July 1970 examination, the desks were consecutively numbered (by a prominent card) from 1 to 343.[11] The number prominently displayed on the desk where a candidate was required to sit and take the examination was his examination number.

We have received not even an ostensible justification for this practice. It obviously increases an expectation among candidates that the Bar examination may not be graded anonymously after all, and that "who you know or are" may count rather than "what you write."

But the "climate" for Blacks in that examination room was disproportionately severe. Those taking the July 1970 examination vividly remembered that in July 1969 seven Blacks were seated consecutively along the same row. Whether an outsider, in retrospect, is persuaded by the State Board's explanation for that coincidence is not the issue. The State Board's explanation is: late filers were assigned consecutive numbers; some twenty repeaters were among the late filers; the seating in the examination room is numerically consecutive; thus, it was coincidental that seven Black repeaters were seated consecutively in one row. To those Black candidates taking the Pennsylvania Bar examination which they have suspected dis-

11. The only break in the seating sequence was in the "typing room" where those candidates who had opted to type their examinations were segregated; but their seats were also prominently numbered.

criminates against them because they are Black, every Board procedure which *appears* to facilitate a breach of "anonymity" would reasonably feed those suspicions. According to these candidates, an actively hostile climate towards Blacks prevails in the examination room. Among a sea of white faces are seated a dozen Blacks; among the twelve proctors in the room, there is not a Black one in sight.

E. Grading the Answers: Participants, Standards and Procedures

The "grading" phase of the Bar examination process has been the focal point for most claims that the State Board practices, or tolerates, racial discrimination (as well as favoritism for some, but not for all candidates). These grave charges should have been identified and resolved by the profession long ago. The "Hastie Committee" Report of 1953-54 would have performed an admirable service along these lines had it been released to the profession generally. It would have identified some problems, practices and trends which have continued unabated to 1970, unbeknownst to the profession.

We are making a detailed disclosure of each critical grading phase. What we found in our investigation and what we are now reporting are standards and procedures that may shock our noble profession. We believe that we, nonetheless, must set the record straight.

Although it sometimes seems ephemeral and has undergone change, a grading process, which is critical in Bar admission, does exist. We base our findings partly on what Board members, graders and candidates have told us and made available to us by documentation. We also draw inferences from missing records and refusals to make other documents or data available to us. We have observed the actual operations in parts of July 1970 examination grading process. We also have drawn inferences from such observations concerning other examinations as well.

For this part of our study, we have met once with the State Board of Law Examiners (Mr. Johnson was not present); with Chairman Wilkinson (three times); Board member McTighe (twice) and Board member Dechert (once); with Secretary-Treasurer Seymour (six times); Supervising Examiner Storb (twice); Assistant Supervising Examiner Thomas Gill (once); Examiners Moran, Baker, Very, Leahey, Matson, Hallgren (once each); Examiners Wells and Spivak (twice); Assistant Secretary-Treasurer Ohuchi (twice); Philadelphia State Board staff clerks McCannon (twice) and Williams (twice); and the test proctors (once) at the Philadelphia location during the

first session of the July 1970 Examination. We have also met with more than 40 present and past candidates for Bar admission (up to four times with some) and with every person who has publicly or—if we learned about it—privately charged the State Board with discrimination in grading (in open and closed hearings). We have also met with lawyers and judges; deans, faculties, students and staff of law schools; and leaders of the A.A.L.S., A.B.A., C.L.E.O. and other committees interested in this subject. We have not met with any member of the Pennsylvania Supreme Court.

In executing this sensitive phase of our study, we received substantial and courteous cooperation from the State Board, primarily through Chairman Wilkinson and Board member McTighe. The Board has permitted us to examine six files of candidates (past or present) and supplied us, in formal responses, with some data in certain of the files which we requested. We were permitted a wide latitude in our interviews. However, many records which we requested—including answer booklets from all examinations before July 1970 and the names of candidates with "borderline papers" during the past 15 years (discussed below)—had been destroyed or were otherwise not made available to us by the State Board.

In the sections which follow, we shall identify, explain and evaluate each critical step in the rather complex grading process using actual Board records to make several of our points. (The confidential data on some records has been blocked out by the Special Committee.)

The relationship of the State Board of Law Examiners to the various graders was depicted earlier in this Report.

1. *Regulations of the State Board of Law Examiners on Grading*

There is no Supreme Court Rule which explicitly deals with grading (standards or procedures). The State Board's Regulation under Rule 10, however, explicitly establishes the minimum passing grade. It has provided at all pertinent times:

> *"Grade Required.*
>
> The minimum passing average is 70 per cent. If a candidate fails the Examination, he must retake an entire subsequent examination (if permitted to do so as explained below)."

As will be revealed below, however, the actual State Board practice may best be characterized as a refutation of the spirit, if not the letter, of this Regulation. Until very recently, a majority of all "passing" papers had, according to Board members and staff, earned grades below 70 but were nevertheless "raised" to 70 and "passed"

by motion of the State Board. Indeed, it is estimated that until very recently, 75% of all *passing* candidates received the flat grade of 70 as their final grade.

We shall now examine the grading practices during the past three Bar examinations within the limits earlier described.

2. *The State Board's Statement of July 17, 1970*

The State Board, on July 17, 1970, supplied us with the following description of the grading process:

> "MARKING
>
> [1] Each examiner marks all of the answers to the questions he has prepared. Since he is thoroughly familiar with the questions and the expected answers, the examiner has assigned tentative values to each issue of each question.
>
> [2] Immediately following the examination, 15 to 20 papers are sent to each examiner for initial reading. The purpose of the initial reading is to check on the validity of the tentative evaluation of issues.
>
> [3] A week after the examination, a meeting of the examining group and the Board is held. At this meeting the results of the initial reading are discussed. Each examiner has compiled a report on the candidates' reaction to each issue of each of his questions. Based on this report, a re-evaluation is usually made.
>
> [4] For example, the 100 points assigned to each question may have been tentatively assigned in question No. 1 on the basis of 25 points for each of four issues. The initial reading discloses that all of the 15 or 20 candidates saw and discussed issues No. 1 and No. 4; half of the candidates saw and discussed issue No. 2; and only one-fourth of the candidates saw and discussed issue No. 3. On re-evaluation, the values assigned would probably be as follows: issue No. 1—35 points; issue No. 2—20 points; issue No. 3—10 points; issue No. 4—35 points.
>
> [5] Thus the aggregate of the easier and obvious issues is 70 (which is the passing grade), while the aggregate of the more difficult issues is only 30.
>
> [6] On rare occasions an issue which has been tentatively assigned to 10 or 15 points has been universally overlooked by the candidates. In these cases, no points are allocated to the issue and the points previously assigned to it are distributed among the easier issues in the answer.
>
> [7] After the grading standards have been established, the examiners read and mark their sessions in numerical order. The results of this reading are sent to the office in Philadel-

phia, where the total of all eight sessions is computed and the overall average grade of each candidate is determined.

[8] If the average is 70 or over the paper automatically passes. If the average is below 65 the paper automatically fails.

[9] The group in which the average is 65-69 is called the borderline group. Those papers in the borderline in which the average is 65 or 66 are sent back to the original markers for re-reading. The 67-68 group are sent to the assistant supervisors for re-reading. The 69's are recommended for passing by the supervising examiner.

[10] If on re-reading, the 65-66 paper remains at that average or is lowered, that paper is recommended for failing. If the average is raised to 69 or better the paper is recommended as passing. If the average is 67-68 the paper is sent to the assistant supervisors for re-reading.

[11] Thus all papers in the 67-68 group are read by the assistant supervisors. If the average, after this reading, falls below 67, the paper is recommended as failing. If the average is raised to 69 or better the paper is recommended as passing. If the average remains at 67-68 the paper is sent to the supervising examiner for re-reading.

[12] If after the supervising examiner's reading, the average falls below 67 the paper is recommended as failing. If the average is raised to 69 or better the recommendation is passing. If the average remains at 67-68 the paper is sent to Board members for re-reading, and this reading becomes the final mark.

[13] Each borderline paper is read at least two times and some are read five times. The statistics of the past ten years show that, as a result of this re-reading, 73% of the borderline papers are passed."

We shall now place the State Board's July 17, 1970 statement in context.

3. *Selecting the "15 to 20 [sic, 17] papers which are sent to each examiner for initial reading to check on the validity of the tentative evaluation of issues." Who, by what procedures and standards, selects which papers?*

a. *The selections*

Contrary to speculation, Secretary-Treasurer Seymour grades no papers. He is charged only with administrative responsibilities.[12]

12. However, Mr. Seymour has stated to us that he could recommend a paper for review (rereading) if there is a "marked aberration" in the scores for the various sessions. See also the subsection "Rereading by the Eight Examiners," below.

One such responsibility, however, is the traditional task of selecting 17 papers for initial reading by Examiners and discussion at the "Hershey Meeting." On the weekend following a Bar examination, all Examiners and the State Board meet in Hershey for the purpose of giving "final" weight to "issues" in the "model" answer for each question. The final weightings are based on both the Examiners' earlier provisional weightings for those issues and the actual performance on the test by the 17 candidates from Philadelphia.

Mr. Seymour delegates to a staff clerk the decision on which 17 papers are selected for initial reading. The clerk in the State Board office who, during the past several examinations, has performed that sensitive selection task is Miss McCannon.

b. *"High, middle, and low stands"*

By a procedure which she effectively controls as Bar examination applications are received, the clerk "predicts" the test performance of 17 candidates. Each is earmarked by the clerk before the test as "predictably *high, middle, low* stand." Her prediction is based on standing (grades) in certain law schools or on past failure in the Bar examination.

It is clear that, until very recently, the seven "high" stands were high-ranking students from only the law schools of Harvard, Pennsylvania, Yale, Chicago and possibly Michigan. Now that law school "grade point averages" and "class rankings" are less commonly available, however, the clerk (who is, of course, not a lawyer or educator) has had to resort to her own discriminating standards as to what constitutes a good law school record (e.g., editor of *Law Review*). No honor graduate of Howard Law School, however, has ever been selected as a "high" stand.

For this initial screening, the five "low" stands have usually been "repeaters"—candidates who previously failed the Bar examination. Other "low" stands have been selected from among the law schools of Temple, Villanova and others which the selector considered "less prestigious." Such candidates are not expected by the State Board staff to do as well on the Bar examination as the "high stands." It is unclear whether such "low stands" have ever included graduates of the Howard Law School.

Finally, the five "middle stand" candidates—who are usually graduates of law schools in this Commonwealth—are chosen as "predictably" average performers on the Bar examination.

As we shall see, these judgments of the clerk are then relied on by the major participants in the grading process at the "initial reading" and "Hershey Meeting" stages.

c. *Initial grading by the Examiners: anonymity?*

Fifteen (5 "high stand," 5 "middle stands," and 5 "low stands") candidates' booklets are intercepted directly after the test by the clerk and sent to the eight Examiners who conduct an initial reading and grading. Each Examiner, of course, receives and reads only the booklet containing a candidate's answers to the three questions he prepared. We have no evidence that any Examiner knows whose booklet he is grading; all he sees is the identification number. Nor does he know whether the paper he is reading is that of a "high," "middle," or "low" stand candidate. But he does know there is that mix.

d. *Initial grading by the Assistant Supervising Examiners and by the Supervising Examiner: anonymity?*

The two additional "high stands" go elsewhere for initial reading. The 16th candidate's entire paper (containing all eight booklets) is sent to Supervising Examiner Storb. We have no evidence that Mr. Storb knows whose paper he is reading, but he certainly does know it is a "high stand" and he expects good answers.

The 17th candidate's paper is divided between Assistant Supervising Examiners Gill and Keitel. Each receives and initially reads the answers to "his" two sessions. Mr. Keitel takes sessions 1 and 2 (questions 1-12, comprising four bluebooks), and Mr. Gill takes sessions 3 and 4 (questions 13-24, comprising four bluebooks). We have no evidence that either Assistant knows whose paper he is reading. But he does know it is a "high" stand, and he expects good answers.

e. *Why are these 17 papers, thus selected, initially read?*

A healthy respect for fallibility in one's ability to communicate through standardized questions and to grade answers requiring legal essays has obviously driven the State Board and Supervising Examiner Storb to devise a system of rechecking and revising their provisional "model" answers. What better way is there to validate the "model" answers, they ask, than to see what 17 candidates actually wrote as answers? Whatever merit there is in a *random* selection of 17 papers for that purpose, serious questions are raised by the present Board practice of selection. Basing his judgment on over 20 years' experience as Bar examiner, Supervising Examiner Storb believes there is a distinct advantage inuring to a candidate whose paper is one of the 17 initially read. Why should any of those 17 candidates in a pur-

portedly "anonymously graded" test receive a benefit or burden because of his law school past or failure on an earlier Bar examination or anything else but what he wrote this time around? We perceive no justification for this practice of the State Board which violates the spirit of the anonymous grading system.

4. What standards are applied in grading "developmental" answers?

As earlier stated, the Pennsylvania Bar examination does not purport to be a "memorization" test; yet no written materials may be consulted. Nor is it an in-depth "subject matter" test; law school test coverage cuts much deeper. Nor is it perceived by the Board as simply an "issue-recognition" test. Indeed, Mr. Storb and Board members have underlined this point: how one *develops* the issues he does recognize may be the difference between passing and failing a question. We have already discussed the absence of explicitly identified purposes of the Bar examination, and the absence of necessary expertise in the preparation of the questions. Without guideposts one is unable expertly to discuss "grading standards." We nonetheless ask, what broad standards, if any, are set and by whom, for making that "developmental" judgment? Do the procedures actually employed in grading the papers insure an even-handed application of whatever broad standards are established? [13]

We have explored these questions with the State Board and Mr. Storb. It is Supervising Examiner Storb who effectively hires, fires and promotes the eight Examiners. It is primarily he who sets whatever uniform standards are found in grading. And by his own admission: "I run a tight shop. If I don't know what happens in grading, no one knows. I try to mold all the Examiners so they will grade the same way I do."

We have been unable to extract from Mr. Storb or any other grader what positive standards he uses in measuring how well a candidate "develops" an answer. Some have, however, demonstrated an awareness that they should ignore *personality* differences symptomized by such phenomena as "neat" or "sloppy" handwriting. Board member Robert Dechert made the additional point that spelling mistakes or "not knowing how to write a good English sentence, having poor syntax and spelling" hurt a student's grade, but Mr.

13. The Hershey Meeting (discussed below), and Mr. Storb's "review" of some ten percent of the papers in any Bar examination (also discussed below) are indirect procedures for encouraging uniformity in grading standards. Mr. Storb's review is, however, limited to papers having grades of 67 or 68 and limited in scope.

Storb disagreed. But neither of them considered that such phenomena might be symptomatic of potential *cultural* differentiation as distinguished from "correctness" or "poorer educational" background, and as such should not count for or against any candidate on an essay test.[14]

5. *The Hershey Meeting*

The Examiners and the State Board meet in Hershey one week after the examination is given. As elaborated and modified in our preceding subsection, the pertinent agenda and procedures at the Hershey meeting are described in the State Board's Statement of July 17, 1970, paragraphs 3-6.

In the three subsections which now follow, we shall describe the grading processes (standards and procedures) from the time the Hershey Meeting is adjourned until, usually some three months later, the State Board's "Final Meeting" is convened in Philadelphia and the grades are released to the candidates.

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14. We have considered this issue in depth and find it inapplicable to the candidates within our mandate. However, we are constrained to respond to the *cultural* explanation issue raised by Mr. Dechert, which we would underline is inapplicable.

Especially in essay tests, *cultural* as well as *individual personality* factors can have a devastating influence on both the candidate and grader. Many such factors are carried unconsciously into one's English prose written in, and later read on, a Bar examination. We are referring, for instance, to dialectical variations, grammatical structure (syntax), blocked communication (language traps) resulting not from stupidity nor from deprivation but from cultural differentiations. No culture or subculture is abstractly "better." Each such linguistic category is relevant to one's group identifications, and to how one therefore develops an issue he recognizes, as well as whether a reader thinks he has identified the issue. Professor Paul Diggs of Howard University Law School has made most of these points in a recent article in the *Toledo Law Journal.*

This "cultural" point is not, as some provincial artisans have reckoned, simply a new excuse for not failing dull candidates. Such critics might fail a candidate who does not "properly" spell or who mixes tenses, genders or numbers, or who does not write an English sentence as the grader would. But would that failure be proper if the essence of the writer's point is found in the answer though buried (for that reader) because, for example, the candidate's writing style was based on oral patterns he developed in a subculture to which he reverted in the over-pressurized Bar test environment? Such critics might also fail a candidate who has not, after three years in a "prestigious" law school, rejected a useful subcultural idiom even though the *grader himself shows no awareness that his own preferred idiom is just as culturally* and class-bound as the writer's? Would such a failure be proper in a Bar examination measuring one's past "achievement" or his "aptitude" to practice law in a multiracial society? Would the critics properly fail one who consciously or otherwise is blocked in expressing himself ("unclearly" to the culture-bound grader) on a "real property" question because he associates the pertinent property doctrines with slave history and because he took the examination in a "lily white" setting (proctors and other personnel) with a firm expectation that a Black man's chances of failing were 2 to 1 those of a non-Black?

Insights into cultural biases reflected in non-expert testing and measurement are now commonplace. The first technique in guarding against such unconscious biases is to recognize their existence; the second is to plan and prepare questions whose subjects and arrangements are culturally "neutral"; the third step is to create environmental conditions (*not just in the test room but at all pre-admission stages*) that equalize pressure; the fourth step is to use graders sensitized to culturally "neutral" standards for answers; and the fifth is to develop procedures insuring uniform implementation of the standards.

6. *From one to five readings: how many papers are read how many times and disposed of by whom?*

a. *How many papers are read in their entirety by one Examiner?*

One's booklet may be read from 1 to 5 times in the grading process. But only one paper in 15 is read in its entirety *by one person,* as all papers in a law school examination almost invariably are read by the one professor.

The only papers read in their entirety by *one* person are those read by Supervising Examiner Storb. He reads the 16th paper selected for initial reading (see next section), and those papers which, after two or three earlier "readings" by Examiners and Assistant Supervising Examiners are in the 67.000 to 68.999 range. On the July 1969 examination, 657 persons took the test, but Mr. Storb read only 32 papers; he "passed" 18, "failed" 3, and submitted the other 11 to the Board for another "split reading" (one fourth of each paper being read by a member of the State Board). Similarly, on the July 1970 examination, Mr. Storb read 45 of the 606 papers, "passing" 29, "failing" 3, and submitting the remaining 13 to the Board for re-reading. On the January 1970 examination, Mr. Storb read 16 of the 167 papers, "passing" 14, "failing" none and submitting the remaining 2 to the Board for re-reading. Thus, during the past 3 Bar Examinations, only 67 of the 1,429 papers were "passed" or "failed" as a result of a complete reading by one grader. We seriously question the procedures of the Board which on an essay, pass-fail test like the Bar examination, permit a pass-fail decision to be made irrespective of patterns or trends in a paper and without one expert examiner's reading of the *entire* essay to base *his* pass-fail judgment on the *whole* paper rather than simply on the sum of its parts through arithmetic "mean" averages as hereinafter described.

b. *How many papers are "disposed of" at various stages of the grading process?*

From the next three stages (each of which comprises page 2 in appendices 1 to 3 below),* the reader can determine how many papers, in each of the last 3 Bar examinations were "disposed" of at each stage in the grading process:

* Ed. Note: Appendices 1 to 3 are not reproduced in full herein. They are retained on file at the Temple Law Quarterly, 1715 N. Broad Street, Philadelphia, Pa., and are available there for examination. Particularly relevant data is generally correlated and analyzed in text and/or footnotes. Significant excerpts from Appendix One are reproduced, however, at pages 244-47 *infra.*

—*by the Examiners,* on first or second reading;
—*by the Assistant Supervising Examiners,* on one reading following either one or two by the 8 Examiners;
—*by Supervising Examiner Storb,* after two or three readings by the 8 Examiners or by the Assistant Supervising Examiners;
—*by a panel of four members of the State Board,* after three or four earlier readings by the 8 Examiners, the 2 Assistants and Mr. Storb.

Each of these borderline papers is "submitted to the Board for reading" by Mr. Storb if his reading has produced an arithmetic mean average between 67.000 and 68.999.[15]

We will detail these procedures below.

After all re-readings were finished:

62.71% = 412 papers recommended for PASSING by Examiners on first reading with grades from 84.792 to 70.

BORDERLINE PAPERS recommended for PASSING.

5.94% = 39 papers by the Marking Examiners with first reading grades in the 69's.
7.91% = 52 papers by the Assistant Supervising Examiners with grades from 72.708 to 69.167.
2.74% = 18 papers by the Supervising Examiner with grades from 69.792 to 69.167.

79.30% = 521 papers recommended for PASSING.

1.67% = 11 papers submitted to the Board by the Supervising Examiner without recommendation with grades from 68.333 to 67.083.

Papers recommended for FAILING.

11.26% = 74 papers by the Marking Examiners with first reading grades from 64.792 to 50.625.
6.85% = 45 papers by the Marking Examiners with second reading grades from 66.875 to 64.167.
.46% = 3 papers by the Assistant Supervising Examiners with grades from 66.875 to 66.25.
.46% = 3 papers by the Supervising Examiner with grades from 66.875 to 66.458.

19.03% = 125 papers recommended for FAILING.

TOTAL
100.00% = 657 papers.

July 1969 Bar Examination

15. But see note 19 below for examples of deviation from the rule.

After all re-readings were finished:

50.30% = 84 papers recommended for PASSING by Examiners on first reading with grades from 85. to 70.

BORDERLINE PAPERS recommended for PASSING.

5.39% = 9 papers by the Marking Examiners with first reading grades in the 69's.

7.19% = 12 papers by the Assistant Supervising Examiners with grades from 72.083 to 69.375.

8.38% = 14 papers by the Supervising Examiner with grades from 70. to 68.958.

71.26% = 119 papers recommended for PASSING.

1.20% = 2 papers submitted to the Board by the Supervising Examiner with both grades of 67.292.

Papers recommended for FAILING.

18.56% = 31 papers by the Marking Examiners with first reading grades from 64.792 to 54.583.

8.38% = 14 papers by the Marking Examiners with second reading grades from 66.875 to 65.417.

.60% = 1 paper by the Assistant Supervising Examiners with a grade of 65.625.

—— = 0 papers by the Supervising Examiner.

27.54% = 46 papers recommended for FAILING.

TOTAL

100.00% = 167 papers.

January 1970 Bar Examination

After all re-readings were finished:

64.30% = 389 papers recommended for PASSING by Examiners on first reading with grades from 84.791 to 70.

BORDERLINE PAPERS recommended for PASSING.

6.12% = 37 papers by the Marking Examiners with first reading grades in the 69's.

5.12% = 31 papers by the Assistant Supervising Examiners with grades from 70.833 to 69.166.

4.79% = 29 papers by the Supervising Examiner with grades from 69.791 to 68.75.

80.33% = 486 papers recommended for PASSING.

2.15% = 12 papers submitted to the Board by the Supervising Examiner with grades from 68.125 to 67.291.

Papers recommended for FAILING.

9.75% = 59 papers by the Marking Examiners with first reading grades from 64.791 to 32.083.

6.78% = 41 papers by the Marking Examiners with second reading grades from 66.875 to 64.375.

.495% = 3 papers by the Assistant Supervising Examiners with grades from 66.875 to 66.458.

.495% = 3 papers by the Supervising Examiner with grades from 66.875 to 66.458.

17.52% = 106 papers recommended for FAILING.

TOTAL

100.00% = 605 papers.

July 1970 Bar Examination

7. Papers "passed" or "failed" on the first reading by the 8 Examiners: standards and procedures.

a. *Reading and grading 105 booklets a week.*

Each Examiner reads the answers only to "his" three questions.[16] He makes notes not on the booklet but on a "tally sheet."

16. Each candidate writes his answers to a group of three questions in one booklet. Each candidate then uses 8 booklets for the Bar examination, and each of the 8 Examiners receives (via the U.S. mail from the State Board staff) the booklet containing answers to "his" three questions.

He is obliged to report the grades of 105 booklets each week to the State Board staff in Philadelphia. Examiners read and grade an answer in 4 or 5 minutes (12 to 15 minutes for a complete booklet). We asked whether that is enough time on which to base a sound judgment on another's professional future. Supervising Examiner Storb insists it is. He told us that four or five minutes spent on an essay answer is ample time for mature judgment. He rigidly enforces this "105 per week" rule even though some Examiners are thereby forced, as they told us, to grade answers in their law offices between phone calls or client visits or while taking lunch or supper.

b. *What is reported on the grade sheet.*

The "grade sheet" that an Examiner forwards to a staff clerk (Mrs. Williams), in the State Board's Philadelphia office, contains the following information: (1) the numerical score (0 to 100) for each answer; (2) the mean average numerical score for three answers; and (3) a "pass" or "fail" recommendation, which is not necessarily based on whether the mean average is 70.

For instance:

Exam number 139

#1	60
#2	80
#3	65
	Av. 68 1/3

Recommendation: pass

Although no standards are established for an Examiner's "pass" or "fail" recommendation not coinciding with the arithmetic mean average of the booklet, it is clear that such an independent recommendation is both purposeful and expected. This is because of a healthy mistrust of attempts numerically to quantify what is eventually a qualitative judgment, i.e., whether to recommend that a paper, on balance, "pass" or "fail" which are the only two gradations that count on this examination.

c. *The arithmetic mean average is computed to three decimal places, but the Examiner's independent "pass" or "fail" recommendation is ignored.*

When the clerk has received from the Examiners all 8 grade sheets for one candidate—the Examiners having been instructed, incidentally, to read booklets and to report grades in numerically chronological order, from candidate #1 to #625—she then computes an

average. *She completely ignores the independent "pass" or "fail" recommendations.* She uses only the numerical score given by the Examiner for each answer. The average she computes is the arithmetic mean.

In that and all other determinations made in the Bar examination process before final grades are assigned, an average is calculated in decimals carried to the thousandths of one point, e.g., 64.792. Curiously, however, everything following 64 in that example is ignored. The three numbers to the right of the decimal point are ignored for all papers except certain of the "borderline" papers which are separately considered (and will be described below) by the State Board on an *ad hoc* basis.

Secretary-Treasurer Seymour, Supervising Examiner Storb, and Board members McTighe and Wilkinson identified no rational purpose that is served by calculating an average to three decimal places and then ignoring it as, for instance, the .792 would be in the example above. The point is driven home when, as will be seen shortly, a paper with that precise score of 64.792 was "failed" on a first reading because it was 0.208 below 65.000! Recall that 64.792 is based solely on the "raw" numerical scores on 24 essay answers. No effective independent or collective judgment is exercised on the paper, and no trends in the 24 answers are effectively considered.

We do not understand why the independent "pass" or "fail" recommendation by the Examiner is ignored.

d. *The Board officially "passes" or "fails" a paper, not the Examiners.*

Officially, no paper is "passed" or "failed" until the State Board's "Final Meeting" in Philadelphia about three months after the test is given. At that meeting, the Board passes motions concerning grade categories of papers, but with one major exception leaves untouched the established consequences of most categories (e.g., 64.999 and below papers are officially failed; 69.000 and above papers are officially passed). Papers which, after reading by Mr. Storb, are between 67.000 and 68.999 are submitted to the Board for another reading. As to this latter group of papers, the Board's decisions to pass or fail are, as will be seen below, not *pro forma.* To avoid confusion, however, we use the expression that, before the Board's "Final Meeting," a paper is "placed in the 'pass' or 'fail' category."

e. *The standards for "pass" and "fail" on the first reading.*

If the arithmetic mean average of a paper is 64.999 or below,

then that paper is placed in the "fail" category by the staff clerk. It is not re-read. (There is a possibility, estimated by Mr. Storb as 1 in 2000, that he might catch a pattern of very extreme unevenness in a paper's grades. He receives a weekly summary, based on the Examiners' combined grade sheets, for each paper. Mr. Storb can theoretically recall any paper and order it re-read by the Examiners or read by himself.[17] But he has recalled less than 6 papers in 15 years that were "disposed of" by the Examiners on first reading.)

If the arithmetic mean average of a paper is 69.000 or above, then that paper is placed in the "pass" category by the staff clerk. (The Board's Statement of July 17, 1970, is incorrect if it implies that a 69.000 paper is treated in any manner whatever differently than a paper having 70.000 or above.) In light of the explicit State Board Regulation that "the *minimum* passing average is 70 per cent," the Board's procedure which treats a 69.000 for all purposes as being 70.000, is, of course, difficult to comprehend.

The inequities in the present grading system are magnified when we consider the different treatment accorded papers which after one reading are below 65.000 and those which as a result of the first reading are between 65.000 and 68.999, and thus deemed "borderline." We shall see that the grades of such papers on subsequent readings have fluctuated more than 4.200 points (usually upwards). But the person whose paper was 64.792 received no such chance for potential benefits, while a paper with 65.000 does. We are not concocting unrealistic possibilities. In the July 1969 Bar examination paper #339 had an average of 65.625 after the first reading. By the time it had been read by the Supervising Examiner, its grade was up to 69.167 and it therefore was passed!

How can the Board rationally treat a paper, graded by no one except eight part-time Examiners, as a failure when it is only 0.208 below another paper in an essay test and in which a potential of 2,400.000 quantitative points are used to measure qualitative performances? Why is a 65.000 paper read and re-read but a 64.792 paper not? It is no answer to say: "We have to draw the line someplace; it is always going to be arbitrary." Not only has the Board lowered the official 70 percent requirement for passing to a *de facto* 69.000, but as we shall see below, it moved the passing grade all the way down to 66.458 in the precise July 1969 Bar examination we are discussing, and in which the paper with a first reading grade of 64.792 was not re-read.

17. So, apparently, can Secretary-Treasurer Seymour; see note 12 above.

8. *The "borderline" papers*

The State Board's Statement of July 17, 1970, quoted above, describes the procedures for a paper not placed in the "pass" or "fail" category after its first reading by the eight Examiners. All such papers are called "borderline" papers.

As a tool for assisting in an understanding of how "borderline" papers are treated (the levels or categories at which papers are read more than once, how frequently and by whom), we produce on the next page parts of the document "Report on Bar Examination held July 10 and 11, 1969, for Board Meeting, November 1, 1969, . . . Examiners' Report":[18]

Papers recommended for PASSING by Supervising Examiner (18 papers):

*Exam'n ** *Number*	*First Reading*	*Second Reading*	*Asst. Super. Examiners' Readings*	*Supervising Examiner's Reading*
	68.75	—	68.542	69.792
	67.083	—	67.083	69.792
	68.75	—	68.75	69.375
	67.917	—	68.958	69.375
	67.708	—	68.75	69.375
	67.083	—	68.958	69.375
	68.125	—	68.75	69.167
	68.125	—	68.75	69.167
	67.917	—	68.542	69.167
	67.917	—	68.333	69.167
	67.708	—	68.542	69.167
	67.50	—	68.958	69.167
	67.292	—	68.542	69.167
	67.083	—	68.958	69.167
	66.875	68.125	68.958	69.167
	66.25	67.292	68.75	69.167
	66.042	67.292	68.958	69.167
	65.625	68.542	68.75	69.167

July 1969 Bar Examination

a. *Rereading by the eight Examiners*

If, after the first reading, the arithmetic mean average for an entire paper is between 65.000 and 66.999, then the staff clerk in the Philadelphia office immediately advises the eight Examiners of the grade and tells them to reread their respective booklets. (The booklets

18. For the text of the entire pamphlet, see Appendix Two below. [Ed. Note: Appendix II is not included herein.]

* Ed. Note: Exam numbers deleted by special Committee.

remain with the eight Examiners until they are ordered returned to the State Board office or to the Assistant Supervising Examiners.)

The eight Examiners must reread the booklet forthwith while still maintaining the 105-a-week "first reading" pace. In that rereading, the Examiner has access not only to the candidate's grade but also to a "tally sheet" from his own first reading containing his written comments, if any, about the paper. His rereading seems therefore to be more a check for gross error than a *de novo* reading. (Since only twelve to fifteen minutes for a booklet is the average *de novo* reading time, that distinction may not be major.) Still, papers can—and often do—rise substantially on a second reading by the same eight Examiners, as for instance, the final three entries on the last page indicate.

The Examiners have no more reason to know whose paper they are grading on a rereading than they had on the first reading following the Hershey Meeting.

The eight Examiners report their "second reading" grades as they did before and the staff clerk computes the arithmetic mean average for only the second reading, ignoring the independent "pass" or "fail" recommendation again.

If this second reading produces an arithmetic mean average of:

66.999 or below, the paper is placed in the "fail" category and is not reread;

67.000 to 68.999, the paper is ordered sent to the Assistant Supervising Examiners;

69.000 or above, the paper is placed in the "pass" category and is not reread.

It may bear reiterating that the arithmetic mean average for such reading is computed by the staff clerk independently of the average for any other reading.

b. *Rereading by Assistant Supervising Examiners*

If the *first* reading by the eight Examiners produced a grade between 67.000 and 68.999 or if the *second* reading by the eight Examiners produced a grade between 67.000 and 68.999, then the paper is reread by the Assistant Supervising Examiner. One such Assistant Supervising Examiner receives the four booklets, comprising the candidate's twelve answers to the first two sessions; the other one receives the four booklets from the last two sessions. Each also receives the "tally sheets" (including comments) of the four Examiners who earlier graded those twelve answers.

It is unlikely that this rereading is fully *de novo*. Interestingly enough, during the past three tests (the only three we were permitted

to review), the Assistant Supervising Examiners' combined grades have been higher than those of the eight Examiners in all but three cases.

We have found no evidence that an Assistant Supervising Examiner consciously has had reason to know whose paper he is grading.

The procedure for turning in the grades from this reading stage is the same as earlier described for the Examiners. Each Assistant Supervising Examiner turns in his grades for "his" twelve questions; he includes an independent "pass" or "fail" recommendation on the grade sheet. His comments are made a part of the complete "tally sheet" that is being developed by the staff clerk for each candidate.

The staff clerk in the Philadelphia office computes the arithmetic mean average from this reading only. She ignores the independent "pass" or "fail" recommendation of the Assistant Supervising Examiner.

If this reading produces an arithmetic mean average of:

66.999 or below, then the paper is placed in the "fail" category and is not reread;

69.000 or above, then the paper is placed in the "pass" category and is not reread;

67.000 to 68.999, then the paper is ordered sent to the Supervising Examiner.

c. *Rereading by Supervising Examiner Storb*

If, as a result of the Assistant Supervising Examiner's reading, the paper's grade is between 67.000 and 68.999, then the entire paper with all 24 answers is sent to Mr. Storb, the Supervising Examiner. Papers thus sent to Mr. Storb are the only ones (in addition to the sixteenth "initially read" paper discussed earlier) that are read cover-to-cover by one person.

Mr. Storb, of course, has access to the grade sheets and "tally sheets" with the comments of each previous grader. Whether his reading is *de novo*, we cannot clearly determine. He certainly does consult those comments and grades. (This is one of the only opportunities, limited as it is, for Mr. Storb to "supervise" the others' grading performances as he seeks to mold a uniform group of Examiners.)

Mr. Storb is the most critical single person in the grading process. It is he who has almost total authority over all Examiners. He may call, at any stage, for any paper and change its grade, almost without review. We have thoroughly discussed with him the question of anonymity in grading and have investigated many hypotheses. We have found no evidence even to support an inference that Mr. Storb,

during the past several examinations when reading papers in this category, has consciously known or had reason to know that any particular paper was that of a Black candidate. We would be remiss if we did not also point out that, based on our "spot checks" of several Black papers in previous Bar examinations, the only three Black papers that we know Mr. Storb did read were raised because of his reading. We are not in a position to comment further or to unravel any alleged links between any grader and the State Board staff prior to the time Mr. Seymour became Secretary-Treasurer some five years ago.

Supervising Examiner Storb grades each question and calculates the arithmetic mean average for each of the four sessions and the entire paper. He also makes an independent "pass" or "fail" recommendation for each session and for the entire paper. But these recommendations are ignored.

If as a result of Mr. Storb's reading, the paper receives the grade of 66.999 or below, then it is placed in the "fail" category as above. No other reading occurs.

If Mr. Storb's reading produces an average between 67.000 and 68.999,[19] then the paper is sent to the four Board members (one session's answers per member) for a final reading. Those papers, a total of twenty-six during the past three Bar examinations, are called "borderline papers submitted to the Board." For these relatively few papers, Mr. Storb includes his independent "pass" or "fail" recommendation for the paper as a whole, as well as a critique.

d. *Re-reading by a panel of four State Board members*

A "paper submitted to the Board for re-reading" is therefore one which, from Mr. Storb's full reading, has received an average between 67.000 and 68.999. Such a paper is not read in its entirety by any one Board member. Each of four Board members receives the six answers to the session containing subject matter for which he has, by custom, taken responsibility. *This is the only time any Board member reads and grades a paper.*

The Board member has, in addition to the two booklets with the six answers, all grade sheets, tally sheets and comments of everyone who previously read those answers, including Mr. Storb's recommendation. We do not know whether this is a *de novo* reading, but

19. We have, however, found four papers in the three examinations we partially reviewed, which after Mr. Storb's reading were placed in the "pass" category despite averages below 69.000. See paper #1196 with 68.938 in January 1970; and papers #196 and #522 with 68.958, and papers #238 and #499 with 68.750 in July 1970. [Ed. Note: These papers appear in appendices II and III which are not included herein.]

Board members have told us they look to help rather than hurt candidates in this reading.

Each Board member enters an arithmetic mean average grade, as well as an independent "pass" or "fail" recommendation for that session. Those four grades are then averaged—again, computed to the third decimal point.

These papers are not read again. They are, however, submitted to the entire Board for *ad hoc* disposition as hereinafter described.

F. THE STATE BOARD'S "FINAL MEETING" IN PHILADELPHIA: THE OFFICIAL DECISIONS ON "PASS" AND "FAIL"; "DISCRETIONARY POINTS"; INEQUALITY.

Some three months after the Bar examination is given, the State Board of Law Examiners meets in Philadelphia for the purpose of making official decisions as to who will pass and fail the Bar examination. Present in the room where all discussion takes place (no minutes are available) are:

The five members of the State Board,
Mr. Storb, Supervising Examiner,
Mr. Seymour, Secretary-Treasurer of the Board.

Mr. Storb leads the discussion and refers throughout to a pamphlet (erroneously called "The Supervising Examiner's Report") which was prepared by the Philadelphia staff, primarily Mrs. Williams. Mr. Storb centers the Board's attention on matters which require either *pro forma* or discretionary action. Each Board member and Mr. Storb has in his hands an identical copy of that pamphlet. What Mr. Seymour has with him at this meeting will be revealed later in this Report.

1. *The Pamphlet: "Report on Bar Examination held January 29 and 30, 1970 for Board Meeting April 4, 1970" (See Appendix One)*

Because the contents of this pamphlet are critical to our investigation and report, we are releasing the contents of the copy for the January 1970 Bar examination which Judge Wilkinson had in his custody at all pertinent times during the April 4, 1970, Final Meeting in Philadelphia.* At that meeting, all formal "pass" and "fail" decisions were made for the January 1970 Bar examination. We have no doubt that each Board member and Mr. Storb had identical copies.

* Ed. Note: See Excerpts from Appendix I *infra* p. 244. Excerpts have retained original pagination at bottom.

(The only changes made by the Special Committee were to maintain a candidate's privacy. We blocked out examination numbers of the candidates and certain personal data discussed later in our Report.)

2. Decision whether to "pass" or "fail" various categories of papers: what standards and procedures does the Board use?

a. *The pro forma decisions*

As indicated earlier in this Report, according to Board practice no candidate passes or fails the Bar examination before a motion is duly passed at the "Final Meeting" which we are now discussing. Some decisions embodied in those motions, however, are *pro forma* only. Although we have seen no Board minutes which we understand are not extant, Board Chairman Wilkinson, Member McTighe and Mr. Seymour have explained to us that the Board quickly disposes of all papers except "borderline papers submitted to the Board for reading." Those motions are usually made in a form such as:

> Motion that [papers with] 69 or 70 averages be recorded as 70 [, and be passed].
>
> Motion that [papers with] 71 or above be recorded as the grade each received [, and passed].
>
> Motion that papers recommended for failure by Supervising Examiner, Assistant Supervising Examiner, or Examiners, and not submitted to the Board for reading, be failed, and recorded as the grade each received.

Simply put: except for "borderline papers submitted to the Board for reading" (which are independently handled by other motions), the Board formally ratifies the "pass" and "fail" categories earlier described. The numerical grade of a 69 paper is raised by motion to the State Board Regulation minimum of 70. The decimal point and all three numbers following it are then dropped for all such papers.

To illustrate: Turn to page 4 of Appendix 1. We note that all papers listed on that page were passed by the Board and given a grade of 70.[20]

b. *The discretionary decisions: What are the procedures and standards?*

We come now to a discussion of the category "borderline papers submitted to the Board for reading." Twenty-six (26) papers were

20. Why the last paper, with an average of 68.958, was submitted to the Board for reading we do not understand. We have, however, found several other "exceptions" to Board regulations and ostensibly uniform practices; the "68.958 paper" exception herein identified is a minor one in comparison to certain other nonuniform practices. And see note 19 above.

thus submitted during the past three examinations. The number in any previous year may have reached 30, but we can make no findings for earlier examinations because the Board declined to reveal these facts. We estimate, however, that during the past fifteen years, some 25% of all papers not "passed" by the second reading wound up at the Board's final meeting for an *ad hoc* decision.

As to these papers, the Board makes a palpably discretionary decision. On what is the Board's decision based? Is there equality of treatment of all candidates? Are there "discretionary points" given for something not in the four corners of the examination answers? We shall now answer these questions.

One issue controverted is whether the candidates are, at this stage, somehow "identified" to the State Board and Mr. Storb. (Compare the "Hastie" Committee Report of 1953-54 above.) We shall shortly address ourselves to that issue. This issue is, of course, broader than alleged identification of, and discrimination against Blacks. It includes identification of and potential discrimination because of a candidate's political activity, age, college and law school attended, preceptor, county in which he intends to practice, number of appearances (times taken the Bar examination), and whatever other data would be available to the decision maker. All such factors are, of course, extraneous in an examination whose grade is purportedly based only on the anonymous grading of the candidate's paper. Whether such factors are available and used by the decision makers, is what we now explore.

* * * *

We first consider what criteria the Board members have acknowledged *do* affect their "pass" and "fail" decisions in this borderline category of papers independently considered at the Final Meeting.

According to Board Chairman Wilkinson and Members McTighe and Lipez, the Board, in addition to a generally charitable intent, bases its decision whether to "pass" or "fail" these papers on three factors: (1) "where the numbers break," (2) "the overall pass rate on the test," (3) "how well a particular paper did according to its numerical averages and the comments of the markers."

(1) *"Where the numbers break"*

If the Board panel has read many papers, the numerical averages for these papers are compared. If a "break" in the numerical average is located, then that is where the pass-fail line is drawn. To illustrate, assume hypothetically that seven borderline papers were submitted to the Board for reading; assume further that the Board-read averages are:

68.994
68.994
68.994
68.252
68.102—"pass" line
66.705—"fail" line
66.705

According to the Board, the pass line would probably be put "where the numbers break," at 68.102. *All papers with that average or above would pass with a grade of 70 ("Motion that 68.102 is 70 and "pass"). All those below that line would fail.*

As you recall, the empirical referents of 66.705 and 68.102 are the arithmetic mean measurements in this essay test which ignore trends in any paper. Thus, under this "where the numbers break" criterion, we theoretically find a decision being based not only on matters extraneous to a candidates' own performance and to the Board's grading Regulation, but one which purports to evaluate the difference between two essay papers on the basis of a few points out of a potential total of 2,400 points.

What seems clear, however, is that no such clear "break" in the grades as appear in our hypothetical situation above has actually occurred in the three examinations we were permitted to study. To illustrate, turn to page 235 below which describes the "borderline papers submitted to the Board" for the July 1970 Examination. (The thick markings on that page were made by this Special Committee.) * According to State Board records, the testimony of Board member McTighe and Secretary-Treasurer Seymour, all papers except the last one were passed; the cut-off "pass" point was 67.291 based on the last reading's grade (Board average) only. The "break" was between 67.291 and 66.871.

The arbitrariness of that type of "line" drawing for pass-fail in an essay test, is magnified when we consider that the failing paper in question had received in earlier readings: a *higher* grade from Assistant Supervising Examiners (67.708) than the eventual passing grade of 67.291; and the *same* grade from Supervising Examiner Storb (67.291) as the eventual passing grade. Why the Board, in looking at "where the numbers break," failed to see and react to higher or the same numbers from earlier readings—when those numbers were directly before them—we do not understand. This is another *ad hoc* decision without rational and uniform standards that we have observed permeates the Bar examination process.

* Ed. Note: Words and numbers marked by Committee appear in italics.

(2) *"The overall pass rate on the test"*

Data on the overall pass rate and the numbers passing are available for the Board members on the first two pages of the pamphlet. (See pages 211-13 above; and see Appendices One, Two, and Three.) * The apparent theory here is that a particular test may have been graded too "hard". A disproportionate number of papers may have, therefore, settled in the 67.000 to 68.999 category. In deciding which of those papers to pass it would thus be helpful, we are told, to look at the "overall pass rate" as a check on an unusually difficult exam in which too many candidates would otherwise fail. To avoid such an occurrence, the Board may move the "passing line" down to the 66 category (as in July 1969) or pass *all* of the papers in the 67-68 category.

Board members vigorously deny using the Bar examination "passing line" as a conduit for controlling the number of lawyers admitted to practice in the state and the various counties. They deny using economic regulation criteria in determining how many candidates pass any test. We pressed Board members to sort out why, then, they do look at the "overall pass rate" in drawing the "passing line" and why during the past 15 years the "pass" rate on the Pennsylvania Bar examination has moved from about 50% to 80% in a period of general economic and technological growth requiring more lawyers and when new lawyers were not unduly competing with older ones. The Board members were unanimous in attributing the rise in the "pass" rate to "a better candidate, who is better-trained and brighter than the ones who took the Bar examination fifteen years ago." It would be superfluous for the undersigned to comment further; the facts speak for themselves.

(3) *"How well a particular paper did according to its numerical averages and the comments of the markers"*

The Bar examination has only two effective grade levels—"pass" and "fail." Each candidate is ostensibly measured on whether *he* passes or fails. The optimum standard under existing Board grading procedures for determining that decision is to determine how well this particular paper did according to the numerical averages and the comments of the markers. But State Board decisions in the only three examinations we were permitted partially to review, suggest this standard was not heeded.

On the January 1970 examination, for instance, only two borderline papers were submitted to the Board panel for reading. Both were

* Ed. Note: See Ed. Note *supra* p. 210 and excerpts from Appendix I *infra* p. 240.

eventually passed. (Turn back to Appendix One, pages 9 and 10, respectively, where data about each paper appears.) Note that each paper received five readings. Note further that the first paper was recommended as failing by Supervising Examiner Storb, and that 3 of its 4 sessions were "failing" in both its numerical scores and the independent recommendation. And note the comments on pages 9a-9d.* Yet this paper was passed by motion of the State Board. So was the other paper.

In this pass-fail essay test, the recommendation of the only person (Mr. Storb) who had read a paper *in its entirety* was ignored; the numerical average of less than 70 percent was overturned; and the Examiners' comments appearing on the tally-comment sheets were bypassed. Why? We are unable to reconstruct a rational basis for such decisions.

(4) *"Discretionary points" based on factors other than what the candidate has written on the examination booklets for which he was to be anonymously graded*

(a) *What does the Board have access to, in the Final Meeting conference room?*

Under the State Board Regulations and all communications previously emanating from the Board, its Members and the Secretary-Treasurer's letter to all candidates, the only reasonable expectation is that the Bar examination will be anonymously graded—that is, only the writing within the answer booklets of an anonymous candidate will be considered in deciding whether the paper passes or fails. As will now be shown, however, the State Board of Law Examiners has failed to live up to this most basic ground rule.

(i) Turn to Appendix One, pages 9 and 10. Look at the bottom half of each page. You will observe that to preserve a candidate's privacy, we have blocked out certain data actually contained in Judge Wilkinson's pamphlet. The blocked out facts are those following: "Born," "Education" (we did not cross out the degrees), "File No." and "Number of appearances" (i.e., the number of times the candidate has taken the Bar examination).

* Ed. Note: Samples of Examiner comments with regard to this paper were: Poor paper—missed issues—weak discussion of other issues. Inadequate knowledge of law. . . . The main trouble is a lack of depth in analysis and generally mediocre reasoning in support of wrong conclusions. . . . [A] lack of knowledge of basic legal principles. Recommendation: Fail.

These comments, along with the identity of the Examiners who authored them, are disclosed on pages 9a-9d of the pamphlet which are not included in Excerpts from Appendix I. See Ed. Note, *supra* p. 210.

In Appendix One, page 8, you will also observe that the "Not Finished" category in the extreme right column also contains law school and examination numbers for such candidates.

In the pamphlet for the Final Meeting on the July 1969 Bar examination (Appendix Two), pages 9, 10, 11, 12, 13, 14, 15, 16, 17, 18 and 19 contain the same personal, factual data for each "borderline candidate whose paper was submitted [by Mr. Storb] to the Board for reading." And on page 8 at the extreme right column (under the category "Not Finished") the examination numbers and law schools are matched.

We are certain beyond doubt that each Board member (and Mr. Storb) had in his hands a pamphlet identical to Judge Wilkinson's when he decided to pass or fail these papers at the July 1969 and January 1970 Bar examination Final Meetings.

We asked the other person who was present in the deliberation-decision room, Mr. Seymour, Secretary-Treasurer of the State Board, whether his copy of this pamphlet was identical. He candidly replied that his copy was identical except for additional personal data, *viz., name of the candidate, name of his preceptor,* and the *county of his residence.* We asked Mr. Seymour why he would carry into the deliberation-decision room this personal data. His response was "I don't know. While I participate in all other agenda items at the Final Meeting, I do not participate in the discussion of borderline papers. Having this data available simplifies my administrative tasks after the Board has made its decision." He did not give a reason for staying in the meeting for agenda items in which he does not participate.

(ii) We have found no direct evidence that, despite sloppy procedures, one particular candidate's name and examination number was matched by any grader. But the opportunities for such matchings exist at every stage. We have earlier described the rather crude practice of allocating these examination numbers consecutively by alphabetical names except for repeating candidates who, because of late filing, receive consecutive but non-alphabetized numbers. We have also revealed that Black repeaters in the July 1969 examination were given consecutive numbers and were thus seated along the same row in the Philadelphia test site with their numbers boldly discernible to whomever could read—as were the numbers of all other candidates. And we have described the indefensible practice of having Master Lists (which pair the candidate's name with his examination number) physically present in the examination rooms. Every grader has denied ever having a matchup of name and number when he graded any paper.

(iii) We have found no direct evidence that, despite the continuing and indefensible practice, one particular candidate's photograph is used in any feature of the grading process by any grader or State Board Member at any time. But the opportunities for such matching exist at every stage. As earlier shown, Mr. Seymour under present procedures, is the administrator charged with supervising all activities in the office of the State Board of Examiners. He has access to the file and the two photographs of each candidate from the time of application (before the examination) until both photographs are destroyed some three months after the examination under present practices. Under earlier Board practices, we have seen that the photographs were placed in a candidate's file and remained there at all pertinent times. Mr. Seymour has stated that he does not participate in any manner whatsoever in any decision to pass or fail any paper. Board Members insist that they do not match the name and examination number of any candidate before the final examination results are announced.

(iv) We have found no direct evidence that a particular candidate's file was physically consulted by any grader in the process of deciding whether to "pass" any paper.

(b) *Does the pamphlet and other accessible data potentially identify a candidate by race or otherwise?*

In this subsection we shall discuss the personal data which is available to the Board members.

(i) Pairing a candidate's name with his examination number and/or his photograph-identification card, which contains his file number, would almost certainly reveal the candidate's race and other personal data about him.[21]

(ii) As State Board members realize, there is a very high probability that a graduate of Lincoln University or Fisk University or North Carolina Central University Law School or Howard University Law School, is Black. The pamphlet ("Supervising Examiner's Report") for the July 1969 and January 1970 Bar examination contained such personal and other data for those "borderline papers submitted to the State Board for reading." This information was in the hands of each Board member before the "pass" or "fail" decisions were made.

21. A candidate's file contains *inter alia:* personal data from his answers to "Application for Registration as a Law Student"; "character" data, which can include political activity from the citizen sponsors; the County Board of Law Examiners' certification and recommendation; college and law school transcripts; preceptor's name and recommendation; and until about two years ago, invariably the candidate's photograph.

For reasons which we shall detail later, the pamphlet for the October 7, 1970, Final Meeting on the July 1970 Bar examination did not contain this data.

(iii) The State Board refused to supply us with the names of all candidates during the past 15 years (30 Bar examinations since the "Hastie Committee" Report of 1953-54), whose papers were "submitted to the State Board for reading" and who were therefore principals in the pamphlet containing personal data. Moreover, the Board made available the pamphlet for only the past three Bar examinations despite admissions from Board members that "in earlier years more personal data was available to Board members and the Final Meeting than was in 1970."

(iv) It is clear that until the "October 3, 1970 Final Meeting" for the July 1970 Bar examination, the college, law school and age of the applicant, the number of times he has taken the Bar examination, and his file number in the State Board office have been available to all State Board members before the "pass" or "fail" decision was made on each candidate whose paper was "submtited to the State Board for reading." There is the strongest likelihood that the Board members' pamphlets for earlier years contained additional personal data (preceptor, county and name) which would have identified the race of the candidate whose paper "was submitted to the Board for reading."

(c) *Has the State Board considered the personal data in its "pass" or "fail" decision? A chronology of events leading up to the Board's October 3, 1970 Meeting to determine who passed the July 1970 Bar examination.*

The undersigned have been met with evasions and contradictions from State Board members when we asked whether any applicant's personal data was considered by Board members at the Final Meeting before "pass" and "fail" decisions are made. The State Board of Law Examiners has not formally and publicly admitted any deviation from the "anonymous grading system" which, it claims, prevails throughout the grading process. Some State Board members may continue to deny ever having had access to, let alone having used, any such personal data. Physical and corroborative evidence refutes such claims. To set the record straight, we are therefore releasing copies (with appropriate deletions to perserve a candidate's privacy) of the aforementioned pamphlets, and now set forth a chronology of events from which inferences may properly be drawn by the reader as to why the Board "changed" the practice it has denied pursuing.

(i) At a meeting on July 1, 1970, among State Board Chairman Wilkinson, Chancellor Landis, Special Committee Chairman Liacouras and Special Committee Member Green, the subject of "discretionary points based on personal data of a candidate" was raised by Mr. Liacouras. Judge Wilkinson denied that the personal data of candidates is revealed to any grader; he further rejected any implication that Board members knew whose paper they were considering in making a "pass" or "fail" decision.

(ii) On July 17, 1970, in Hershey, we confronted the four assembled State Board members (Judges Wilkinson and Lipez, Messrs. McTighe and Dechert) and Supervising Examiner Storb with a finding of the "Hastie Committee" Report of 1953-54 that some candidates are "identified . . . in a final procedure" before a final grade is entered. Mr. Storb candidly stated that the Board had the following information at the Final Meeting: identification (examination) number, number of times taken the Bar examination, age, law school and rank in law school. Judges Wilkinson and Lipez contradicted Mr. Storb. Judge Lipez made the point that such practices were eliminated in "the late 1950's"; Judge Wilkinson acknowledged that change and recalled the Board also once had, in "final process," the class rank and law school of the candidate. Mr. McTighe categorically stated that during his six years on the State Board, he has had no information concerning any writer of an examination booklet except his examination number. Judge Wilkinson then interrupted further discussion and indicated that "a formal written response to the question will be formulated by the State Board and sent to the Special Committee." No such response has been received by the undersigned.

(iii) On August 19, 1970, Secretary-Treasurer Seymour, in response to a question, stated that the State Board does not see a candidate's file at the Final Meeting, although it does study a booklet or pamphlet prepared by one of the staff secretaries. It contains statistical data about "passes" and "fails" as well as comments on the papers to be discussed at the meeting, and also: identification (examination) number, law school attended, class rank, age, number of times taken the Bar examination, but not the name of the preceptor. Mr. Seymour maintained that the candidate's file is studied at another time and only for indications of bad character, not for purposes of the Bar examination.

(iv) On September 14, 1970, Chairman Liacouras of the Special Committee wrote to Mr. Seymour with *inter alia* two requests:

> "At our meeting with you on August 19 (at which Mr. Robert Dechert was also present), you described the 'bro-

> chure', or 'packet' which you made available to each Board member and the Chief Examiner on *inter alia* each exam paper which, after rereading, was 67 or 68. The Special Committee requests the name of each candidate whose paper has been in that particular category at the State Board meeting held immediately prior to the announcement of 'final results.' We would like to receive the names of the *pertinent* candidates for all examinations from 1954 through the January 1970 Bar Examination. And we would be pleased to receive copies of the 'brochure' or 'pamphlet' made available to the Board members at that meeting which includes *inter alia:* identification (exam) number, law school attended, class rank, age, number of times taken the Bar Examination, and possibly the Preceptor (although we understand from you that the Preceptor's name has not appeared in that 'pamphlet' during the past several years); and which also contains the comments (or critique) of Graders, Assistant Supervisors, and/or Chief Storb on the examination paper."

(v) On September 30, 1970, Chairman Liacouras again wrote to Mr. Seymour setting a deadline of October 12, 1970, for the receipt of the information contained in the letter of September 14. Mr. Seymour's response of October 9, 1970, stated *inter alia:*

> "I have been able to locate copies of the Supervising Examiner's Report (the 'brochure' or 'packet' referred to in point number 2 of your September 14th letter), which were actually used by members of the Board at the meeting just before the bar examination results were announced. Our archives, however, do not contain copies of these reports all the way back to 1954 as you had requested, but I am certainly glad to let you examine such copies as we have. Fortunately, in most instances, we have each Board member's copy (as we do not let Board members take these from the office). You may examine these books while you are at the office, but as we do not permit Board members to take them, I cannot permit you to take them.
>
> With respect to the second part of your request concerning the names of those candidates whose papers were read by the Board from 1954 to January 1970, my Board has declined to give me authority to release the names to your Committee."

(vi) On September 18, 1970, Special Committee Chairman Liacouras ascertained that the State Board's "Final Meeting" for the July 1970 Bar examination was scheduled for Saturday, October 3. He immediately called a meeting of the Special Committee for 3:15 P.M., Thursday, September 24, in Philadelphia, and personally invited the Deans of the following Law Schools: Dickinson (Laub, who was a member of the State Board of Law Examiners from 1961 to 1965),

Duquesne (Davenport), Pennsylvania (Wolfman), Pittsburgh (Sell), Temple (Norvell), Rutgers-Camden (Fairbanks), Villanova (Reuschlein), New York University (McKay, who is also chairman of the A.A.L.S. Committee on the Minority Students in Law School), and Howard (Miller).

(vii) On September 24 at 3:30 P.M., the Special Committee met with the aforementioned deans except Laub and Wolfman. At 5:00 P.M., Chairman Liacouras described *inter alia* the manner in which examination numbers are assigned, the seating arrangements in the examination room, the retention of photograph-identification cards by the State Board, and the presence of Master Lists in the test room pairing names with examination numbers. He then revealed that the Special Committee also had hard evidence that some aspects of the Bar examination grading process were not anonymous and that a pamphlet was available to each Board member containing personal data (law school, age, number of appearances) for "borderline papers submitted to the Board for reading." The assembled deans to a man responded that any practice which gives discretionary points to anyone for what is not within the four-corners of the answer booklets should cease forthwith.

(viii) On September 24 (the same day) at 6:30 P.M., the State Board of Law Examiners met in Philadelphia with the deans of the six Pennsylvania Law Schools—Dickinson, Duquesne, Pennsylvania, Pittsburgh, Temple and Villanova. We are reliably informed that the investigation of this Special Committee was discussed and the existence of the pamphlet containing personal data was acknowledged by the Secretary-Treasurer, Mr. Seymour. Following a discussion, the State Board decided to black out the personal data on the candidates in the July 1970 Bar examination pamphlet which had been prepared for the October 3 "Final Meeting" of the Board.

(ix) On Monday, October 12, 1970, we met in the office of the State Board in Philadelphia with Judge Wilkinson, Mr. McTighe, Mr. Seymour and his staff. Judge Wilkinson formally responded for the Board to the September 14 request (which Mr. Seymour had answered on October 9 in writing): the Board declined to supply us with either the names of the pertinent candidates during the past 15 years whose papers had been "submitted to the Board for reading," or the pamphlets prepared for the Board for the Final Meeting. However, on his own authority, State Board Chairman Wilkinson stated that we could examine the pamphlets for July 1970 and January 1970 Bar examinations, and he noted that personal data for candidates had been expunged in the latest pamphlet. We responded that we would return on

Wednesday, October 14, and Judge Wilkinson informed us that Board member McTighe would be present at the time and make whatever decisions were necessary.

(x) On Wednesday, October 14, Board member McTighe and Secretary-Treasurer Seymour made available to us one copy of the pamphlet used for, respectively, the July 1970 examination (Mr. McTighe's copy), the January 1970 examination and the July 1969 examination (Judge Wilkinson's copies). After some discussion of the July 1969 examination pamphlet, Chairman Liacouras took personal custody of the three pamphlets; he agreed to preserve, where not inconsistent with the mandate of the Special Committee, the privacy of individual Bar candidates.[22]

(d) *Has there been any reliance on such personal data by Board members in exercising their official decisions to "pass" or "fail" papers?*

We believe that, despite earlier denials, the State Board members have read the critical pages in the pamphlet which contain both the candidate's average for each reading and his personal data. A contrary finding would negate what even busy lawyers ordinarily do: they read the entire page, not just half. To be sure, the State Board has delegated much responsibility in the Bar examination process to its staff and Examiners. Members may skim over the pamphlet to get the facts on which to cast their votes, but they would skim over an entire page, and certainly the final decision for each paper is made by the Board.

A contrary finding would ignore the fact that we are dealing with Bar admission of candidates who have, on the average, completed some 19 years of formal education including three years and 1080 hours of formal law school course work, some 120 hours of expertly prepared and graded law school examinations, several weeks of "cram school," a long process of registration and character investigations, and have undergone the inordinate tension surrounding this entrance test to our profession. If the State Board members simply skimmed or did not read what they are presented with in making their judgments (including personal data on the same page as the data which they acknowledge they do use in making the "pass" and "fail" decisions), then how considered are these important judgments of the State Board?

We have, of course, been told rather belatedly that State Board members consulted this personal data only to "help"—never to "hurt"—a candidate. This is a curious point for a state official to make: how is a candidate "helped" and another one not hurt, if the

22. These pamphlets comprise three of the Appendices in this Final Report. [See Ed. Note *supra* p. 210.]

Board considers the fact that, for example, each went to different law schools? Either the law school one went to is irrelevant and therefore inappropriate to consider, or it is relevant which necessarily implies a hierarchy among law schools. Graduates of various law schools which some State Board members consider "less pretigious" than others—a distinction not made by the Supreme Court or the State Board in any formal statement—may justifiably wonder if they failed the Bar examination on the merits or because they went to "less pretigious" law schools.

As to Black candidates, one could argue that if State Board members have known a particular candidate was Black, that fact might have "helped" him. (The "Hastie Committee" Report of 1953-54 raised the possibility that the graders would be unaffected by knowledge of one's race or other personal data.) But in the context of the "passing" rates of Black candidates on the Pennsylvania Bar examination—especially the graduates of predominantly Black law schools such as Howard University—that argument is hardly persuasive.

There is no justification whatsoever for this longstanding State Board practice. It violates the most elemental ground rule in the Bar admission process. Ours is not a country club; it is a profession charged with a public interest and demands equality in admission. The use of personal data for even one candidate on one Bar examination cannot be tolerated. The use of personal data for as many candidates and for as long as the State Board has, despite repeated denials, indulged in this practice, impeaches the test itself.

The Board claims that all papers are treated equally in the pass-fail decisions. It claims that when the Board does reach down to "help" one paper, it invariably raises all papers having equal or higher scores to the same pasing level. But, as the next section reveals, the facts again are otherwise.

3. *Inequality of treatment even as to categories in the same examination: the twenty-two papers improperly "failed" in the July 1969 examination*

We have already discussed the anomaly of the State Board's grading standards which, despite the unambiguous requirement of seventy percent, permit an estimated thirty-five percent of the candidates to pass the Bar examination with earned grades below seventy percent. We have also observed that a paper whose first reading is below an arithmetic mean average of 65.000 is not reread, while one between 65.000 and 68.999 is—with all that suggests for a probable rise in the latter's grade and the unreasonableness of such classifications.

But one might ask: are all papers with the *same* earned grades (arithmetic mean averages) at least treated equally? For instance, if the Board, for whatever reason, moves the passing grade down to 66.458, are all papers with the grade of 66.458 also passed?

Shockingly, the answer again is "no."

In our partial review of the past three Bar examinations, we have found *inter alia:*

(a) *Inequality of treatment for papers with the same grades on two examinations*

For example, the final reading grade of 67.291 was deemed by the Board to be a "fail" on the January 1970 and July 1970 examinations, but in the July 1969 examination, that grade was a "pass."

(b) *Inequality of treatment for papers with the same grades on different readings in the same examinations*

In the July 1970 examination, for instance, 67.291 was the Board's "passing" grade.[23] But paper #413 was failed with a Board reading of 66.875 even though its averages from the readings by the Assistant Supervising Examiners and Supervising Examiner Storb were 67.708 and 67.291, respectively. (See the excerpts from the pamphlet on the next page for a comparison of readings.)

BORDERLINE papers submitted to the Board members:

Page No.	*Exam'n Number*	*First Reading*	*Second Reading*	*Asst. Super. Examiners' Readings*	*Supervising Examiner's Reading*	*Board Average*
13	-	66.875	68.333	68.125	68.125	69.583
14		67.50		68.125	67.708	69.583
15		67.916		67.50	67.708	69.166
16		66.458	67.291	67.916	67.916	69.166
17		67.083		67.291	67.50	68.958
18		68.125		67.916	68.125	68.958
19		67.083		67.291	67.50	68.750
20		67.708		67.50	68.125	68.541
21		67.083		67.083	67.916	68.541
22		67.083		68.125	67.708	68.333
23		66.875	67.291	67.291	67.291	67.916
24	PASS	67.708		67.50	67.916	*67.291* *
25	FAIL	66.666	67.083	*67.708*	*67.291*	66.875

July 1970 Bar Examination (13 papers)

23. State Board member McTighe and Mr. Seymour confirmed this fact for us.

* Ed. Note: Italicized numbers and words in this table and the following tables were circled in original copy.

(c) *Inequality of treatment for papers having the same grades on the final reading in the same examination*

The most dramatic illustration of inequality is found in the July 1969 examination. Paper #644 passed with a Board reading (final) average of 66.458.[24] But as the Board records on the next 3 pages reveal, twenty-two papers with final reading averages identical or even higher than 66.458 were failed on the same Bar examination!

BORDERLINE papers submitted to the Board members:

Page No.	*Exam'n No.*	*First Reading*	*Second Reading*	*Asst. Super. Examiners' Readings*	*Supervising Examiner's Reading*	*Board Average*
9	527	67.50	—	68.333	68.333	69.375
10	360	68.333	—	67.917	67.50	68.542
11	247	68.333	—	67.50	67.50	68.333
12	160	68.333	—	68.125	67.708	68.333
13	125	67.292	—	67.292	67.292	68.125
14	482	66.875	68.125	68.333	67.708	68.042
15	645	67.50	—	68.125	67.50	67.917
16	226	66.667	67.50	67.292	67.083	67.50
17	62	65.833	67.083	67.708	67.083	66.875
18	331	67.083	—	67.292	67.708	66.667
19	644	67.292	—	67.50	67.083	*66.458* *

July 1969 Bar Examination (11 papers)

24. State Board records confirm this fact. On October 14, State Board member McTighe and Secretary-Treasurer Seymour attested to this fact. Again, on October 22, Mr. Seymour reconfirmed this fact after Chairman Liacouras asked for reconfirmation. Mr. Seymour told Mr. Liacouras that "I will testify in court, if necessary. I am absolutely sure that #644 passed with a 66.458 final reading."

* Ed. Note: This number was circled with the comment added "This was passing."

Papers recommended for PASSING by Supervising Examiner (18 papers):

Exam'n Number	*First Reading*	*Second Reading*	*Asst. Super. Examiners' Readings*	*Supervising Examiner's Reading*
569	68.75	—	68.542	69.792
529	67.083	—	67.083	69.792
138	68.75	—	68.75	69.375
465	67.917	—	68.958	69.375
9	67.708	—	68.75	69.375
346	67.083	—	68.958	69.375
605	68.125	—	68.75	69.167
683	68.125	—	68.75	69.167
133	67.917	—	68.542	69.167
444	67.917	—	68.333	69.167
574	67.708	—	68.542	69.167
230	67.50	—	68.958	69.167
612	67.292	—	68.542	69.167
89	67.083	—	68.958	69.167
616	66.875	68.125	68.958	69.167
696	66.25	67.292	68.75	69.167
19	66.042	67.292	68.958	69.167
339	65.625	68.542	68.75	69.167

Papers recommended for *FAILING* by Supervising Examiner (3 papers):

Exam'n Number	*First Reading*	*Second Reading*	*Asst. Super. Examiners' Readings*	*Supervising Examiner's Reading*
167	68.75	—	67.50	*66.875*
511	68.542	—	67.50	*66.458*
285	65.417	67.083	67.292	*66.458*

July 1969 Bar Examination

Papers recommended for *FAILING* after Second Reading (45 papers):

Exam'n Number	*First Reading*	*Second Reading*
307	66.875	*66.875*
650	66.458	*66.875*
627	66.25	*66.875*
338	66.042	*66.875*
400	66.042	*66.875*
642	65.833	*66.875*
513	66.667	*66.667*
562	66.458	*66.667*
451	66.25	*66.667*
461	66.25	*66.667*
494	66.042	*66.667*
415	65.667	*66.667*
172	65.417	*66.667*
130	66.875	*66.458*
251	66.667	*66.458*
414	66.458	*66.458*
214	66.25	*66.458*
324	65.833	*66.458*
663	65.	*66.458*
570	65.833	66.25
284	65.625	66.25
646	65.	66.25
355	66.458	66.042
42	66.25	66.042
427	66.042	66.042
623	65.833	66.042
611	65.625	66.042
198	66.667	65.833
531	66.25	65.833
323	66.042	65.833
581	65.625	65.833
639	65.625	65.833
169	65.	65.833
176	66.458	65.625
55	66.042	65.625
528	65.625	65.417
447	65.417	65.417
483	65.	65.417
467	66.042	65.208
204	65.208	65.208
389	65.208	64.792
464	65.	*64.792*
362	65.	64.583
515	65.	64.583
537	65.208	64.167

July 1969 Bar Examination

Under no rational theory consistent with due process and equal protection of law is a grade of 66.875 below 66.458. But seven papers with 66.875 were failed and one paper with 66.458 was passed in the July 1969 Bar examination.

Nor is 66.667 below 66.458, but seven papers with grades of 66.667 were failed despite the passing of another paper with the grade of 66.458 in that same Bar examination.

Moreover, in the July 1969 Bar examination, eight papers with grades of 66.458 were failed but one with the identical grade was passed. Meanwhile, seven papers with grades of 66.875 were failed but one with the identical grade was passed. Although seven papers with 66.667 were failed, another paper with the identical grade was passed.

* * *

This palpably unequal treatment of papers with the same or higher grades can only be described as scandalous.

G. There Is "No Right to Review" the Results: a Curious Policy and a Curiously Inconsistent Practice

In Rule 15 on "Review and Appeal" (set forth earlier in this Report[25]), the Supreme Court precludes review "of the decision of the State Board that an applicant has passed or failed a bar examination," and further provides that "the actions and records of the State Board . . . shall not be open to inspection by the public or by the persons interested." Together, these parts comprise a so-called "no right to review" rule.

The grievous but simply detectable errors in failing those twenty-two papers in the July 1969 Bar examination, illustrates one group of "costs" for procedures insuring secrecy and nonreviewability. Those errors should not have gone unnoticed. But they were undetected until a Special Committee conducted an investigation. Leaving to the side for a moment, our earlier analyses of Bar examination "validity" (purposes, questions, grading standards) and the Board's use of personal data in violation of the anonymous grading system, our partial investigation of the past three tests has revealed simple but basic errors which delayed or even possibly detoured twenty-two qualified persons from legal careers. What are the "benefits" enuring from secrecy and nonreviewability, which compensate for such costs in human and professional misery? How many comparable errors were committed before that time, and how many more errors were committed on those

25. See the first section of Part Two, above.

same three examinations which we partially reviewed, are not of immediate concern in this section. What we would underline is this: without some continuous review of the State Board's decisions, we cannot reasonably expect the improvement needed to justify a continuation of the Bar examination. Yet isn't that a principal reason why we have a State Board?

Moving from the group to an individual level, the barest *minimum* that a failing candidate should be entitled to from authoritative sources (e.g., graders) are: (1) an explanation of what questions he failed, and why; (2) the opportunity to consult optimum (model) answers to each question; and (3) an unambiguous statement of why, on balance, his paper was failed. What does the State Board presently make available to a failing candidate in the post-exam process? Secretary-Treasurer Seymour's letter to a failing candidate provides the answer:

> "The greatest care has been observed in fixing the grades of candidates. No review of papers and no discussion of the papers or the grades given by the examiners will be permitted by the office of the Secretary or any personnel of the Board. Any examinee may request a copy of his answer book. The charge is $15.
>
> As heretofore, answer books will be retained in the office of the State Board for a period of 3 months after the date of this letter and then destroyed. All requests for answer books must be received by the State Board before the original answer books are destroyed."

The candidate's answer books are, of course, unmarked and without notations or comments. No "model" answers are available; indeed, we have not received a consistent answer from the Board and staff on whether such "model" answers are prepared for the Board and graders. With the type of issue-recognition and subject-matter emphasis into which recent Bar examinations have been molded, a "model" answer to each question is a relatively simple document to construct. But extant or not, that document has not been made available to any candidates. The justifiable uncertainty which a graduate of an approved law school must feel about failing a Bar examination after having succeeded in a professionally-challenging law school is arbitrarily ignored by this "no right to review" rule.

But the "no right to review rule is not self-executing. It has not been consistently interpreted by the State Board's staff. For instance, on May 22, 1956, while the same Rule was in effect the Secretary of the State Board of Law Examiners wrote the following letter to a failing candidate which we reproduce on the next two pages:

STATE BOARD OF LAW EXAMINERS
COMMONWEALTH OF PENNSYLVANIA
616 Quaker City Federal Building
20 South Fifteenth Street
Philadelphia 2

Members of Board
Hon. Edmund C. Wingerd,
Chairman, Chambersburg
Michael F. McDonald, Wilkes-Barre
Paul N. Schaeffer, Reading
Alexander C. Tener, Pittsburgh
Ernest Scott, Philadelphia

Mathilda H. Remmert
Secretary and Treasurer

LOcust 4-1724

May 22, 1956

We find from an examination of the markers' tallies relating to your January 1956 bar examination paper, on which you received a rating of 64, that you passed the second session and failed the other three sessions (with sessions ratings from highest to lowest) in this order: second, third, fourth, and first.

The comments of the various readers, session by session, are as follows:

Comments

First Session: Grasp of Issues: Poor
Knowledge of Law: Fair to Poor
Reasoning: Fair
Question #1 confuses elements of libel with those of right of privacy, while question #2 deals with immaterial points.
Issues are not recognized or clearly discussed in questions #3, 4 and 5. Reasoning on fiduciary duty is inadequate in question #4.
Examinee's central flaw seems to be in recognizing the problems raised.

Second Session: Grasp of Issues: Fair
Knowledge of Law: Fair
Reasoning: Fair
Pretty good quality.

Third Session: Reasoning erratic and incomplete at times, and lacks depth. Too many wrong conclusions. However, some good spots, and not a hopeless paper.

Fourth Session: Capable of writing satisfactory answers, but his performance on the first two questions is clearly substandard.

On the basis of the Board's passing grade of 70, you passed the following twelve questions:

Torts	1
Evidence	7
Criminal Law	8 (good)
Real Property	10
Real Property	12 (excellent)
Decedents' Estates	13
Personal Property	15
Agency	18 (good)
Neg. Instruments	21
Conflict of Laws	22
Sales	23
Contracts	24

You failed the other twelve questions, namely,

Corporations	2, 4
Torts	3, 6
Practice	5
Evidence	9
Domestic Relations	11
Decedents' Estates	14
Equity	16
Trusts	17
Contracts	19
Constitutional Law	20

You were slightly under passing on #2, 6, and 11; and your weakest responses were in answer to #3, 4, 5, 9, 17, and 20. Of these, the failing grades on #3, 4, 5, and 20 were quite low, especially #5 and #20.

Very truly yours,

M. H. REMMERT
Secretary

MHR:MYO

enclosures: Postscript
January 1956 Bar Exam'n Qs
"On Answering the Pa Bar Exam'n"

On September 14, 1970, Chairman Liacouras wrote to Secretary-Treasurer Seymour requesting a formal answer to these questions:

> "Why, if there is no 'right to review one's paper, do you make available to the candidate his Examination booklet and not the 'critique' and not a revelation of whether each Answer was a Pass or Fail (and its precise numerical score)? What we would appreciate, as you can infer from our discussions at our August 19 meeting, is a brief memorandum describing why the practices of your predecessor, Miss Remmert, . . . were changed, and why you still make available the Examination booklet of answers despite the position that there is 'no right to review.' We would also appreciate receiving from you [an answer to the present availability in the State Board files of *inter alia*] optimum (model) answers for the Bar examinations beginning in July 1954 and ending with last January's examination, and to whom such data is now available . . ."

We have received no reply to that portion of our letter of September 14.

EXCERPTS FROM APPENDIX ONE

(TAKEN FROM "REPORT ON JANUARY 29 & 30, 1970, BAR EXAMINATION FOR SATURDAY, APRIL 4, 1970 BOARD MEETING")

After all re-readings were finished:

50.30% = 84 papers recommended for *PASSING* by Examiners on first reading with grades from 85. to 70.

BORDERLINE PAPERS recommended for *PASSING.*

5.39% = 9 papers by the Marking Examiners with first reading grades in the 69's.

7.19% = 12 papers by the Assistant Supervising Examiners with grades from 72.083 to 69.375.

8.38% = 14 papers by the Supervising Examiner with grades from 70. to 68.958.

71.26% = 119 papers recommended for *PASSING.*

1.20% = 2 papers submitted to the Board by the Supervising Examiner with both grades of 67.292.

Papers recommended for *FAILING.*

18.56% = 31 papers by the Marking Examiners with first reading grades from 64.792 to 54.583.

8.38% = 14 papers by the Marking Examiners with second reading grades from 66.875 to 65.417.

.60% = 1 paper by the Assistant Supervising Examiners with a grade of 65.625.

—— = 0 papers by the Supervising Examiner.

27.54% = 46 papers recommended for *FAILING.*

TOTAL

100.00% = 167 papers.

January 1970 Bar Examination

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BORDERLINE papers submitted to the Board Members:

Page No.	*Exam'n Number*	*First Reading*	*Second Reading*	*Asst. Super. Examiners' Readings*	*Supervising Examiner's Reading*	*Board Average*
9		66.875	67.083	67.917	67.292	67.50
10		66.458	67.292	67.917	67.292	67.292

(2 papers)

January 1970 Bar Examination

—3—

Papers recommended for *PASSING* by Supervising Examiner:
(14 papers)

Exam'n Number	*First Reading*	*Second Reading*	*Asst. Super. Examiners' Readings*	*Supervising Examiner's Reading*
	67.292	—	68.75	70.
	67.917	—	68.125	69.583
	67.50	—	67.917	69.583
	68.333	—	68.958	69.375
	68.125	—	68.75	69.375
	68.542	—	67.708	69.167
	68.333	—	68.958	69.167
	67.708	—	68.125	69.167
	67.50	—	68.542	69.167
	67.50	—	68.75	69.167
	67.292	—	68.542	69.167
	67.083	—	68.75	69.167
	66.667	67.917	68.542	69.167
	67.083	—	68.333	68.958

Papers recommended for *FAILING* by Supervising Examiner:
(none)

January 1970 Bar Examination

—4—

JANUARY 29 and 30, 1970 BAR EXAMINATION

Law School And Other Classification		*Number Examined*	*Number Failed*	*Number Passed*	*Percentage Passed*	*Board Readings*	*Not Finished*
	First-timers	0	0	0	—		
	Repeaters	6	2	4	66.67	—	—
DICKINSON		6	2	4	66.67		
	First-timers	0	0	0	—		
	Repeaters	16	4	12	75.00	—	—
DUQUESNE		16	4	12	75.00		
	First-timers	4	0	4	100.00		
	Repeaters	6	0	6	100.00	—	—
PENNSYLVANIA		10	0	10	100.00		
	First-timers	2	0	2	100.00		
	Repeaters	7	2	5	71.43	—	—
PITTSBURGH		9	2	7	77.78		
	First-timers	2	1	1	50.00		
	Repeaters	14	0	14	100.00	—	—
TEMPLE		16	1	15	93.75		
	First-timers	4	2	2	50.00	0	
	Repeaters	12	3	3		1	#1008
VILLANOVA		16				1	
	First-timers	3	0	3	100.00		
	Repeaters	0	0	0	—	—	—
HARVARD		3	0	3	100.00		
	First-timers	40	12	28	70.00	0	
	Repeaters	42	16	25		1	#1006
OTHER LAW SCHOOLS		82				1(Wash. & Lee)	
	First-timers	4	1	3	75.00		
	Repeaters	3	2	1	33.33	—	—
ATTORNEYS OTHER STATES		7	3	4	57.14		
	First-timers	0	0	0	—		
COMBINED	Repeaters	2	1	1	50.00	—	—
LAW SCHOOL & CLERKSHIP		2	1	1	50.00		
	First-timers	59	16	43	72.88	0	
	Repeaters	108	30	76		2	
TOTAL		167				2	
	First-timers						
	Repeaters	—	—	—		—	—
	First-timers						
	Repeaters	—	—	—		—	—

1 Candidate = .598% (.59880%)

JANUARY 1970 BAR EXAMINATION

BAR EXAMINATION January 29 and 30, 1970

Board Action ..... Candidate No. .....

AVERAGES AND RECOMMENDATIONS

	Examiners 1st reading	*Examiners 2d reading*	*Assistant Supervising Examiner*	*Supervising Examiner*	*Board Members*
				WCS	
1-3	73⅛ P	70 P	GWK		RWJr.
			Prob.		
4-6	75 P	75 P	69⅛ P here	70⅝	72⅝ P
7-9	66⅔ F	68⅛ F			DJMcT.
	Poss.	Poss.	Prob.		
10-12	65 P	65 P	66⅛ F	66⅛ F	66⅛ F
13-15	56⅔ F	56⅔ F	TIG		JMJ
16-18	63⅛ F	66⅔ F	66⅛	64⅛ F	63⅜ F
19-21	60 F	60 F			AHL
22-24	75 P	75 P	69⅛	67⅝ F	67⅛ F
	66.875	67.083	67.917	67.292 Fail (B.A.)	67.50

Name:
Born
Preceptor
Education B.A.—
L.L.B.—

County:

File No.:
Number of appearances:

—9—

BAR EXAMINATION January 29 and 30, 1970

Board Action ..... Candidate No. .....

AVERAGES AND RECOMMENDATIONS

	Examiners 1st reading	*Examiners 2d reading*	*Assistant Supervising Examiner*	*Supervising Examiner*	*Board Members*
				WCS	
1-3	61⅔ F	65 F	GWK		RWJr.
			Poss.		
4-6	76⅔ P	75 P	68⅝ P?	69⅛ P	71⅛ P
7-9	53⅛ F	58⅓ F			DJMcT.
		Poss.			
10-12	63⅓ F	65 P	62⅝ F	60⅝ F	61⅛ F
13-15	56⅔ F	56⅔ F	TIG		JMJ
16-18	71⅔ P	76⅔ P	69⅛	68⅝ F	65 F
19-21	70 B/L	65 B/L			AHL
22-24	78⅛ P	76⅔ P	71⅛	70⅝ P	70⅝ P
	66.458	67.292	67.917	67.292 Fail (B.A.)	67.292

Name:
Born
Preceptor
Education B.A.—
L.L.B.—

County:

File No.:
Number of appearances:

—10—

APPENDIX FOUR (MEMORANDUM TO THE MEMBERS OF THE SPECIAL COMMITTEE)

EVALUATING BAR ADMISSION PROCEDURES UNDER STANDARDS OF EQUAL PROTECTION

Robert J. Reinstein †

At the request of the Chairman of this Committee, Professor Peter J. Liacouras, I have undertaken an analysis of whether the practices and procedures allegedly employed by the Pennsylvania State Board of Bar Examiners in determining admission to the bar have illegally discriminated against black applicants. The analysis which follows is premised upon a hypothetical set of facts supplied by the Committee. On the basis of these facts and the legal principles which I believe are governing, I have concluded that black applicants for admission to the Pennsylvania Bar have been denied equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States. It should go without saying that this conclusion would not necessarily be reached if different factual settings are assumed to exist.

STATEMENT OF RELEVANT FACTS

In order to be admitted to practice to the state bar, an applicant must successfully pass a bar examination administered by the State Board. With minor exceptions, only graduates of law schools approved by the American Bar Association (ABA) are eligible to take the examination. For at least the past decade there has been a gross statistical disparity between the pass rates of white and black applicants. While an average of 75 percent of the white applicants have been passing each bar exam during the past ten years, the rate for black applicants has been about 25 percent. Applicants who have failed the exam the first time may retake it on successive occasions; and the eventual pass rate for all white applicants is over 98 percent, but only 60 percent of the black applicants have ultimately been successful during the past twenty years. The disproportionately high failure rate of black applicants is most marked with respect to graduates of Howard University, a well-known predominately black law school located in the District of Columbia. Although Howard is accredited

† Assistant Professor of Law, Temple University, and member of the Maryland and Federal bars. The views expressed in this paper are, of course, the author's personal opinions.

by both the ABA and the American Association of Law Schools (AALS), the latter having more stringent accreditation requirements, and even though Howard graduates compete favorably on bar exams administered in other Eastern states, of the last 39 bar exams written by Howard graduates in Pennsylvania only 4 have received passing grades. This figure is much lower than those of other out-of-state law schools which are predominately white having a substantial number taking the Pennsylvania Bar.

The questions on the Pennsylvania Bar Examination are developed and written by a group of examiners who are lawyers, under the supervision and marginal participation by the Board. The examination is not professionally developed in that full-time law professors may not participate and testing experts are not consulted for particular exams. No validation study, either prospective or retrospective, has been conducted in order to determine whether the state bar exam accurately predicts the ability of applicants to perform adequately as lawyers.

The answers to the examination questions are graded in the first instance by the examiners who prepare the questions. If the applicant obtains a grade of 69 or better, he is recommended for passing, despite a State Board rule requiring a 70 average for passing. There is a re-reading, but about 25 percent of the papers wind up in the range of 67.000 through 68.999 and these papers are submitted to the State Board which decides in its discretion whether the applicant should pass. This decision is essentially standardless, although several factors other than the exam itself have been given weight. Among these factors are the age of the applicant, the college and the law school he attended and his degrees, his rank in law school if available, the number of times he took the exam, the county in which he intends to practice, and the identity of his preceptor. The Board potentially has access to the applicant's entire file and his signed picture which is also initialed by his preceptor. It is not known whether the Board keeps (and for how long) a full record of the papers which were in this discretionary category or the reasons which prompted the Board to pass or fail an individual applicant. It is, however, known that the Board has discretionarily raised to a passing 70 percent level certain papers whose grades were lower than or the same as others which were not raised and passed. On at least one occasion, a paper whose actual grade was the same or lower than one-sixth of all those which failed, was passed by the Board in the discretionary stage.

The applicant has no right to review the Board's decision that he passed or failed, nor may he ascertain at what state of the evaluation

process his final grade was determined, nor may he even question the mathematical correctness of his grade. There is no model answer available to the applicant, and he may receive only an unmarked, uncorrected copy of his exam booklets if he promptly requests it; and three months after the grades are released the Board destroys all examination papers and tally sheets (bearing the examiner's comments) still in its possession.

Legal Discussion

The Fourteenth Amendment to the United States Constitution provides that "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." The federal statute which implements this constitutional guarantee is the Civil Rights Act of 1871, 42 U.S.C. § 1983, which reads as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Since the State Board of Law Examiners is established by and derives its power and responsibility from state law, and since the members of the Board are appointed by the State's Supreme Court, it is bound by the prohibitions of the Constitution and the Civil Rights Act. *Konigsberg v. State Bar,* 353 U.S. 252 (1957); *Schware v. Board of Bar Examiners,* 353 U.S. 232 (1957). And it is too late in the day to argue that otherwise unconstitutional state action is justified by characterizing the practice of law as a privilege or benefit rather than a right. "A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment." *Schware, supra* at 238.[1]

The question, then, is whether the practices and procedures of the State Board have denied equal protection to black applicants to the bar. It might seem at first blush that a negative answer is required because there is no direct evidence that any examiner or member of

1. Numerous recent cases have rejected the notion that a State may impose any conditions it wishes, independent of constitutional restraints, on the distribution of government largess or the allocation of licenses. *E.g.,* Shapiro v. Thompson, 394 U.S. 618 (1969); Sherbert v. Verner, 374 U.S. 398 (1963); Flemming v. Nestor, 363 U.S. 603 (1960); Speiser v. Randall, 357 U.S. 513 (1958).

the Board has consciously and explicitly acted in an adverse manner toward an applicant solely because of his race. But, while a showing of purposeful racial discrimination would of course be decisive, the absence of such a showing does not in and of itself establish compliance with the Equal Protection Clause. Federal courts have held that a person alleging racial discrimination by state officials need not assert nor prove a specific intent to discriminate. If he establishes that a practice results in detrimental treatment to himself and other members of his race relative to whites who are similarly situated, he has made out a prima facie case of denial of equal protection and the burden of proof shifts to the state to show why the practice is justified as necessary to the accomplishment of a legitimate government purpose.

This doctrine is sound, for several reasons. First, one of the oldest and most fundamental principles of equal protection is that where significant interests are affected, "the law shall operate equally and uniformly upon all persons in similar circumstances." *Kentucky R.R. Tax Cases,* 115 U.S. 321 (1885). This principle is violated whenever a state, acting through its officials, burdens one class and benefits another without justification; and it is little solace to the victims that their rights were abridged inadvertently or accidentally.[2] Some of the most important Supreme Court rulings on equal protection have been made where the motives of state officials were hardly "evil". Thus, the states were ordered to reapportion their legislatures even though state election officials did not intend to make anyone politically powerless. See *Reynolds v. Sims,* 377 U.S. 533 (1964). The poll tax was held unconstitutional on its face despite the fact, conceded by all, that there was no proof that it was designed to restrict the franchise to the affluent. See *Harper v. Virginia Board of Elections,* 383 U.S. 663 (1966). And the states were held to deny equal protection when they did not grant free transcripts and counsel to convicted indigents on appeal, although this conduct was motivated entirely by a desire to save money. See *Douglas v. California,* 372 U.S. 353 (1963) and *Griffin v. Illinois,* 351 U.S. 12 (1956). In each of these cases, the state was unable to justify or counter-balance the discriminatory results of a practice by showing that it served an important public interest.

Second, as Judge J. Skelly Wright has said, "we now firmly recognize that the arbitrary quality of thoughtlessness can be as

2. It is, of course, no answer for the state to say merely that a practice appears on its face to be fair and neutral, for if it is applied discriminatorily the procedure may be constitutionally impermissible. Yick Wo v. Hopkins, 118 U.S. 356, 359, 373-74 (1886). *See also* Meredith v. Fair, 298 F.2d 696, 701 (5th Cir.), *cert. denied,* 371 U.S. 828 (1962); Penn v. Stumpf, 308 F. Supp. 1238, 1242-44 (N.D. Calif. 1970); Lea v. Cone Mills Corporation, 301 F. Supp. 97, 100-02 (M.D.N.C. 1969).

disastrous and unfair to private rights and the public interest as the perversity of a willful scheme." *Hobson v. Hansen,* 269 F. Supp. 401, 497 (D.D.C. 1967), *aff'd sub nom.* 408 F.2d 175 (D.C. Cir. 1969). Particularly in the area of race, given the historical underpinnings of the Fourteenth Amendment, a state should not be heard to insulate itself from the unequal treatment flowing directly from one of its official practices by the mere expedient of taking on a see-no-evil-hear-no-evil approach.[3] *Anderson v. Martin,* 375 U.S. 399 (1964); *Norwalk CORE v. Norwalk Redevelopment Agency,* 395 F.2d 920 (2d Cir. 1968); *Ross v. Dyer,* 312 F.2d 191 (5th Cir. 1962). "Equal protection of the laws means more than merely the absence of governmental action designed to discriminate." *Norwalk CORE, supra* at 931.

Third, except for those cases in which a state official is imprudent enough to admit a specific intent to discriminate, it is often virtually impossible to prove illegitimate motivations which are subtly concealed. But the Constitution "nullifies sophisticated as well as simple-minded modes of discrimination." *Lane v. Wilson,* 307 U.S. 268, 275 (1939). When it is shown that the discretionary administration of state law acts in a disproportionately adverse manner towards a racial minority, a strong inference of illegal discrimination exists. If the state officials have acted fairly and neutrally to accomplish a legitimate state purpose, "that fact rest(s) more in the knowledge of the state" and the burden is on the state's representatives "to refute the strong prima facie case developed." *United States ex rel. Goldsby v. Harpole,* 263 F.2d 71, 78 (5th Cir. 1959). This standard has been consistently applied in cases of tests for voting, *see, e.g., Gomillion v. Lightfoot,* 364 U.S. 339 (1960); *Davis v. Schnell,* 81 F. Supp. 872 (S.D. Ala.), *aff'd* 336 U.S. 933 (1949); *United States v. Duke,* 332 F.2d 759 (5th Cir. 1964); and jury selection, *see, e.g., Jones v. Georgia,* 389 U.S. 24, 25 (1967); *Avery v. Georgia,* 345 U.S. 559, 562-63 (1953). Only last term the Supreme Court held in a case challenging jury selection procedures:

> "In sum, the [plaintiffs] demonstrated a substantial disparity between the percentages of Negro residents in the county as a whole and of Negroes on the newly constituted jury list. They further demonstrated that the disparity originated, at least in part, at one point in the selection

3. This is very different from the case of *de facto* segregation, where the inequality results from the natural workings of the market and the legal issue is whether the state has an affirmative obligation to rectify results caused by private individual preference and conduct. Where the inequality is *caused* by a state practice, state action and responsibility are evident and the legal issue focuses on the justification for the practice.

> process where the jury commissioners involed their subjective judgment rather than objective criteria. The (plaintiffs) thereby made out a prima facie case of jury discrimination and the burden fell on the [state officials] to overcome it." *Turner v. Fouche,* 396 U.S. 346, 360 (1970).

Finally, applying the standard of a prima facie case based on the effect of a state practice is consistent with the approach normally taken in constitutional adjudication. In passing the Civil Rights Act of 1871, Congress created federal constitutional torts redressable in civil suits. Because a basic element of tort law is that "a man (is) responsible for the natural consequences of his actions," a plaintiff asserting a constitutional violation need not allege nor prove a specific intent to deprive him of his rights. *Monroe v. Pape,* 365 U.S. 167 (1961). See also *Whirl v. Kern,* 407 F.2d 781, 787 (5th Cir. 1968); *Penn v. Stumpf,* 308 F. Supp. 1238, 1244 (N.D. Calif. 1970). Further, courts do not ordinarily delve into the subjective motivations of state legislators and officials, and in the rare case when an improper motive is found it is typically because no other cogent justification could be advanced for the practice under attack. For example, when black plaintiffs in *Gomillion v. Lightfoot,* 364 U.S. 339 (1960) alleged that Alabama had redistricted the City of Tuskegee from a square to a twenty-eight sided figure in which all but four or five of the 400 black voters were excluded, the Court said (at 341):

> "If these allegations upon trial remain uncontradicted or unqualified, the conclusion would be irresistable, tantamount for all practical purposes to a mathematical demonstration, that the legislation is solely concerned with segregating white and colored voters by fencing Negro citizens out of town so as to deprive them of their pre-existing municipal vote."

But the Court was quick to add that "no countervailing municipal function which (the redistricting) is designed to serve . . . (except) generalities" had been shown by the state. And when it was argued in a later case that the legislators' motives had led to the ruling in *Gomillion,* the Court properly responded that the statute had been struck down because of its "inevitable effect." *United States v. O'Brien,* 391 U.S. 367, 384-85 (1968). See also *Cypress v. Newport News,* 375 F.2d 648 (4th Cir. 1967).

I believe that it follows from this analysis that the state of mind of the bar examiners and members of the State Board when they adopt and administer practices is constitutionally irrelevant when the effect of their actions does not differ from purposeful discrimination. If a prima facie case is made that such a disparate effect has occurred

due to the bar examination, the state must produce an adequate justification or else be held to violate the equal protection clause. As has been seen, this is the approach taken by the federal courts in the closely analogous area of tests for voting;[4] and the recent prevailing view has been that it applies to tests for employment, both public, *Penn v. Stumpf*, 308 F. Supp. 1238 (N.D. Cal. 1970); *Arrington v. Mass. Bay Transportation Authority*, 306 F. Supp. 1355 (D. Mass. 1969); and private, *Local 189 v. United States*, 416 F.2d 980, 994 (5th Cir. 1969); *United States v. H. K. Porter*, 59 L.C. 9204 (M.D. Ala. 1969); *Dobbins v. Local 212, IBEW*, 292 F. Supp. 413 (S.D. Ohio 1968); *see also United States v. Local 36, Sheet Metal Workers*, 416 F.2d 123 (8th Cir. 1969); *but see Griggs v. Duke Power Co.*, 420 F.2d 1225 (4th Cir. 1970), *cert. granted* 399 U.S. 926 (1970).

A prima facie case of illegal discrimination against black applicants to the Pennsylvania Bar is set forth in the statement of facts. The facts show a gross statistical discrepancy between the percentage of black applicants who pass the bar exam relative to their white counterparts. This discrepancy cannot be readily explained away by hypothesizing that the black applicants are less qualified, for each black applicant has, in accordance with the rules of the Pennsylvania Supreme Court, graduated from an accredited law school. Moreover, the most pronounced disparity relates to graduates of Howard Law School, which has a *higher* accreditation than is required for taking the bar exam. The black and white applicants thus appear to stand on equal footing, and the gross statistical disparity is enough to make out a prima facie case of violation of the equal protection clause. "In the problem of racial discrimination, statistics tell much, and Courts listen." *Alabama v. United States*, 304 F.2d 583, 586 (5th Cir.) *aff'd.* 371 U.S. 37 (1962).

Any doubt on this score is removed by the factual presence of unreviewable discretion in the final determination of whether an applicant for admission is passed. Practices of this sort must be examined very strictly because they offer a potential reservoir for discrimination to those who would take advantage of it. In some cases the probability that this potential well would be tapped was so high that it, standing alone, raised a presumption of invidious discrimination. *Hunter v.*

4. While the jury selection cases employed the same approach, they are factually distinguishable because the state practices which were challenged did not purport to measure qualifications but instead were simply devices for choosing "randomly" among a group of equally qualified individuals for jury service. In the voting and employment testing cases (including the present one), the practices used disqualify individuals because they do not meet the standards which are set. In these latter cases, the inquiry on justification focuses on the legitimacy and necessity of the standards themselves.

Erickson, 393 U.S. 385 (1969); *Anderson v. Martin*, 375 U.S. 399 (1964); *cf. Davis v. Schnell*, 81 F. Supp. 872 (S.D. Ala.) *aff'd.* 336 U.S. 933 (1949). The practices used by the State Board are particularly suspect because the decisions made are secretive and unreviewable and because at least two of the factors employed in one stage of the discretionary process—law school attended and preceptor—may identify the race of a black applicant and tender the opportunity for overt discrimination. A remarkably similar situation was struck down by the Fourth Circuit when state hospital directors decided in their discretion and by secret ballot that black doctors were unqualified for admission to the hospital staff. The court held that "a prima facie inference of discrimination exists whenever the action on said application is by secret ballot and without hearing from the applicant . . . (T)he burden was on the hospital to disclose what rules and regulations it has adopted and to indicate in what way (the black doctors) failed to comply with the requirements." *Cypress v. Newport News*, 375 F.2d 648, 654 (4th Cir. 1967). The statistical showing that black applicants to the bar are treated in an adverse manner with respect to white applicants who appear to be similarly situated combines with the use of discretionary, unreviewable determinations to transform the possibility of discrimination into a high probability that black applicants have been denied their constitutional rights. *Turner v. Fouche*, 396 U.S. 346 (1970). On the basis of these facts, we may be bound to say, as the Supreme Court did in *Whitus v. Georgia*, 385 U.S. 545, 552 (1967), that "the opportunity for discrimination was present and on this record we cannot say it was not resorted to."

Of course, the determination of a prima facie case of illegal discrimination is not conclusive with respect to the bar examination itself. But it does focus us on the critical inquiry of the state's justification for adverse treatment against black applicants. If it cannot be shown that the practices which exclude blacks from the bar are administered fairly and also further legitimate state interests, the state cannot meet its burden and the practices are unconstitutional and must be ended.

The primary justification usually urged in support of the bar examination is that it is necessary to screen out unqualified applicants for admission to the bar. However, since applicants for admission must graduate from an ABA approved law school, this argument implies that such law schools are not measuring accurately the competence of their students and that the bar examination is necessary to fill a hiatus. In other words, under this state of facts, this argu-

ment boils down to the proposition that the State Board is able to devise an examination which is so accurate that it is better able to predict the future performance of applicants to the bar than law schools which supervise and analyze the applicants over a period of at least three years. See Comment, *Admission to the Pennsylvania Bar: The Need for Sweeping Change*, 118 U. PA. L. REV. 945, 974 (1970). There are cogent reasons why this proposition is unacceptable in the context of the factual setting presented. First of all, as already noted only graduates of approved law schools are permitted to take the exam; and over 98 percent of all applicants eventually pass. Thus, in practice, the screening function of the exam is negligible and the State Board winds up deferring to the judgment of accredited law schools. So far as the facts reveal, the only applicants who are consistently "screened" out are black, and this does not answer—it reinforces—the equal protection challenge. The screening argument would be very different if, as in Maryland, anyone could take the exam and only about half eventually pass. Secondly, not only has the state failed to demonstrate the necessity of the challenged practices, but their accuracy is purely speculative on the hypothetical facts assumed herein. Law school professors and administrators are professionals with a large store of expertise in evaluating the competence of law students. But the facts show that the individuals who develop and grade the bar examination, on the other hand, are not professionals, do not utilize testing experts and have never shown by validation studies or otherwise that the bar exams accurately predict the performance of applicants as lawyers. If these factors were present, the disparate results of the bar exams on racial lines could be justified on the ground that the black applicants who were excluded were not competent. But absent these factors, the state's burden of proof cannot be met, for all that is left is the assumption of non-professionals that they *think* that a given practice is desirable. In the general area of tests for employment positions, the federal courts have struck down examinations which exclude a disproportionately high percentage of black applicants and which have not been shown to predict performance on the job and thus serve a legitimate business interest. See cases cited on Page 254, *supra*,[5] and Cooper & Sobol, *Seniority and Testing Under*

5. The one exception is the *Griggs* case, a 2-1 decision of the Fourth Circuit. This decision cannot be considered as controlling. The suit was brought under Title VII of the Civil Rights Act of 1964, which prohibits private employment discrimination, and the majority relied on a provision of the Act (§ 703(h)) which it construed as approving general ability tests which were professionally developed but not validated for predicting job performance. The case is therefore distinguishable from the bar examination because: (1) the tests in *Griggs* were professionally developed, and (2) here state action is involved and tests are not excluded from equal protection

Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion, 82 HARV. L. REV. 1598 (1969). The same result follows here.

There are two other possible justifications for the bar examination as administered by the State Board, but, as the principal justification just considered, they do not withstand critical scrutiny under the assumed facts. One is that the examination insures that applicants have a working knowledge of legal principles unique to Pennsylvania. But the examination as given does not purport to test the knowledge of "minute and obscure principles of Pennsylvania law," and a competent lawyer can quickly learn the more basic state principles in his practice. See Note, *Admission to the Pennsylvania Bar, supra* at 974. And, here too the validity of the examination as an accurate testing device in this area cannot be established because of the lack of professional inputs and validation studies.

Similarly, the third possible state purpose—that the bar examinations put pressure on the law schools to insure a high standard of legal education—is admirable as an abstract proposition but, given the facts, does not justify the discriminatory effects of the present practices. Surely, no one would contend that the state could require law schools to exclude qualified blacks altogether under the guise of maintaining quality. Under present practices, the judgment of quality is made on the basis of a non-professionally developed examination with unproven accuracy at judging quality. This is too tenuous a reason for justifying racial discriminatory effects. One can appreciate that the law school faculties and administrations would prefer the present practices to more direct intrusions into their processes—e.g., dictation of choice of curriculum—but political expediency has never been considered a legal justification for otherwise invidious discrimination. *Cooper v. Aaron,* 358 U.S. 1 (1958). And the finding of illegality of the present practices under the assumed facts is not an invitation for more intrusion by the State Board into the lives of law schools; it means only that the Board should reform its present practices to comply with the dictates of the Constitution. "A bar composed of lawyers of good character [and competence] is a worthy objective

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analysis. The two cases relying directly on the equal protection clause required professional development and validation. Penn v. Stumpf, 308 F. Supp. 1238 (N.D. Cal. 1970); Arrington v. Mass. Bay Transportation Authority, 306 F. Supp. 1355 (D. Mass. 1969). In addition to being distinguishable on its facts, the majority opinion in *Griggs* is at odds with the prevailing view in the federal courts and is directly contrary to the guidelines of the Equal Employment Opportunity Commission, the federal agency charged with primary enforcement of Title VII. For the reasons fully set out in Judge Sobeloff's dissent and in the detailed article by Cooper and Sobol, *supra,* I believe that the majority in *Griggs* erroneously read the legislative history of Title VII and decided the case wrongly.

but it is unnecessary to sacrifice vital freedoms in order to obtain that goal." *Konigsberg v. State Bar,* 353 U.S. 252, 273 (1957).

In sum, the hypothetical state of facts establish a convincing prima facie case of racial discrimination, which has not been explained, justified or counterbalanced by any legitimate state interest. It follows that under these facts, the present practices of the State Board in administering the bar examination deny equal protection to black applicants. This conclusion in no way implies that bar examinations are *per se* unconstitutional. I reiterate what is said in the introduction: this conclusion rests on the state of facts set forth herein. If different facts existed, or if the state adopted different practices in the administration of the bar examination that either removed the gross discrepancy of pass rates between white and black applicants or which could be justified as furthering a legitimate state interest, the constitutional infirmity on equal protection grounds would be eliminated.