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## Guests in Another's House: An Analysis of Racially Disparate Bar Performance

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## GUESTS IN ANOTHER'S HOUSE: AN ANALYSIS OF RACIALLY DISPARATE BAR PERFORMANCE

*Cecil J. Hunt, II*

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# GUESTS IN ANOTHER'S HOUSE: AN ANALYSIS OF RACIALLY DISPARATE BAR PERFORMANCE

CECIL J. HUNT, II\*

I.	INTRODUCTION .....	722
II.	THE ABSENCE OF DATA.....	726
	A. <i>State Practices</i> .....	726
	B. <i>State Studies</i> .....	728
	C. <i>Law School Admission Council Bar Study</i> .....	729
III.	JUDICIAL CHALLENGES TO THE BAR EXAMINATION ON THE BASIS OF UNLAWFUL RACIAL DISCRIMINATION.....	734
	A. <i>The Judicial Record</i> .....	734
	1. <i>Tyler v. Vickery</i> .....	734
	2. <i>Parrish v. Board of Commissioners of the Alabama State Bar</i> .....	744
	3. <i>Richardson v. McFadden</i> .....	747
	4. <i>Pettit v. Gingerich</i> .....	748
	5. <i>Delgado v. McTighe</i> .....	750
	B. <i>Reflections on the Judicial Record</i> .....	754
	1. <i>Discouraging History</i> .....	755
	2. <i>Inhospitable History</i> .....	756
	3. <i>Irrational History</i> .....	757
	4. <i>A Bleak Future</i> .....	759
	5. <i>A Ray of Hope</i> .....	761
	a. <i>Equal Protection</i> .....	761
	b. <i>Title VII</i> .....	762
IV.	THE MYTH OF THE BAR EXAM AS A TEST OF MINIMUM COMPETENCE .....	764
	A. <i>Definitional Barriers</i> .....	764
	B. <i>Measurement Barriers</i> .....	768
V.	THE CAUSES AND SOURCES OF RACIALLY DISPARATE BAR PERFORMANCE.	769
	A. <i>Educational Deficiencies</i> .....	769
	B. <i>Socio-Psychological Factors</i> .....	770
	1. <i>The Law School Experience</i> .....	771
	2. <i>A Hostile Learning Environment for Students of Color</i> .....	774
	3. <i>A Hostile Learning Environment for Women</i> .....	777
	4. <i>Academic Support Programs and Stigmatization</i> .....	782
	5. <i>The Power of Law School Grades</i> .....	784
	6. <i>Effects on Bar Exam Performance</i> .....	785
VI.	A MODEST PROPOSAL FOR A SOLUTION TO THE PROBLEM OF RACIALLY DISPARATE BAR PERFORMANCE.....	787
VII.	CONCLUSION.....	791

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## I. INTRODUCTION

We claim for ourselves every single right that belongs to a freeborn American, political, civil and social; and until we get these rights we will never cease to protest and to assail the ears of America. The battle we wage is not for ourselves alone but for all true Americans. It is a fight for ideals, lest this, our common fatherland, false to its founding, become in truth the land of the thief and the home of the Slave—a by-word and a hissing among the nations for its sounding pretensions and pitiful accomplishments.<sup>1</sup>

W.E.B. DuBois

Prevailing wisdom holds that substantial disparities exist in bar passage rates between people of color<sup>2</sup> and their white counterparts.<sup>3</sup> Some scholars argue that these differences reflect the educational preparation and academic performance of racial groups prior to and during law school.<sup>4</sup> However,

1. DAVID LEVERING LEWIS, W.E.B. DUBOIS: BIOGRAPHY OF A RACE 330 (1993). These lines were part of DuBois' compelling "Address to the Country" read by Lafayette Hershaw at the Second Meeting of the Niagara Movement on August 15, 1906. *Id.* The address ended with the reasoned demand: "Cannot the nation that has absorbed ten million foreigners into its political life without catastrophe absorb ten million Negro Americans into that same political life at less cost than their unjust and illegal exclusion will involve?" *Id.*

2. Any and all references in this Article to "people of color" or "minorities" is expressly intended to include Blacks or African-Americans, Latinos or Hispanic-Americans, and Asians or Asian-Americans.

3. See Daniel O. Bernstine, *Minority Law Students and the Bar Examination: Are Law Schools Doing Enough?*, B. EXAMINER, Aug. 1989, at 10, 10. From confidential discussions with several law school deans, Dean Bernstine recounts what he terms "unsubstantiated horror stories" about the poor performance of minority students. *Id.* For example, he writes:

I have been able to determine that for some recent bar examinations, zero out of eleven minority graduates of a particular law school passed the local bar . . . and at yet another school, zero out of eight passed the local bar. The schools involved are among the "better" law schools and, in fact, two of these three schools, in all likelihood would, by consensus, be ranked in the top thirty of American law schools.

*Id.*; see generally STEPHEN P. KLEIN & ROGER BOLUS, COMMITTEE OF BAR EXAMINERS OF THE STATE OF CALIFORNIA, MINORITY GROUP PERFORMANCE ON THE CALIFORNIA BAR EXAMINATION (1987); Katherine L. Vaughns, *Towards Parity in Bar Passage Rates and Law School Performance: Exploring the Sources of Disparities Between Racial and Ethnic Groups*, 16 T. Marshall L. Rev. 425 (1991); Armundo M. Menocal, III, *Letter from the Chair*, B. EXAMINER, Feb. 1991, at 2. Menocal writes:

Almost all examiners acknowledge that disproportionate pass rates exist. Too few, however, actually know how great the gap is between men and women, minorities and non-minorities, and other discreet [sic] groups. . . .

California keeps and publishes race, gender, and law school bar passage rates. These confirm that major disparities exist. On a recent July examination, Anglo first time bar-takers from ABA-approved law schools passed the California Bar examination at approximately eighty percent. For Asians, it was only sixty-five percent. Latinos . . . between fifty-five and sixty percent. The Black bar passage rate is at fifty percent.

Menocal, *supra*, at 2-3.

4. See, e.g., Stephen P. Klein, *On Testing: How To Respond to the Critics*, B. EXAMINER, Feb. 1986, at 16, 23 [hereinafter Klein, *On Testing*] (concluding that the bar exam is "neither widening nor narrowing the gap among groups . . . [because a]nalyses of this issue show that the

such disparate performance also generates concern that the bar examination, the gateway to the legal profession, may be infected with racial, ethnic, cultural, gender, and/or economic bias unrelated to the competent practice of law.<sup>5</sup> To the extent that such bias prevents otherwise capable law graduates from entering the legal profession, it is a serious problem.<sup>6</sup>

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differences in performance level among racial/ethnic groups on this state's bar exam parallel the size of the differences among them in law school grades and admission test scores"). Klein states that,

[i]n short, the bar exam neither widens or narrows the differences among groups that were present before they took the exam.

Differences among racial groups on the bar exam also parallel differences among them at other key points in the educational pipeline, such as graduation from high school and college. The bar exam simply reflects an accumulated educational deficit.

It does not create or exacerbate it. Doing away with the exam would no more cure this problem than would throwing away the scale change your weight.

Stephen P. Klein, *Bar Examinations: Ignoring the Thermometer Does Not Change the Temperature*, 61 N.Y. ST. B.J., Oct. 1989, at 28, 30 [hereinafter Klein, *Bar Examinations*] (citations omitted). See also *Delgado v. McTighe*, 522 F. Supp 886, 894 (E.D. Pa 1981) (rejecting a claim of racial discrimination in the grading of bar examinations and quoting the report of a defense expert witness: " 'The differences in the percentages failed will be eliminated only when the blacks as a group . . . come to the examination as well prepared as are the whites.' ") (citations omitted).

5. See generally Maurice Emsellem, *Racial and Ethnic Barriers to the Legal Profession: The Case Against the Bar Examination*, 61 N.Y. ST. B.J., Apr. 1989, at 42; Henry Ramsey, Jr., Symposium, *National Conference on Minority Bar Passage: Bridging the Gap Between Theory and Practice*, 16 T. MARSHALL L. REV. 419 (1991); Dannye Holley & Thomas Kleven, *Minorities and the Legal Profession: Current Platitudes, Current Barriers*, 12 T. MARSHALL L. REV. 299 (1987); Linda E. Dávila, *The Underrepresentation of Hispanic Attorneys in Corporate Law Firms*, 39 STAN. L. REV. 1403 (1987); Klein, *On Testing*, *supra* note 4; John Pierre et al., *Racial Disparities in Bar Examination Performance: An Hypothesis*, 40 LA. B.J. 483 (1993).

6. The consequences of discriminatory bar exams are extremely significant. See, e.g., NEW YORK STATE BAR ASSOCIATION, PROPOSED STUDY OF THE BAR EXAMINATION (1991). After noting the large numerical differences in passage rates, the authors concluded:

The societal impact of this discrepancy cannot be overstated. First, the disproportionate failure rate affects the hiring and retention of minority law graduates in all areas of the profession. Second, these rates may substantially discourage minority college graduates from seeking admission to law school, thus compounding the problem of law-school recruitment as minority enrollment in college drops nationwide. Third, and perhaps most important, the level of minority representation in the profession has a significant impact on public confidence in and respect toward the justice system.

*Id.* at 1. See also THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, REPORT ON ADMISSION TO THE BAR IN NEW YORK IN THE TWENTY-FIRST CENTURY—A BLUEPRINT FOR REFORM 11 (1992) [hereinafter REPORT ON ADMISSION TO THE BAR IN NEW YORK]. While reiterating the concerns reflected in the New York State Bar Association's report, the authors write that "because many minority lawyers serve the under-represented, legal services to the poor have been especially hard-hit by the disparities in bar passage rates between whites and minority groups." *Id.* at 13.

The California Committee of Bar Examiners appointed a special multiracial subcommittee to examine the disproportionality in the bar passage rates of minorities and whites. The subcommittee concluded that "a substantial increase in the minority representation in the profession is one of the greatest challenges facing the legal profession in California and must be addressed by the profession as a whole as rapidly as possible." MICHAEL R. YAMAKI ET AL.,

The issue is not new. Bias in the examination process has been observed in one form or another for over sixty years, but any serious effort to recognize or correct this problem has been stymied by three interrelated factors.<sup>7</sup> First, there is a scarcity of comprehensive, accurate statistical data to confirm racial disparities in bar passage rates over time and across jurisdictions. Second, courts consistently demonstrate an unwillingness to consider judicial remedies as an appropriate response to any aspect of the disparate bar passage problem. Lastly, there is a surprising lack of thorough, sensitive analysis of the causes and the sources of such racially disparate bar performance. This Article analyzes each of these three interrelated factors.

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COMMITTEE OF BAR EXAMINERS OF THE STATE BAR OF CALIFORNIA, MINORITY PASSING RATES ON THE BAR EXAMINATION 24 (1988).

7. See, e.g., *Delgado*, 522 F. Supp. at 886. In that case, the plaintiffs, three African-Americans and two Hispanics, alleged that the Pennsylvania Board of Bar Examiners intentionally manipulated the required passing score in order to discriminate against minorities. *Id.* They also argued that

[t]he allegation that Blacks have been excluded by the Board from the practice of law in Pennsylvania is not new. Frankly, some of the statistics are shocking. For the ten year period from 1933 to 1943, no Black was admitted to the practice of law in Pennsylvania. . . . [F]rom July 1950 to the end of 1952, thirty Black candidates from Philadelphia County took a total of forty-three examinations, some individuals being examined two or more times, and . . . only six of them passed.

*Id.* at 886-87. See also GERALDINE R. SEGAL, *BLACKS IN THE LAW: PHILADELPHIA AND THE NATION* (1983). In discussing the nature of this problem, Segal cites a 1973 study by Lani Guinier, a University of Pennsylvania Law School Professor at that time. The study, which was conducted before indicia of color were eliminated from the records kept by state bar examiners, documented the failure rates of black candidates as follows:

California (no year given)	56% of blacks and Latins failed 24% of nonminorities failed
District of Columbia June 1973	184 of 200 blacks failed (92%)
Georgia 1972	41 of 41 blacks failed (100%)
Illinois August 1972 March 1973	30 of 40 blacks failed (75%) 12 of 16 blacks failed (75%)
Nebraska June 1972 January 1973	5 of 10 blacks failed (50%) 1 of 9 blacks failed (11%)
Ohio 1973	11 of 29 blacks failed (38%)
Virginia 1970	24 of 30 blacks failed (80%)

*Id.* at 11.

Part II examines the widespread practice of forbidding the collection of hard data documenting the performance of bar candidates along racial or ethnic lines in virtually every jurisdiction. In reviewing the history of this practice, the Article identifies a correlation between the banning of such data collection and the entry of large numbers of minorities into law schools. The proffered rationale supporting this practice is reviewed, and recommendations calling for its reversal are made.

Part III examines prior judicial challenges to the bar examination on the basis of unlawful racial discrimination. This part reviews the various constitutional and statutory bases which plaintiffs have utilized and suggests that not only do courts almost universally reject racial discrimination claims against state bar examiners, but they also appear hostile to such actions. The Article explores possible sources and explanations for such hostility and considers their implications.

Part IV confronts and dispels the myth that the bar examination serves as a test to ensure the minimum competence of lawyers.

Part V reviews the major theories, as reflected in the few studies which have been conducted in this area, and explains the causes and sources of racially disparate bar performance. This part analyzes and critiques the prevailing rationale that racial differences in bar passage rates derive from poor academic preparation and performance by minorities at every significant stage along the educational pipeline. This part also confronts the logical conclusion of this theory—that the only solutions to the present problem are long-term and must occur long before minorities come to the bar exam.

This part suggests that to solve the problem of racially disparate bar passage rates, educators do not need to improve the quality of minority candidates but rather to alter the procrustean, negatively reinforcing pedagogical process to which those students are subjected before and especially during law school. In other words, to the extent that any fault can be identified, it does not lie with minority candidates per se, but rather in the educational process which produces them.

Finally, in part VI the Article concludes with a modest proposal for process-based solutions to the bar passage problem, including both long- and short-term applications. While these solutions are designed to be applied at every level of the educational system, their primary utilization should be in the law school teaching and learning process.

Law school pedagogical paradigms have remained essentially unchanged for over 100 years. Perhaps the greatest benefit of examining whether bar examinations discriminate along racial, ethnic, and gender lines would be the motivation for a long overdue reevaluation and redefinition of what constitutes a competent attorney—a reconsideration addressing the issue of how best to produce such a person and, ultimately,

how to test such a person's competence without unreasonably sacrificing fairness.

## II. THE ABSENCE OF DATA

### A. State Practices

With the single exception of the state of California, no state regularly collects or maintains data on the race, ethnicity, or gender<sup>8</sup> of its bar examination candidates.<sup>9</sup> As a consequence, virtually no state can claim any accurate knowledge "of the effect of [its] bar examination on minority applicants."<sup>10</sup> What little information which does exist (outside of California) is necessarily anecdotal and incomplete and, therefore, largely unreliable.<sup>11</sup>

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8. From the limited information available, it also appears that the bar exam has a discriminatory impact on women. Recent figures from Iowa indicated an 11% difference in the passage rate between men and women in the June, 1987 administration of the Iowa Bar Examination, and a 14% difference in the passage rate in the December, 1987 administration. REPORT ON ADMISSION TO THE BAR IN NEW YORK, *supra* note 6, at 13; see also Arthur E. Ryman Jr., *Women and the Bar Examination: Thinking like a Woman Lawyer*, 37 DRAKE L. REV. 79 (1987-88). Interestingly, Ryman notes that the female graduates of Drake University Law School who failed the Iowa Bar Exam on the subject dates had better academic records, on average, than their male classmates who failed the exam. Ryman, *supra*, at 79; see also Stephen P. Klein, *An Analysis of the Relationships Between Bar Examination Scores and an Applicant's Law School, Admissions Test Scores, Grades, Sex, and Racial/Ethnic Group*, B. EXAMINER 1980, at 14, 17. The author notes that "[f]emale applicants did slightly less well on the MBE [multistate bar examination] portion of the examination than would have been expected on the basis of their LGPAs [law school grade point averages] and LSAT [Law School Admissions Test] scores. For example, 7% more females than males passed the essay, but 5% more males than females passed the MBE." *Id.* Although Klein characterizes this difference as "slight," it is important to note that the net effect resulted in a 12% swing downward from the position in which the females should have been on the basis of LGPAs, LSAT scores, and essay performance. See generally *infra* part IV.B.3.

9. Menocal, *supra* note 3, at 3; see also SEGAL, *supra* note 7, at 10-11 & n.41. According to Segal, the National Conference of Bar Examiners did not maintain any data on the race of those candidates who either took or passed the various state bar examinations and was unable to refer Segal to any other sources that did. SEGAL, *supra*, at 10-11 & n.41; see also REPORT ON ADMISSION TO THE BAR IN NEW YORK, *supra* note 6, at 12 ("California is the only state which regularly collects and analyzes data concerning the minority pass rate.").

10. Menocal, *supra* note 3, at 3.

11. See generally Bernstine, *supra* note 3; MASSACHUSETTS BAR ASSOCIATION, REPORT OF THE COMMITTEE ON BAR ADMISSIONS, THE BAR EXAMINATION: IS IT FAIR? (1989) [hereinafter MASSACHUSETTS BAR REPORT]. The Committee concluded, after a frustrating and ultimately unsuccessful effort to verify and quantify the nature of the bar passage problem among minorities, that

[a]lthough we found very few answers or reasons for the low passage rate, and in fact little concrete statistical evidence that a significant variance between majority and minority exam takers exists, other than anecdotally, we nonetheless believe that the questions raised herein and our recommendations are sound, and can serve as a basis for further study and analysis. . . .

In spite of an exhaustive attempt to establish the actual pass/fail rate for minority bar exam takers in Massachusetts, the Committee was unable to obtain data sufficient to quantify the minority pass rate for any specific year. However, we have no reason

Commentators have advanced three reasons to explain the failure of state bar associations to collect a broader scope of data on applicants, including their race, rather than merely collect data on which law school the applicants attended.<sup>12</sup> First, it has been suggested that "some jurisdictions are unwilling to collect information on such a major, volatile, social issue when they see no solution in sight."<sup>13</sup> This observation is particularly troubling when one considers that the practice of barring disclosure or collection of race information in state bar examinations begun in the early 1970s closely parallels the entry of significant numbers of minorities into the nation's law schools.

Second, out of an expressed concern for applicants' privacy interests, some states forbid the collection of racial and ethnic data on bar examination candidates.<sup>14</sup> The validity of this justification weakens if one considers that racial and ethnic data are collected at virtually every other stage of a student's educational experience, from grade school through college and graduate school admissions to employment applications.<sup>15</sup> No such privacy concerns have been seriously raised at any of these other levels, either by those who seek such information or by those who supply it. In fact, by the time minority candidates reach this stage in their educational careers, they are quite accustomed to providing such information at the threshold of every significant standardized examination. Consequently, the failure to collect such data is likely to spark the interest of minority applicants because noncollection is anomalous when compared to their previous experience. The justification to protect privacy is paternalistic and unwarranted, at best. More troubling is the possibility that noncollection is disingenuous as a pretext for more insidious goals. Privacy arguments are probably advanced more to protect the interests of a board of examiners than those of the minority test takers.

The third, and perhaps most popular, justification for the prohibition against data collection is a desire to avoid even the appearance of impio-

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to conclude that the minority pass rate is any better or worse here in Massachusetts than any other state in the nation.

MASSACHUSETTS BAR REPORT, *supra*, at 6-8.

12. See also Menocal, *supra* note 3, at 3; Bernstine, *supra* note 3, at 10 ("[J]urisdictions are careful to protect the confidentiality of a particular school's bar passage rates and will, in most instances, release data to a school about only its graduates.").

The problem of data collection is further complicated by the fact that many jurisdictions do not maintain any records of graduates by school. In those jurisdictions which do maintain such records, however, the records are often kept only for graduates of the schools in that particular jurisdiction or for schools which have a substantial number of graduates taking that jurisdiction's examination.

Bernstine, *supra*, at 15 n.1.

13. Menocal, *supra* note 3, at 3.

14. *Id.*

15. *Id.* ("[T]his kind of data collection is an accepted fact from law school admissions to employment records.").

priety or discrimination.<sup>16</sup> Some have suggested that if bar examiners knew the race and ethnicity of each bar taker, somehow that information would be intentionally and deliberately “misused to single out and fail the minority applicant.”<sup>17</sup>

Avoiding the appearance of any impropriety is a worthy goal; however, evidence reveals that even this concern is misplaced. For example, the state of California has collected, analyzed, and published data on the races and ethnicities of its exam takers for more than twenty years. In that time, there has been neither controversy nor the privacy violation predicted by those jurisdictions that prohibit the collection of such data.<sup>18</sup> On the contrary, as a consequence of this open information practice, California is at the forefront of confronting the problem of racially disparate bar performance and serves as a model for the rest of the nation in this regard.<sup>19</sup>

### B. State Studies

Although the problem of racially disparate bar performance has been known for some time, relatively few states have studied the causes of this disparity or acted to address it. Only California, New York, Florida, Massachusetts, and Washington have undertaken any serious effort to study the problem.<sup>20</sup> While these states' efforts have yielded varying re-

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16. *Id.*; see also REPORT ON ADMISSION TO THE BAR IN NEW YORK, *supra* note 6, at 11.

17. Menocal, *supra* note 3, at 3; see *infra* part III; see also Pierre et al., *supra* note 5, at 487. In attempting to discover the reason for the racially disparate bar performance of bar candidates in Louisiana, the authors hypothesized that, given the essay format of Louisiana's Bar Exam, it might be possible “for the bar examiners *unconsciously* to pick up on the race of the writer from their usage, syntax, grammar and word choice. And is it possible that these examiners, again unconsciously, would allow their lower expectations of a particular writer to influence their assessment” of the writer[’s] score?” Pierre et al., *supra* note 5, at 487 (citations omitted).

This theory is not so unreasonable as it may appear, given the results of a study conducted in California. In that study, 80 elementary school teachers were given a series of eight essay exams to grade. *Id.* at 486. All of the exams had been previously determined by educational experts to be of equal quality—the only difference among the essays was the name assigned to each one. *Id.* Some essays were given so called “red-blooded all-American” sounding names, others were given wimpy or unpopular sounding names. *Id.* The teachers gave the papers significantly different grades, with the red-blooded all-American names receiving the highest grades, and the wimpy or unpopular sounding names receiving the lowest. *Id.* at 486-87. Such studies and questions fuel suspicions that extraneous matter such as word choice, or even a name, can significantly, albeit unconsciously, affect the substantive evaluation of quality.

18. See Menocal, *supra* note 3, at 3.

19. *Id.*

20. See generally KLEIN & BOLUS, *supra* note 3 (California); YAMAKI ET AL., *supra* note 6 (California); REPORT ON ADMISSION TO THE BAR IN NEW YORK, *supra* note 6; HARI SWAMINATHAN & H. JANE ROGERS, AN INVESTIGATION OF RACIAL AND ETHNIC BIAS IN THE FLORIDA BAR EXAMINATION, FINAL REPORT SUBMITTED TO THE RACIAL AND ETHNIC BIAS STUDY COMMISSION OF THE FLORIDA SUPREME COURT (1991); MASSACHUSETTS BAR REPORT, *supra* note 11.

sults, they have reached unanimous conclusions with respect to two key points.

First, all of the studies agree that state bar examinations appear to have a discriminatory impact along racial, ethnic, and gender lines.<sup>21</sup> Second, all agree that the collection of racial data on bar takers appears to be essential.<sup>22</sup> In fact, one study concluded that the “[c]ompilation of data regarding bar passage rates of minority law graduates is a prerequisite to any conclusive assessment of claims of racial bias of the bar examination . . . . [T]he proper collection of such data and the preparation of statistics are essential elements of any meaningful reform of the bar examination.”<sup>23</sup> Clearly, no one can meaningfully address the issues raised by racially disparate bar performance without a base of hard empirical data regarding the races of those who take the exam and their performances.

### C. Law School Admission Council Bar Study

Fortunately, the need for more information is beginning to be recognized and addressed on a national scale. In 1991, the Law School Admission Council (LSAC) began a national bar passage study “in an effort to obtain complete and accurate information about bar passage rates among graduates from ABA-approved law schools, as well as about factors that may influence performance in law school and success on the bar examination.”<sup>24</sup> Con-

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21. See, e.g., REPORT ON ADMISSION TO THE NEW YORK BAR, *supra* note 6, at 12. The Committee found that in New York State, the significance of the disproportionality between whites and minorities was “sobering and should occasion much concern” and concluded that “[t]he extant research in other jurisdictions indicates that the bar examinations in those states have a discriminatory impact on minority applicants and may also discriminate against female and older applicants.” *Id.* (citations omitted). See also SWAMINATHAN & ROGERS, *supra* note 20, at 28. In evaluating the essay portion of a number of prior administrations of the Florida Bar Exam, the Commission concluded: “In the February administration, all essays showed potential bias against minority candidates. The performance of the minority candidates was substantially lower than the performance of the Whites. For the July administration, one of the three essays showed potential bias against the minority candidates.” *Id.*

22. See REPORT ON ADMISSION TO THE BAR IN NEW YORK, *supra* note 6, at 14. This study emphasized that

[s]uch data collection is a necessary antecedent to the identification of any defects in the content, design, and/or administration of the bar examination. The goals of data collection are to identify any components of the testing process which are unrelated to the practice of law and which have a disproportionate adverse impact upon minority applicants.

*Id.*

23. *Id.* at 11; see also SWAMINATHAN & ROGERS, *supra* note 20, at 30. The report recommended that “[t]he Florida Board of Bar Examiners obtain racial/ethnic information on candidates for the Bar Exam so that performance levels of majority and minority candidates can be monitored.” SWAMINATHAN & ROGERS, *supra* note 20, at 30.

24. Henry Ramsey Jr., *Law Graduates, Law Schools and Bar Passage Rates*, B. EXAMINER, Feb. 1991, at 21, 21. Therein Dean Ramsey notes that on the basis of the LSAC study,

[f]or the first time, an accurate determination of the bar passage rate among various discrete groups; e.g., men and women, minorities, graduates of large and small law schools,

cerned about the legal profession's comparatively few minority members,<sup>25</sup> many major national legal organizations have endorsed this laudable effort.<sup>26</sup> Despite the good faith efforts of many, there has not been any significant change in the numbers of minority lawyers since Secretary of Labor Willard Wirtz more than thirty years ago described "the legal profession as the worst segregated group in the whole economy."<sup>27</sup>

The LSAC bar passage study is an excellent first step in identifying whether there are components of the bar examination "which are unrelated to the practice of law and which have a disproportionate adverse impact upon minority applicants."<sup>28</sup>

However, the value of the LSAC study is limited for a variety of reasons. The study is a single study covering only three classes of graduates from ABA-approved law schools during the years 1988, 1989, and 1991.<sup>29</sup> Moreover, the race, ethnicity, and gender data of bar applicants in the study will not be collected from the boards of bar examiners but rather

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members of low and middle income families, graduates of private and public law schools, and the like, can be achieved over several administrations of the bar examination and in all states.

*Id.*

25. See, e.g., Anne R. Carey & Suzy Parker, *Blacks in the Legal Profession*, USA TODAY, Feb. 20, 1995, at A1. In 1983, there were 651,000 lawyers and judges in America, of whom 17,577, or 2.7%, were black. *Id.* Ten years later in 1993, there were 815,000 lawyers and judges in America, of whom 22,820, or 2.8%, were black. *Id.* This represents an increase of just 0.1% in 10 years!

The lack of any significant change in minority representation in the legal profession is highlighted by the statement of the great Charles Hamilton Houston, the first general counsel of what later became the independent NAACP Legal Defense Fund: "According to the 1930 census there were 1230 Negro lawyers in the United States in 1930 as against 159,735 white lawyers." Charles H. Houston, *The Need for Negro Lawyers*, 4 J. OF NEGRO EDUC. 49, 49 (1935). This means that from 1934 to 1993, a period of almost 60 years, the percentage of black lawyers increased from 0.7% to 2.8%, or by only 2.1%. The lion's share of this increase occurred during the period from 1970 to the present and was spurred in large part by the advent of affirmative action. See SEGAL, *supra* note 7, at 5-9. The dismantling of affirmative action, a current popular political goal, portends a deceleration of the meager gains in representative proportions which black lawyers have achieved.

26. The *Bar Passage Rates* study

has been endorsed by the Conference of Chief Justices, National Conference of Bar Examiners, American Bar Association Section of Legal Education and Admissions to the Bar, National Asian Pacific American Bar Association, and the Council on Legal Education Opportunity. [Moreover boards of law examiners in Alabama, Arizona, California, Colorado, Florida, Maine, Maryland, Mississippi, New York, North Carolina, Texas and Wisconsin have already agreed to fully cooperate with the study.

Ramsey, *supra* note 24, at 21-22.

27. SEGAL, *supra* note 7, at 24 (citations omitted); see, e.g., William L. Martin, *The Women and Minorities Study: The Results Are In*, ARKANSAS LAWYER, Apr. 1992, at 51, 51 (observing, from his study results, that "[e]ighty percent of the white attorneys work in segregated offices"). Thus, as of 1992, 80% of white lawyers in Arkansas worked in offices that had no minority attorneys at all. Martin, *supra*, at 51.

28. REPORT ON ADMISSION TO THE BAR IN NEW YORK, *supra* note 6, at 14.

29. Ramsey, *supra* note 24, at 21.

will be obtained directly either from the law students themselves or from the participating law schools.<sup>30</sup>

For these reasons, this study does not address the real need for bar performance data. An effective determination of the impact of race, ethnicity, and gender on bar examination performance requires a systematic and continuous collection of such data across administrations and jurisdictions.<sup>31</sup>

Moreover, the task of collecting such data should be the responsibility of each state's board of bar examiners, not the LSAC. The former are charged by their respective state legislatures with preparing, monitoring, and administering a fair and impartial examination and, at the very least, should be routinely required to provide some modest amount of statistical evidence to prove that they are acting impartially and lawfully. Ideally, bar examiners' efforts in this regard should occasionally be subject to independent audits evaluating their performance. However, it should not be left to an outside agency to compile the data essential to judge the performance of the various state boards of bar examiners.<sup>32</sup> This is true because,

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30. *Id.* at 23. Although well-intentioned and an extremely valuable contribution to the extant knowledge in this area, the LSAC study, even when completed, will be of limited value. This is because its statistical base consists of only three classes of graduates and thereby is limited in terms of the range of its informational base. *Id.* This is true even though the retrospective module will focus on the graduates of the classes of 1988 and 1989, while the prospective module will focus on those students who entered law school in the fall of 1991 and thus were members of the graduating class of 1994. *Id.* This limited statistical base is further exacerbated by the fact that the study will terminate with the class of 1994 and, at least presently, there are no plans to continue monitoring future classes in order to measure the effect of reforms currently being discussed by members of the bench, bar, and academia. *Id.* By its own terms, the study is designed to provide information to "assist students, educators, bar examiners and administrators, and others to better understand the national bar passage situation, and, as a result, to develop methods for increasing the success rates of students—particularly minority students—in law school and on the bar examination." *Id.* The study will clearly make a significant contribution to the information available to all of these identified groups, but without further and continuous monitoring, there is no way to determine whether the anticipated new "methods for increasing the success rates of students—particularly minority students—in law school and on the bar examination" will bear any tangible fruit in terms of increases in law school performance or bar exam passage rates. *Id.*

31. See REPORT ON ADMISSION TO THE BAR IN NEW YORK, *supra* note 6, at 14. The authors conclude:

Collection of such data on a long-term, continuous basis is absolutely crucial to the process of evaluation and reform of the examination and the admissions process. Only by collecting such data across administrations of the examination can the impact of reform upon minority pass rates be monitored, and further reform effected.

That an inadequate examination should prevent the entry of capable minority students into a profession which desperately needs their talents—and that the Board of Law Examiners has failed to compile the information necessary to confront these problems effectively—impresses this Committee as a shortcoming of significant proportions.

*Id.* at 14-15.

32. Currently most states *do not* collect data on the race or ethnicity of their bar exam applicants. See Menocal, *supra* note 3, at 3 ("[T]he overwhelming majority of all states have avoided the collection of race-ethnic data. Frankly, some jurisdictions are unwilling to collect

as a matter of simple efficiency, the boards of bar examiners are in the best position to acquire and maintain data on the race, gender, and ethnicity of their bar applicants and their exam results. It seems quite illogical to ask such boards not to discriminate among its bar applicants on the basis of race, gender, and ethnicity but then to fail to require them to obtain and maintain sufficient data to determine whether they are fulfilling that mandate.

A revealing analogy can be found in the area of racially discriminatory lending practices by banks. Racial discrimination in lending is explicitly prohibited by federal law.<sup>33</sup> Moreover, in order to monitor the financial industry's compliance with these statutory mandates, lenders must collect, maintain, and disclose the number of mortgage applications they receive and their lending decisions with respect to each one, on the basis of the census tract, income, race, and sex of the applicant.<sup>34</sup>

On the basis of the data which the law requires lenders to collect and maintain on the race and results of mortgage applicants, startling empirical findings showed that blacks with the same income as whites were

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[such] information."); see also REPORT ON ADMISSION TO THE BAR IN NEW YORK, *supra* note 6, at 11; MASSACHUSETTS BAR REPORT, *supra* note 11, at 7-8.

Regarding failure of the New York State Board of Law Examiners to collect racial or ethnic data on its bar applicants, the authors of the New York Bar report observed, "The Law Examiners, however, to avoid the appearance of discrimination, have purposefully refused to compile these statistics." REPORT ON ADMISSION TO THE BAR IN NEW YORK, *supra* note 6, at 11. In the Massachusetts report, the authors noted that they had been unable to quantify the exact number of minority applicants who took and failed the Massachusetts Bar Exam because "[t]he Committee discovered . . . that the bar examiners do not collect information as to race or ethnic background. . . . The law schools were reluctant to provide any information because of privacy concerns for the graduates." MASSACHUSETTS BAR REPORT, *supra* note 11, at 7-8.

33. There are three principal federal statutes in this area:

(1) The Fair Housing Act, Pub. L. No. 90-284, 82 Stat. 81 (1968) (codified as amended at 42 U.S.C. § 3601 (1988 & Supp. V 1993)) (prohibiting discrimination in the sale or rental of residential housing on the basis of race, color, religion, sex, handicap, familial status, or national origin).

(2) The Equal Credit Opportunity Act, Pub. L. No. 93-495, 88 Stat. 1521 (1974) (codified as amended at 15 U.S.C. §§ 1691-1691f (1994)). Although this Act was originally passed to address the problem of discriminatory lending against women, it was expanded in 1976 also to prohibit discrimination based on race, color, religion, or national origin. See Equal Credit Opportunity Act Amendments of 1976, Pub. L. No. 94-239, Sec. 32, 90 Stat. 251 (1976) (codified at 15 U.S.C. § 1691 (1994)).

(3) The Community Reinvestment Act, Pub. L. No. 95-128, 91 Stat. 1147 (1977) (codified at 12 U.S.C. §§ 2901-07 (1994) (requiring regulated federal institutions to serve the convenience and needs of their communities for deposit and credit; inter alia, regulated institutions must meet the statute's standards in order to receive permission to buy another bank or to open an additional branch facility).

34. See Pub. L. No. 94-200, 89 Stat. 1125 (1975) (codified as amended at 12 U.S.C. §§ 2809-10 (1994)); Financial Institutions Reform, Recovery and Enforcement Act of 1989, Pub. L. No. 101-73, Sec. 1211, 103 Stat. 183, 524-26 (1989) (codified as amended in scattered sections of 12 U.S.C. (1994)).

more than twice as likely to be denied approval for home mortgages.<sup>35</sup> Similarly, a now famous study conducted by the Federal Reserve Bank of Boston revealed that, even after correcting for all relevant differences among applicants, blacks were still turned down almost sixty percent more often than similarly situated qualified whites.<sup>36</sup>

This empirical evidence of such stark racial disparities in mortgage lending has led many to view the numbers as evidence of clearly illegal racial discrimination by banks.<sup>37</sup> Others disagree regarding the meaning and significance of the numbers.<sup>38</sup> However, it is clear that the entire current debate over the possibility of lending discrimination would be significantly less focused without the supporting data that lenders were required to collect, maintain, and disclose in order to monitor their compliance with the federal mandate not to discriminate.

That statutory scheme appreciated that the lenders themselves are in the best position to collect and disclose the data on their mortgage applicants. Moreover, without such comprehensive and continuous collection of information, it would be impossible to determine whether the banks are in fact discriminating along racial lines. Similarly, the various boards of bar examiners are in the best position to collect and disclose the data on their bar exam applicants; without such comprehensive and continuous collection of information, any effort to determine definitively whether the boards are discriminating along racial, ethnic, or gender lines will be significantly and unnecessarily burdened.

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35. See Glenn B. Canner & Delores S. Smith, *Expanded HMDA Data on Residential Lending: One Year Later*, 78 FED. RESERVE BULL. 801 (1992).

36. See ALICIA H. MUNNELL ET AL., *MORTGAGE LENDING IN BOSTON: INTERPRETING THE HMDA DATA 2* (Federal Reserve Bank of Boston, Working Paper No. 92-7, 1992).

37. See, e.g., Anthony D. Taibi, *Banking, Finance, and Community Economic Empowerment: Structural Economic Theory, Procedural Civil Rights, and Substantive Racial Justice*, 107 HARV. L. REV. 1463 (1994); see also Peter P. Swire, *The Persistent Problem of Lending Discrimination: A Law and Economics Analysis*, 73 TEX. L. REV. 787 (1995). Although he acknowledges that he shares the economists' view that government regulation of lending discrimination is unnecessary because the market will deter, correct, and punish lenders who voluntarily forego profits or income in order to indulge their prejudices, Swire does observe that "[t]he Boston Fed Study, based on by far the best data yet available, was hailed by true believers and others as definite proof of continuing discrimination in mortgage lending." Swire, *supra*, at 808 & n.120 (citing Paul Wiseman, *Bankers Grumpy Despite Strong Profits*, USA TODAY, Oct. 19, 1992, at B6) (quoting Federal Reserve Governor John LaWare, who stated that the study provided "conclusive evidence of de facto discrimination").

38. See, e.g., Swire, *supra* note 37, at 798 (citing Gary S. Becker, *The Evidence Against Banks Doesn't Prove Bias*, BUS. WEEK, Apr. 19, 1993, at 18; Stan Liebowitz, *A Study That Deserves No Credit*, WALL. ST. J., Sept. 1, 1993, at A14).

### III. JUDICIAL CHALLENGES TO THE BAR EXAMINATION ON THE BASIS OF UNLAWFUL RACIAL DISCRIMINATION

#### A. *The Judicial Record*

It is well-settled that states have a legitimate interest in regulating the admission of attorneys to their respective bars by imposing a standard of licensing that ensures competence and thus protects the public.<sup>39</sup> As the United States Supreme Court noted in the oft-cited case of *Schwartz v. Board of Bar Examiners*:<sup>40</sup>

A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law. . . . Even in applying permissible standards, officers of a State cannot exclude an applicant when there is no basis for their finding that he fails to meet these standards or when their action is invidiously discriminatory.<sup>41</sup>

#### 1. *Tyler v. Vickery*

*Tyler v. Vickery*<sup>42</sup> is one of the earliest, and most frequently cited, judicial challenges to the bar examination. *Tyler* involved a consolidation of a number of suits into a class action "on behalf of all black persons who have taken and failed the Georgia Bar Examination and have not been admitted to the practice of law in Georgia, as well as all black persons who will take the examination in the future . . . ."<sup>43</sup> The plaintiffs claimed that the Georgia Bar Examination violated the United States Constitution on both due process and equal protection grounds.<sup>44</sup>

The plaintiffs' constitutional challenges fell into three categories. They alleged that 1) the Georgia Bar Examiners used the Bar Examination to discriminate purposefully against black applicants on the basis of race; 2) the Georgia Bar Examination inherently violated the equal protection clause of the Fourteenth Amendment due to the highly disparate passage

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39. See, e.g., *Schwartz v. Board of Bar Examiners*, 353 U.S. 232 (1957); see also *In re Griffiths*, 413 U.S. 717 (1973); *Martin-Trigona v. Underwood*, 529 F.2d 33 (7th Cir. 1975); *Hawkins v. Moss*, 503 F.2d 1171 (4th Cir. 1974), cert. denied, 420 U.S. 928 (1975).

40. 353 U.S. 232 (1957).

41. *Id.* at 239 (citations omitted).

42. 517 F.2d 1089 (5th Cir. 1975), cert. denied, 426 U.S. 940 (1976). Cases which followed *Tyler* include *Jones v. Board of Comm'rs of the Ala. State Bar*, 737 F.2d 996 (11th Cir. 1984); *Woodard v. Virginia Bd. of Bar Examiners*, 598 F.2d 1345 (4th Cir. 1979); *Parrish v. Board of Comm'rs of the Ala. State Bar*, 533 F.2d 942 (5th Cir. 1976); *Delgado v. McTighe*, 522 F. Supp. 886 (E.D. Pa. 1981); *Newsome v. Dominique*, 455 F. Supp. 1373 (E.D. Mo. 1978); *Pettit v. Gingerich*, 427 F. Supp. 282 (D.Md. 1977).

43. *Tyler*, 517 F.2d at 1092.

44. *Id.*

rates of blacks and whites; and 3) the Georgia Bar Examiners violated the applicants' due process rights by not providing a procedure for review of failing grades.<sup>45</sup> The federal district court granted summary judgment in favor of the Georgia Board of Bar Examiners on all three of the plaintiffs' claims.<sup>46</sup> The Fifth Circuit Court of Appeals affirmed the district court's grant.<sup>47</sup> However, in a separate opinion, Judge Adams provided a spirited, eloquent, and well-reasoned dissent.<sup>48</sup>

The uncontroverted facts in *Tyler* demonstrated that, for a number of years, black bar applicants had failed the Georgia Bar Examination in significantly disproportionate numbers to their white counterparts.<sup>49</sup> As even the circuit court majority conceded, disproportionality "reached a nadir in July, 1972, when each of the 40 black applicants taking the examination failed. On the February and July, 1973, examinations, slightly more than one-half of the black applicants were unsuccessful, as compared to a failure rate of roughly one-fourth to one-third among white examinees."<sup>50</sup>

Notwithstanding these strikingly disparate bar results, the court held that the appellants had failed to establish the requisite showing of intentional discrimination by the Georgia Bar Examiners.<sup>51</sup> In so holding, the court reasoned that a mere showing of a discriminatory motive, even if proven, did not rise to the level of a constitutional violation.<sup>52</sup> Rather, in order to prove such a violation, the appellants needed to show such motives coupled with the opportunity to manifest such motives in discriminatory conduct.<sup>53</sup> In short, the Bar Examiners had to be able to identify a particular test as having been authored by a black applicant in order to discriminate intentionally against him.

45. *Id.* at 1093.

46. *Id.* at 1092.

47. *Id.*

48. *Id.* at 1105 (Adams, J., dissenting).

49. *Id.* at 1092.

50. *Id.* It is interesting to note that, although it was not pointed out by the court in *Tyler*, "even blacks graduating from top-ranking 'Ivy League' law schools did not fare well." SEGAL, *supra* note 7, at 11.

All of the white Yale law school graduates who took the Georgia test passed, but the two black Yale graduates failed. All of the white Harvard law school graduates passed and the one black Harvard person failed.

All of the white Columbia law students passed and the three black graduates from Columbia failed.

*Id.* at 11-12 (citation omitted).

Therefore, even those black applicants who had high LSAT scores and LGPAs, as evidenced by their admission to and graduation from a range of Ivy League law schools, and who presumably had received relatively good educational preparation and experience, uniformly failed that administration of the Georgia Bar Examination.

51. *Tyler*, 517 F.2d at 1093.

52. *Id.*

53. *Id.*

The appellants had advanced a novel theory to explain how the examiners could make such a racial identification. They argued that the Bar Examiners could identify black applicants in the grading process by virtue of their use of a Southern *patois* that they referred to as "Black English."<sup>54</sup> However, the court rejected this theory on two grounds. First, the plaintiffs' own expert acknowledged that this dialect was not limited to blacks but was, in fact, characteristic of the Southern dialect generally.<sup>55</sup> Second, the plaintiffs' expert acknowledged that it was quite unlikely that anyone not trained in linguistics would "recognize the use of Black English as a 'black' characteristic, or indeed as anything other than incorrect standard English."<sup>56</sup>

The court also relied on the grading procedure of the Georgia Board of Bar Examiners to decide that the opportunity for racial discrimination was absent. The Board presented evidence that all examination papers were identified and graded anonymously. Throughout the grading process, the identification cards that contained the applicants' names were in the custody of an employee of the Georgia Supreme Court who served as an administrative assistant to the Board.<sup>57</sup> That custodial official, by deposition, swore that examinations were matched with their corresponding identification cards only after the exams were given their final grades.<sup>58</sup> The Fifth Circuit accepted these representations as accurate and held that since the examiners could not discover the race of an applicant, the district court's grant of summary judgment for the Bar Examiners on the appellants' intentional discrimination claim was correct as a matter of law.<sup>59</sup>

The appellants' second constitutional claim alleged that, notwithstanding intent, the Georgia Bar Exam inherently denied them equal protection under the law by disproportionately failing black applicants.<sup>60</sup> As support for this conclusion, the appellants urged the court to apply by analogy the

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54. *Id.* at 1094. In support of this theory, the plaintiffs introduced the deposition testimony of a professional linguist, who held a Ph.D. in the field and had spoken and published widely about Black English, including its history and usage in America. *Id.* The linguist indicated that there was such an English variant, distinct and identifiable, and that under extreme stress, such as a bar exam, an individual who had been raised in this dialect might well revert to it notwithstanding years of formal training in standard English. *Id.*

55. *Id.*

56. *Id.* The black appellants argued that, notwithstanding this acknowledgment by their own expert, the use of Black English in a bar examination essay response could still be the basis for overt discrimination because even if the grader did not recognize it as a racial characteristic, he would still react "negatively because he conceives it to be incorrect." *Id.* Recent studies provide support for the appellants' arguments. See discussion *supra* note 17.

57. *Tyler*, 517 F.2d at 1093.

58. *Id.* at 1093 n.1.

59. *Id.*

60. *Id.* at 1095.

previously-operative standards developed by the Equal Employment Opportunity Commission for employment testing under Title VII.<sup>61</sup>

In 1971, the U.S. Supreme Court had ruled in *Griggs v. Duke Power Co.*<sup>62</sup> that Title VII prohibited the use of any testing process or procedure, regardless of intent or motive, that disproportionately excluded members of a protected minority unless such tests were "demonstrably a reasonable measure of job performance."<sup>63</sup> The circuit court in *Tyler* agreed with the appellants that the Georgia Bar Exam violated the first prong of the *Griggs* Court's interpretation of Title VII because the exam had a disproportionate, adverse impact on black applicants.<sup>64</sup> The court agreed that the Bar Exam also violated the second prong because the examination had never been the subject of a professional validation study.<sup>65</sup>

After concluding its Title VII comparison, the circuit court recognized that "acceptance of appellants' suggested standard of review would inexorably compel the conclusion that the examination is unconstitutional,"<sup>66</sup> but it then avoided this result by holding that Title VII did not apply "by its terms."<sup>67</sup> To support this conclusion, the court rejected appellants' arguments that the Bar Examination was an employment test<sup>68</sup> and found that the Georgia Board of Bar Examiners was "neither an 'employer,' an 'employment agency,' nor a 'labor organization'."<sup>69</sup>

The *Tyler* Court took pains to explain that, although the Georgia Bar Exam had not been professionally validated as Title VII required and although no alternative means of measuring professional competence had

61. *Id.*; see Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. § 2000e (1996). As construed by the then-operative, but now-overturned, case of *Griggs v. Duke Power Co.*, Title VII prohibited the use of any testing process or procedures, regardless of intent or motive, that had the effect of disproportionately excluding members of a protected minority class of persons, unless such tests were "demonstrably a reasonable measure of job performance." 401 U.S. 424, 425 (1971). Under the EEOC guidelines interpreting Title VII, which were in place at the time:

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

29 C.F.R. § 1607.3 (1974).

62. 401 U.S. 424 (1971).

63. *Id.* at 425.

64. *Tyler*, 517 F.2d at 1096.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* The appellants actually posited that the Bar Examination was a type of super-employment test, in that failure resulted not simply in the loss of a specific job, transfer, or promotion, but rather in the inability to practice law anywhere in the entire state. *Id.* Nonetheless, the court was not persuaded. *Id.*

69. *Id.*

been considered, the conclusion did not necessarily follow that "the 'job-relatedness' of an examination has no relevance to its constitutionality."<sup>70</sup> However, the court ultimately decided that it was inappropriate to equate Title VII protections with Fourteenth Amendment equal protection requirements.<sup>71</sup> The court based its decision, in part, on a reading of the case law.<sup>72</sup>

The majority also rejected the appellants' alternative strict scrutiny standard of review. The appellants contended that the significant disparity in bar passage rates between blacks and whites created a classification based on race, for which strict scrutiny review was constitutionally mandated.<sup>73</sup> In rejecting the appellants' theory, the court noted that the clear weight of authority held that "an otherwise legitimate classification does not become . . . 'suspect' simply because greater numbers of a racial minority fall in the group disadvantaged by the classification."<sup>74</sup>

However, the court noted that its conclusion did not mean that "any facially neutral method of classification automatically escapes more than minimal judicial scrutiny."<sup>75</sup> Rather, the court presented examples of situations in which a facially neutral classification might trigger a higher standard of review, including 1) when such a classification is "merely a subterfuge for invidious discrimination,"<sup>76</sup> 2) when such a classification is "discriminatorily applied,"<sup>77</sup> or 3) when "statistical evidence of disparate racial impact alone may establish a prima facie case of racial discrimination."<sup>78</sup> The court held that none of these classifications were applicable to the instant case.<sup>79</sup>

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70. See *id.* at 1099. The court went on to observe, "The hallmark of a rational classification is not merely that it differentiates, but that it does so on a basis having a fair and substantial relationship to the purposes of the classification." *Id.*

71. *Id.* at 1098. In fact, the court referred to its holding in this regard as "our refusal to measure the constitutionality of the Georgia Bar Examination by Title VII standards." *Id.* at 1098-99.

72. See, e.g., *Allen v. City of Mobile*, 466 F.2d 122 (5th Cir. 1972), *cert. denied*, 412 U.S. 909 (1973); *Geduldig v. Aiello*, 417 U.S. 484 (1974); *Communications Workers of Am. v. AT&T*, 513 F.2d 1024 (2d Cir. 1975), *vacated*, 429 U.S. 1033 (1977); *Wetzel v. Liberty Mut. Ins. Co.*, 511 F.2d 199, (3d Cir. 1975), *vacated and remanded*, 424 U.S. 737 (1976); *Gilbert v. General Elec. Co.*, 519 F.2d 661 (4th Cir. 1975), *rev'd*, 429 U.S. 125 (1976).

73. *Tyler*, 517 F.2d at 1099.

74. *Id.* (citing *Jefferson v. Hackney*, 406 U.S. 535 (1972); *James v. Valtierra*, 402 U.S. 137 (1971); comparing *Geduldig v. Aiello*, 417 U.S. 484 (1974)).

75. *Id.* at 1100.

76. *Id.*

77. *Id.*

78. *Id.* The court noted that when this showing has been met, it shifts the burden of proof to the defendant to demonstrate that, in fact, "invidious discrimination was not among the reasons for his actions." *Id.* However, the court concluded that it did not have to decide whether this standard applied in the instant case because of its conclusion that the appellee-examiners had carried their burden of demonstrating the absence of any genuine issue of material fact regarding intentional racial discrimination. *Id.*

79. *Id.*

The court then applied the rational relationship test to find the Georgia Bar Examination constitutional.<sup>80</sup> In reaching this conclusion, the court noted that an examination should meet two criteria to be rationally supportable: it should “be designed for the purpose for which it is being used,” and it should “utilize a cutoff score related to the quality the examination purports to measure.”<sup>81</sup>

The *Tyler* court held that the Georgia Bar Examination satisfied both prongs of this two-part rationality test.<sup>82</sup> The examination satisfied the first prong because both the essay and the multistate portions of the exam were “designed solely to assess the legal competence of bar examinees.”<sup>83</sup> The examination satisfied the second standard because, “while the minimum passing score of 70 has no significance standing alone, it represents the examiners’ considered judgments as to ‘minimal competence required to practice law’ . . . .”<sup>84</sup> The court reasoned that because the operative standard of review was one of rational relationship rather than strict scrutiny, the state was not required to show that it had no other less restrictive means of testing applicants but was required to show only that the means it did employ were reasonable.<sup>85</sup>

Finally, the appellants argued that they were denied due process of law by the Bar Examiners’ failure to provide a procedure for review of a failing exam should an examinee request it.<sup>86</sup> The appeals court agreed with the district court’s holding that such a review process was not constitutionally required because the failed examinee had the absolute and unlimited right to take the examination again at its next administration.<sup>87</sup> Further, the court found that the administrative burdens of a review outweighed any possible benefits.<sup>88</sup> In the court’s view, the requested reviews would be time-consuming, expensive, and burdensome to the Bar Exam-

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80. *Id.* at 1101.

81. *Id.* at 1101-02 (citing *Armstead v. Starkville Mun. Separate Sch. Dist.*, 461 F.2d 276 (5th Cir. 1972)) (holding that the Graduate Record Examination was an unconstitutional method for selecting primary and secondary school teachers since it failed to meet the standard of a rationally supportable examination established therein).

82. *Id.* at 1102.

83. *Id.*

84. *Id.*

85. *Id.* The court also rejected appellants’ argument that the Board of Examiners should be required to use model answers and predetermined standards in grading, since these were merely suggestions for improvement and did not go to the question of whether the examination was reasonable. *Id.* Similarly, the court rejected appellants’ arguments that the Board of Examiners was acting unreasonably in at least two other respects: 1) because its practice of determining which failing exams were to be reviewed and regraded was based not on a definitive numerical cutoff, but rather on the exercise of an examiner’s own discretion, and 2) because it employed the practice of comparing examination results with the law school records of the examinees. *Id.* at 1103.

86. *Id.*

87. *Id.*

88. *Id.* at 1103-04.

iners and unlikely to be “significantly more effective in exposing grading errors than would reexamination.”<sup>89</sup>

The decision in *Tyler* is interesting and illustrative. Notwithstanding the length and detail of the opinion, the majority’s decision appears hostile in its tone towards the appellants’ claims. For example, the court described the appellants’ arguments as “speculative inferences,”<sup>90</sup> which are not to be “treated indulgently”;<sup>91</sup> they were “overly simplistic,”<sup>92</sup> “naked statistical argument[s],”<sup>93</sup> which are “specious,”<sup>94</sup> “devoid of merit,”<sup>95</sup> and “beyond question”<sup>96</sup>—all descriptions making it seem perfectly reasonable that the court should “flatly reject [the] appellants’ contentions.”<sup>97</sup> Furthermore, the court used all of this language in the context of affirming the district court’s granting of summary judgment against the appellants on issues involving motive and intent—a context in which the majority acknowledged that the Supreme Court had admonished that “‘summary procedures should be used sparingly.’”<sup>98</sup> The *Tyler* dissent drove home this point: “[W]here one of the key factors in determining illegality will be the evaluation of motive, it seems particularly inappropriate to employ the device of summary judgment.”<sup>99</sup>

Because the district court granted summary judgment in favor of the Bar Examiners, the appellants never had an opportunity to prove their case at trial. As Judge Adams emphasized in his dissent in *Tyler*, “[T]he majority decision rests upon a tenuous resolution of pivotal factual issues in a troublesome area of the law where residual doubts . . . should be resolved in favor of the plaintiffs.”<sup>100</sup> On the issue of purposeful discrimination, the dissent agreed with the majority that where the state is administering a policy which is neutral on its face, unequal application in and of

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89. *Id.* at 1104. The court noted in this regard that, even if it were to make the “generous assumption that one out of every hundred applicants who take the examination fail[s] when they should have passed due to arbitrary grading, the probability that the same individual would be the victim of error after two reexaminations is literally one in a million.” *Id.* (citation omitted). The court was also impressed with the fact that the hearing process itself could be susceptible to error. *See id.* Accordingly, on balance they saw little advantage to providing such a review and certainly no constitutional error in not providing one. *See id.* at 1104-05.

90. *Id.* at 1095.

91. *Id.*

92. *Id.* at 1097.

93. *Id.* at 1099 (citation omitted).

94. *Id.* at 1101.

95. *Id.*

96. *Id.* at 1102 (quoting an unreported opinion of the court granting summary judgment in one of the consolidated actions comprising the appeal at issue).

97. *Id.* at 1103.

98. *Id.* at 1093 (quoting *Poller v. Columbia Broadcasting Sys., Inc.*, 368 U.S. 464, 473 (1962)).

99. *Id.* at 1108. Interestingly, the dissent also cited *Poller*, as had the majority, to support this proposition.

100. *Id.* at 1105.

itself is not a violation of the equal protection guarantee.<sup>101</sup> However, the dissent did observe that such purposeful discrimination “may be evidenced by a systematic, long-continued pattern of unequal results.”<sup>102</sup>

The dissent suggested that insidious forces were at work beneath the face of the court’s decision.<sup>103</sup> Judge Adams observed that in this case, a clear, historical pattern of racial disparity in the bar passage rate did exist. For the years at issue in the case, 1972 and 1973, 100% of the black applicants who took the Bar Exam failed the first administration.<sup>104</sup> In the face of this evidence, Judge Adams concluded:

A colorable case of purposeful racial discrimination is set forth where sustained de facto discrimination is shown together with the absence of an investigation, or indeed any effort, by the administrators of the state program in question to ascertain whether the seemingly purposeful discrimination is intentional in fact or is explainable by the circumstances. This is so because a presumption of racial inferiority is simply not permissible.<sup>105</sup>

The dissent quite correctly observed that, given Georgia’s poor history of race relations, it was extremely curious that when faced with a 100 percent failure rate of black applicants, six of whom had been graduated from the top law schools in America, the state made no effort to inquire whether the Bar Examiners had unlawfully discriminated against these applicants.<sup>106</sup> It is difficult to understand why a 100% bar failure rate for the state’s black bar applicants did not lead to some sort of inquiry by the state’s Board of Bar Examiners. Such dismal unanimity would seem to suggest that something is terribly wrong somewhere. It therefore follows logically that, on at least some level, the Georgia State Bar Examiners were not alarmed by such results and did not find them sufficiently at odds with their expectations for the intellectual performance of their black applicants to warrant either investigation or inquiry.<sup>107</sup> As the dissent ob-

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101. *Id.* at 1106.

102. *Id.*

103. See *infra* note 108 regarding the impermissibility of presumptions of racial inferiority.

104. *Tyler*, 517 F.2d at 1105. This applicant pool consisted, in part, of at least six blacks who were recent graduates of three of the finest law schools in the country, and yet each of them failed this Bar Examination. See *supra* note 50.

105. *Tyler*, 517 F.2d at 1106 (citations omitted).

106. *Id.* There is no record of either an official inquiry or investigation by the Georgia State Board of Bar Examiners as a consequence of this 100% bar failure rate of all 40 black applicants. This is particularly striking in light of the fact that among that group were six black applicants who had been graduated from Harvard, Yale, and Columbia law schools. See SEGAL, *supra* note 7, at 11-12. The dissent noted, in this regard, that there was “the absence of an investigation, or indeed any effort, by the administrators of the state program in question to ascertain whether the seemingly purposeful discrimination is intentional in fact or is explainable by the circumstances.” *Tyler*, 517 F.2d at 1106.

107. Perhaps there are more benign explanations for the Board of Bar Examiners’ nonreaction to such unanimous failure, but I am at a loss to think of one. As the dissent in *Tyler* pointed out, there was, and to a large extent still is today, a widespread presumption, particu-

served, this attitude was grounded in the presumption of the inferiority of blacks as a race, an attitude beyond the pale of acceptable state action.<sup>108</sup> The dissent argued its position “based in large measure on the nature of the uncontradicted facts which plaintiffs have advanced to establish a case of racial discrimination violative of the equal protection clause of the fourteenth amendment.”<sup>109</sup>

In response to the majority’s finding that the Bar Examiners would have difficulty identifying applicants by race, the dissent insightfully observed, “[T]he difficulty of proof does not eliminate its possibility. Surely such difficulty, without more, should not bar, in the context of this case, affording the plaintiffs the opportunity of offering any such evidence at trial.”<sup>110</sup>

The majority seemed too quick to believe the evidence presented by the Board of Bar Examiners. In finding no genuine issue of material fact on the issue of intentional discrimination, the majority relied solely on the deposition of the custodian of the identification records, who stated that detailed procedures were in place to ensure the anonymity of the applicants.<sup>111</sup> Notwithstanding the official written procedures, it is certainly possible that the custodian did not follow those procedures. Cross-examination could have uncovered such information at trial. Yet a trial on the merits was foreclosed by the grant, and subsequent affirmance, of summary judgment in favor of the Bar Examiners.

The majority’s presumption of credibility is also evident in its application of the rational relationship test. In *Armstead v. Starkville Municipal Separate School District*,<sup>112</sup> the Fifth Circuit had developed a two-part test for determining whether an examination was rational.<sup>113</sup> The second prong required that the examination “utilize a cutoff score related to the quality

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larly in states such as Georgia, of the intellectual inferiority of blacks as a race. This presumption strikes me as the most, in fact the only, logical explanation for the Board’s apparently passive reaction to such stark bar results. Although private individuals are free to harbor such racist presumptions about the intellectual capacity of an entire race of people, such an attitude is absolutely unacceptable as a basis for either state action or inaction. Again, as the dissent in *Tyler* pointed out, with respect to state action, “a presumption of racial inferiority is simply not permissible.” *Id.*

108. *Id.* Such presumptions have been a part of our common American heritage since before the founding of the Republic and continue to haunt us to this day. See *infra* part V.B.

109. *Tyler*, 517 F.2d at 1105.

110. *Id.* at 1106.

111. *Id.* at 1093. The Board of Bar Examiners thus denied both that there was any actual racial animus and that, even if there were, there was no opportunity to act upon it since the examiners could not discover an applicant’s race before grading his or her exam. *Id.*

112. 461 F.2d 276 (5th Cir. 1972) (holding that the Graduate Record Examination was an unconstitutional method for selecting primary and secondary school teachers).

113. *Tyler*, 517 F.2d at 1102. The test suggested that a rationally supportable examination should meet two standards: 1) be designed for the purpose for which it is being used, and 2) utilize a cutoff score related to the quality which the examination purports to measure. *Id.*

the examination purports to measure.”<sup>114</sup> The only evidence that the Georgia Bar Exam satisfied this standard was the court’s unsubstantiated conclusion that the cutoff score “represents the examiners’ considered judgments as to ‘minimal competence required to practice law’.”<sup>115</sup> Judge Adams, in dissent, made clear the oddity of the majority’s holding when he wrote:

[T]he selection of cut-off scores, especially when such selection is not subject to review, may be arbitrary. The legality of such decisions may not properly be resolved by mere reference to the good faith judgment of the bar examiners.<sup>116</sup>

Similarly, the majority’s refusal to apply strict scrutiny review in this case was suspect in light of the court’s decision just three years earlier in *Baker v. Columbus Municipal Separate School District*<sup>117</sup> As the dissent pointed out, this same court had held in *Baker* that “ ‘[w]henver the effect of a law or policy (use by school district of a 1,000 cut-off score in the National Teachers Examination as a condition of employment) produces . . . a (significant) racial distortion it is subject to strict scrutiny.’ ”<sup>118</sup> Curiously, in attempting to distinguish *Baker*, the majority argued that the holding therein had been based on “an explicit finding of purposeful racial discrimination.”<sup>119</sup> Yet, in this case, by affirming the grant of summary judgment below, the court foreclosed the appellants from any opportunity to establish such similarly purposeful racial discrimination and justifiably to invoke strict scrutiny analysis at trial.<sup>120</sup>

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114. *Id.*

115. *Id.*

116. *Id.* at 1106. In reaching this conclusion, Judge Adams observed in a footnote that he did not mean “by this statement to impugn the integrity of the examiners. Rather, [he] suggest[ed] only that it is not appropriate to foreclose an attempt by plaintiffs to establish this fact.” *Id.* at 1106 n.7.

117. 462 F.2d 1112 (5th Cir. 1973).

118. *Tyler*, 517 F.2d at 1106 (quoting *Baker*, 462 F.2d at 1114); see generally Beverly M.M. Charles, *First They Came for the Teachers . . . : Competency Testing and the Decertification of Texas Teachers Issued Certificates Valid for Life*, 12 T. MARSHALL L. REV. 1 (1986). But see Michael Rebell, *Disparate Impact of Teacher Competency Testing on Minorities: Don't Blame the Test-Takers—or the Tests*, 4 YALE L. & POL'Y REV. 375 (1986).

119. *Tyler*, 517 F.2d at 1102 n.11. As a consequence of this finding, the court had held that the appropriate standard of judicial review was one of strict scrutiny (requiring a compelling state interest) rather than merely of rational relationship. *Id.*

120. Of course, the majority found that there was no genuine issue of material fact on the issue of purposeful discrimination. *Id.* at 1093. However, in so doing, it relied unreasonably and without further explanation on the good faith word of the Bar Examiners themselves and their agents, without giving the appellants an opportunity to test such testimony and the credibility of the witnesses on cross-examination before a jury. See *supra* notes 57-59 and accompanying text.

## 2. Parrish v. Board of Commissioners of the Alabama State Bar

Ironically, a short time after deciding *Tyler*, the Fifth Circuit reviewed the grant of summary judgment in a similar claim of intentional discrimination, this time brought by a class of black plaintiffs against the Alabama State Bar Examiners. In *Parrish v. Board of Commissioners of the Alabama State Bar*,<sup>121</sup> a class of black bar applicants appealed a grant of summary judgment. At the lower level, the black bar applicants had challenged the constitutionality of the Alabama Bar Examination on two grounds: (1) that the Bar Examiners intentionally discriminated against black applicants by identifying their supposedly anonymous exams and “grading them lower than white applicants who displayed equal proficiency,”<sup>122</sup> and (2) that the examination was invalid under Title VII standards because it was not “sufficiently ‘job-related’ ”<sup>123</sup> and “fail[ed] blacks in disproportionately high numbers compared to whites.”<sup>124</sup> In support of this latter claim, the appellants had presented uncontroverted evidence to the district court that over the last ten administrations of the Bar Examination “the passing rate for blacks had been 32% while it had been 70% for whites.”<sup>125</sup>

On appeal, the plaintiffs argued that summary judgment had been granted despite the fact that they had not yet completed discovery of documents that contained facts essential to opposing the defendants’ motion for summary judgment.<sup>126</sup> Specifically, the plaintiffs sought copies of all answer sheets for the February, 1973 Bar Exam in order to demonstrate that “substantially identical answers were graded discriminatorily on the basis of race.”<sup>127</sup> The Bar Examiners claimed that these documents were neither relevant nor material to the allegations in the complaint and refused to produce them.<sup>128</sup> Relying on its recent *Tyler* holding, the circuit court held that the trial court should have required production of the examination documents requested by the plaintiffs.<sup>129</sup> The court reasoned

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121. 533 F.2d 942 (5th Cir. 1976).

122. *Id.* at 944.

123. *Id.*

124. *Id.*

125. *Id.* In addition, the plaintiffs presented evidence that notwithstanding the fact that blacks comprised over 25 percent of the population in Alabama, the number of black lawyers constituted less than 1% of the state population. *Id.* The plaintiffs argued that this disparity was caused, in part, by the discriminatory and unconstitutional Bar Exam. *Id.*

126. *Id.* at 947.

127. *Id.*

128. *Id.* The plaintiffs filed a motion to compel the production of those documents. However, without ruling on that motion, the trial court entered a summary judgment in favor of the Bar Examiners. The court found no material issue of fact and held that “ ‘under the circumstances . . . the disparity in percentage of failures among blacks as compared to whites has little weight and fails to make out a prima facie case sufficient to realign the burden of proof so as to require the Defendants to establish that the exams are not discriminatory.’ ” *Id.* at 945 (quoting the district court).

129. *Id.* at 948.

that its finding in *Tyler* was premised, in part, on the fact that the plaintiffs had been provided with all of the examination papers, though they had still failed to establish any connection between race and examination results. According to the court, the plaintiffs in this case “lacked ‘the means’ (access to the examination papers) and thus were not saddled with ‘the duty’ to bring the pertinent facts forward”<sup>130</sup> to show a connection between race and examination results.

However, in sharp contrast to its reasoning in *Tyler*, the *Parrish* court held that “we are compelled to recognize that a plaintiff has a right to challenge the sworn affidavits used to support a motion for summary judgment by discovery in order to meet such a motion just as he is entitled to challenge sworn testimony on a trial.”<sup>131</sup>

The plaintiffs in *Tyler* were not afforded such an opportunity to challenge the sworn affidavits of the Bar Examiners and their agents. Rather, the *Tyler* court accepted the Bar Examiners’ representations as truthful, based solely on the court’s belief in the affiants’ good faith.

The *Parrish* plaintiffs’ allegations of intentional discrimination were leveled at Bar Examiners who expressly required that each examination applicant provide a photograph with his or her application.<sup>132</sup> In this context, contrary to *Tyler*, the court stated that “the fact that the defendants required a clearly racially identifiable application form to be filed for the taking of examinations without question put it within the power of the defendants to utilize racial identification as an ingredient in the grading of the examination papers.”<sup>133</sup>

Although the circuit court noted that the state had a compelling interest in identifying its attorneys once they had been admitted to practice, it rejected this justification for requiring a photograph prior to admission.<sup>134</sup> Undisputed testimony revealed that the photographs were, in fact, never used for the purpose of verifying the identity of persons who actually sat for the Bar Examination.<sup>135</sup> Thus, the court found that Alabama’s re-

130. *Id.*

131. *Id.*

132. *Id.* at 949. The Bar Examiners defending this practice claimed that it was crucial to the compelling state interest in identifying attorneys and discouraging persons other than the actual applicants from sitting for the examination. *Id.* (citing the district court opinion).

133. *Id.* (citation omitted).

134. *Id.* at 949-50.

135. *Id.* at 950. “At the April 20 hearing, the appellee secretary of the Alabama Bar Association stipulated that ‘there is no effort by affiant to match the photographs of applicants with the persons actually appearing for the bar examinations, and affiant knows of no one else who attempts to make such a match up.’ ” *Id.* at 950 n.8.

Clearly, this admission suggests that the proffered justification for requiring photographs—of deterring impostors from sitting for the Bar Examination—was, at best, disingenuous, and, at worst, a pretext for purposeful discrimination. The court found that such a practice “[o]bviously . . . makes it easier for those to discriminate who are of a mind to discriminate.” *Id.* (citing *Avery v. Georgia*, 345 U.S. 559, 562 (1953)); see, e.g., *Avery v. Georgia*, 345 U.S. 559 (1953) (involving a jury selection process that identified white jurors on white tickets

quirement of a photograph with each Bar Examination application created an "opportunity for discrimination, which *if coupled with statistics showing a prima facie case of racial discrimination* as was present in the jury selection cases, would deny appellants equal protection of the law."<sup>136</sup>

In *Parrish*, the plaintiffs also argued that statistical evidence showing substantial differences between the bar passage rates of blacks and whites<sup>137</sup> amounted to a constitutional deprivation by requiring blacks to pass a bar examination that had not been validated "in the sense that this term is used under Title VII of the Equal Employment Opportunity Act."<sup>138</sup> The plaintiffs cited the Supreme Court's decision in *Griggs v. Duke Power Co.*<sup>139</sup> in support of their argument.<sup>140</sup> However, between the original disposition of *Parrish* at the trial level and its later consideration on appeal by the Fifth Circuit Court of Appeals, that same court had just recently decided the case of *Tyler v. Vickery*.<sup>141</sup> In *Tyler*, the plaintiffs made the same test validation argument that was presented in *Parrish* and the appellate court rejected it by concluding that the act did not apply to the Georgia Board of Bar Examiners because the scope of the statute was expressly limited to employers, employment agencies, and labor unions,<sup>142</sup> and the Board satisfied none of those jurisdictional categories.

Relying on its decision in *Tyler*, the *Parrish* court rejected the plaintiffs' test validation argument by simply noting that, since it had recently held that Title VII did not apply to the Georgia State Bar Examiners because they were not an employer, they saw no basis for "distinguishing that case from the Alabama case now before us."<sup>143</sup> However, the court did nevertheless reverse and remand the case back to the trial court—but only on the limited issue of allowing the plaintiffs an opportunity to com-

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and black jurors on yellow tickets); *Whitus v. Georgia*, 385 U.S. 545 (1967) (involving a jury selection process that designated blacks with an identifying code letter after their names); *Anderson v. Martin*, 375 U.S. 399 (1964) (involving a voting practice that racially identified a black candidate on the voting slate in the voting booth); *Jones v. Smith*, 420 F.2d 774 (5th Cir. 1969) (involving a jury selection process based on tax records that used different color forms for blacks and whites).

136. *Parrish*, 533 F.2d at 950.

137. *Id.* at 944 ("Statistics produced during the litigation showed, for example, that in the last ten bar examinations the passing rate for blacks had been 32% while it had been 70% for whites.").

138. *Id.* at 949.

139. 401 U.S. 424 (1971).

140. In *Griggs*, the Supreme Court had held that Title VII precluded the use, in the context of employment decisions, of tests or testing procedures that disproportionately excluded minorities, without regard to intent, absent a demonstration that such tests had been validated as demonstrating "a reasonable measure of job performance." *Id.* at 436.

141. 517 F.2d 1089 (5th Cir. 1975).

142. *Id.* at 1096 (citing 42 U.S.C. § 2000e(a)).

143. *Parrish*, 533 F.2d at 949.

plete discovery of relevant documents before the trial court could properly consider the defendant's motion for summary judgment.<sup>144</sup>

### 3. Richardson v. McFadden

The Fourth Circuit addressed the constitutionality of the South Carolina Bar Examination in *Richardson v. McFadden*,<sup>145</sup> a case in which four black applicants who had failed the exam brought suit against the state Bar Examiners on due process and equal protection grounds. The essence of the plaintiffs' claims in the lower court was that "other applicants at other times appeared to have received more favorable treatment in grading than that which was afforded them."<sup>146</sup>

This case was an en banc reconsideration by the Fourth Circuit Court of Appeals of its prior review of the district court's denial of relief to the plaintiff group. The prior panel affirmed the district court's denial of relief to the plaintiff group except for the individual claims of two members, Spain and Kelly. Regarding Spain and Kelly, the Fourth Circuit had previously held that the "Law Examiners had acted arbitrarily and capriciously, and it directed the district court to order them to be certified as having passed the South Carolina Bar."<sup>147</sup> As a threshold matter in its reconsideration, the court noted that its function was not to determine whether the Bar Examiners had made a mistake in individual cases but, rather, to ascertain "if there [had] been a denial of due process or of equal protection . . . [since n]ot every erroneous determination mounts up to a denial of due process or equal protection."<sup>148</sup> The court then found that the appellants Spain and Kelly were not entitled to individual relief.<sup>149</sup>

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144. *Id.* at 950. The documents in question consisted of the examination papers and graders' notes, which the plaintiffs wanted in order to see whether the papers of black and white exam takers with similar answers had, in fact, been graded differently. *Id.* at 947. Although the plaintiffs had moved to compel the production of these documents, the Board resisted and the court entered summary judgment in favor of the Board without ever ruling on the plaintiffs' motion. Thus the court held that it was necessary to remand on at least this issue "in order to permit the plaintiffs to complete their discovery as to matters on which the trial court had not acted prior to its final judgment." *Id.* at 948.

145. 563 F.2d 1130 (4th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978).

146. *Id.* at 1131. Specifically, the evidence showed that plaintiff Spain, a June, 1971 applicant, had an average score of 70.5 and was failed by three examiners. *Id.* However, applicant number 129, a white June, 1970 applicant, received a score of 71.8 and was failed by three examiners but was then passed by the Board and admitted to practice. *Id.* Similarly, plaintiff Kelly, a February, 1971 applicant, received an average score of 69.6 and was failed by three examiners. *Id.* However, applicant number 10, a white February, 1971 applicant, received a score of 69.3 and was failed by two examiners but was then passed by the Board and admitted to practice. *Id.*

147. *Id.*

148. *Id.* (citing *Bishop v. Wood*, 426 U.S. 341 (1976), *overruled as stated in Nichols v. City of Jackson*, 848 F. Supp. 718 (S.D. Miss. 1994)).

149. *Id.* Additionally, the Fourth Circuit was concerned about whether the district court had even possessed the required subject matter jurisdiction to review the denial of admission of an individual to the state bar. *Id.* However, the majority of the court found it unnecessary to

In rejecting their claims, the court found that “of the aggregate 828 examinations given during the eight times that the bar examination was administered over a four-year period, only these two [plaintiffs’] examples of alleged discrimination were proved.”<sup>150</sup> On this record, the court concluded that the plaintiffs had failed to establish “the constitutional discrimination requisite to the granting of individual relief.”<sup>151</sup> Having determined that there had been no constitutionally protected denial of due process or equal protection, the court of appeals held that Spain and Kelly were not entitled to individual relief.

#### 4. *Pettit v. Gingerich*

In *Pettit v. Gingerich*,<sup>152</sup> a case strikingly similar to *Tyler*, a class of black plaintiffs brought suit claiming that the Maryland State Bar Examination was violative of their Fourteenth Amendment equal protection guarantee. The district court granted summary judgment for the Bar Examiners.<sup>153</sup>

The plaintiffs claimed that the Bar Examiners’ intentional discrimination was evidenced by the examiners’ ability to determine the race of the applicants before the grading process and the disparity in passage rates between black and white applicants.<sup>154</sup> However, relying on *Tyler*’s reasoning, the

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resolve this issue because they agreed that, even if the district court had possessed the subject matter jurisdiction, there was not sufficient proof to entitle the plaintiffs to individual relief in any case. *Id.* In fact, the court was divided on this question. Judge Hall wrote a separate, concurring opinion in which he stated that, while he agreed with the majority’s holding on the merits, he was convinced that the district court did not, in fact, have the subject matter jurisdiction to review questions regarding the admission of individuals to the state bar. *Id.* at 1132. Judge Hall concluded that such disappointed individuals’ proper recourse was to the state supreme court and then only to the United States Supreme Court. *Id.* at 1133.

150. *Id.* at 1132. No doubt, the court was also not impressed by the fact that both Spain and Kelley continued to fail on subsequent reexaminations. *See id.*

151. *Id.* at 1131.

152. 427 F. Supp. 282 (D. Md. 1977), *aff’d sub nom.* *Pettit v. Ginerich*, 582 F.2d 869 (4th Cir. 1978).

153. *Id.* at 294.

154. *Id.* at 290-91. Because the state did not record racial data on its bar applicants or require photographs during the years in question, plaintiffs’ evidence for the existence of a racial disparity was based on information that they derived through an informal monitoring of the exam by black candidates. *Id.* at 290 n.4. That information suggested that between 1962 and 1972, the passage rate of whites was approximately 50%, while that of blacks was 6%. *Id.* Further, the plaintiffs alleged that for 10 of the 11 examination administrations between 1962 and 1973, approximately 50% of whites passed, while only 12% of blacks passed. *Id.* Lastly, the plaintiffs alleged that between 1962 and 1972, approximately 70% of whites eventually passed the exam after successive reexaminations, while only 20% of blacks eventually passed. *Id.*

In addition, one failed black bar applicant, Charles Marshall, testified by affidavit that at a post examination meeting between himself and one of the Bar Examiners, he discovered that all of his examination books were marked with a small “c”. *Id.* at 291 n.5. Plaintiffs claimed that such markings suggested that the examination books of black applicants were marked and identified as belonging to a “colored” test taker before they were graded, *id.*, like the different

court held that the issue of whether there had been intentional discrimination was “conclusively disposed of” in the negative,<sup>155</sup> since it found no genuine issue of material fact on the issue of evidence of intentional discrimination.<sup>156</sup> In making such a finding, the court relied on the Maryland State Bar Examiners’ sworn affidavits, in which they stated that they did not and could not discriminate.<sup>157</sup>

Regarding the *Pettit* plaintiffs’ claims of inherent discrimination in the Bar Exam, the court held that, based on *Tyler* and its progeny, “It is well settled that the appropriate standard of review is whether the Maryland Bar examination bears a rational relationship to the state’s admittedly valid interests in professional licensure.”<sup>158</sup> Moreover, the court observed that the disparate racial impact of the Bar Examination by itself is not

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color forms used to distinguish the black plaintiffs in the jury selection cases. *See supra* note 134. When Marshall asked the Board member about the letter on his examination books, he was told that it represented an internal administrative code. 427 F. Supp. at 291 n.5. Additionally, the *Pettit* plaintiffs argued, as the *Tyler* plaintiffs had done, that the Bar Examiners could also identify the examination books of black applicants by their black writing style, also known as Black English. *Id.* at 291.

155. *Id.* at 291. The sole basis for this conclusive disposition of the plaintiffs’ claim of intentional discrimination was the court’s reliance on the deposition of Board Chairman Gingerich in which he represented that, based on their established procedures, the Board did not have the opportunity to discriminate because it could not tell the race of any individual bar applicant from that person’s exam materials, seating charts, etc. *See id.* Regarding the affidavit testimony of the failed black applicant Marshall, who discovered that his examination books had been marked with a small letter “c,” the court stated, “Apparently, plaintiffs wish this court to construe the marking as meaning colored.” *Id.* However, without engaging in an analytical process, the court dismissed the possibility that such coding could exist, based on a defense affidavit regarding the proctors’ practice during the examination of checking each test taker’s name and seat number in order to check attendance. *Id.* at 292 n.6. Relying on that affidavit, the court concluded that “[t]here is nothing in the record to suggest, however, that the checking process has been used to gather racial information or that even if the process were so used, that the Board had access to the data.” *Id.* at 291 n.5. Just as had been done in the *Tyler* case, the *Pettit* court relied presumptively on the statement of the Board members in their affidavits that they did not, and could not, know the race of any individual test taker during the grading process. The court’s faith in the word of the Board members was so strong that it concluded that the “stringent procedures adopted by the Board . . . conclusively insure the anonymity of Bar examination candidates and concomitantly, the impossibility of discrimination.” *Id.* at 292 (emphasis added). However, there was no evidence either requested or offered to determine the existence or purpose of an alleged internal Board administrative procedure that resulted in a small “c” being placed on all of Marshall’s exam books. Moreover, due to the summary process disposition of this matter, the appellants were not afforded an opportunity to test the credibility of the testimony of the Bar Examiners on cross-examination before a jury.

156. *Id.* at 292.

157. *Id.* at 291-92.

158. *Id.* at 292-93. (citing *Schware v. Board of Bar Examiners*, 353 U.S. 232, 239 (1957); *Tyler v. Vickery*, 517 F.2d 1089, 1099-1101 (5th Cir. 1975), *cert. denied*, 426 U.S. 940 (1976); *Whitfield v. Illinois Bd. of Law Examiners*, 504 F.2d 474, 476 n.5 (7th Cir. 1974); *Feldman v. State Bd. of Law Examiners*, 438 F.2d 699, 705 (8th Cir. 1971); *Chaney v. State Bar of Cal.*, 386 F.2d 962, 964-65 (9th Cir. 1967), *cert. denied*, 390 U.S. 1011, *reh’g denied*, 391 U.S. 929 (1968); *Lewis v. Hartsock*, No. 73-16 at 15-16 (S.D. Ohio, March 9, 1976); *Shenfield v. Prather*, 387 F. Supp. 676, 686 (N.D. Miss. 1974)).

enough to "evidence a suspect racial classification and thereby trigger a strict scrutiny analysis."<sup>159</sup> Lastly, the court rejected the plaintiffs' claim that disparate racial results on the Bar Exam required the use of Title VII standards to resolve their Fourteenth Amendment equal protection claim.<sup>160</sup>

Following *Tyler*, the *Pettit* court found that the Bar Examination at issue satisfied the rational relationship standard. Although the plaintiffs advanced undisputed evidence that Maryland's Bar Examination did not comport with standards for the educational and psychological tests as published by the American Psychological Association,<sup>161</sup> the court, again relying on *Tyler*, found these concerns merely indicative of ways in which the test could be improved and not "suggestions of constitutional infirmity."<sup>162</sup>

In addressing the plaintiffs' allegations that the Bar Examiners' cutoff score of seventy percent was arbitrary, the court again relied on *Tyler* when it held that the cutoff was a "reasonable yardstick by which competence . . . may be determined."<sup>163</sup> However, it did not explain why this cutoff was reasonable other than to note that a number of other states used the same figure.<sup>164</sup>

##### 5. Delgado v. McTighe

While constitutional challenges to state bar examinations have been universally unsuccessful in the South,<sup>165</sup> minority plaintiffs have fared no better in the North. One notable Northern case is *Delgado v. McTighe*.<sup>166</sup> The plaintiffs in *Delgado*, three blacks and two Hispanics, claimed that the Pennsylvania State Bar Examination violated their Fourteenth Amendment equal protection rights.<sup>167</sup> Specifically, the plaintiffs claimed that the Pennsylvania Bar Examiners changed the passing scores on the examination arbitrarily and with the intent to discriminate against minor-

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159. *Id.* at 293. However, the court noted that such disproportionality is not irrelevant; rather, it simply is not "the sole touchstone of an invidious racial discrimination forbidden by the Constitution." *Id.* (citing *McLaughlin v. Florida*, 379 U.S. 184 (1964)).

160. *Id.* (citing *Washington v. Davis*, 426 U.S. 229, 248-52 (1976); *Richardson v. McFadden*, 540 F.2d 744, 748-49 (4th Cir. 1976)).

161. *Id.*

162. *Id.* (citing *Tyler v. Vickery*, 517 F.2d 1089, 1102 (5th Cir. 1975)).

163. *Id.* (quoting *Shenfield v. Prather*, 387 F. Supp. 676, 689 (N.D. Miss. 1974)).

164. *Id.* The court quoted the *Shenfield* court, which noted that a 70% cutoff score had been adopted by 16 of the 24 states whose practices were known to it. *Id.* There was no indication as to the cutoff scores of the other 8 states and what, if any, standards should be employed to distinguish the arbitrary, but popular, standards from the rational and constitutional ones. See *supra* notes 100-10 and accompanying text for discussion of the dissent's view in *Tyler*.

165. *Tyler* and *Parrish* were decided in Georgia and Alabama, respectively; *Richardson* was decided in South Carolina; and *Pettit* was decided in Maryland.

166. 522 F. Supp. 886 (E.D. Pa. 1981).

167. *Id.*

ity applicants<sup>168</sup> and that the Bar Examination was not rationally related to its objectives.<sup>169</sup>

Unlike *Tyler* and its progeny, the *Delgado* plaintiffs' claims were not disposed of summarily by the federal district court. After undertaking a thorough review of the history of black applications to the Pennsylvania bar, the *Delgado* court admitted, "Frankly, some of the statistics are shocking."<sup>170</sup> However, the court also noted the rather significant efforts undertaken over the years by the Philadelphia Bar Association and the law schools of Temple University and the University of Pennsylvania to study this problem and to suggest corrective measures.<sup>171</sup> The court also noted that the instant case appeared "to be the first time that allegations of discrimination by the Board [had] been subjected to judicial scrutiny."<sup>172</sup>

At the conclusion of a fifteen-day trial, however, the court held that the plaintiffs had "failed to carry their burden of proof with respect to each of the two constitutional violations claimed by them."<sup>173</sup> The court first concluded that the Bar Examiners had raised the passing scores "with the sole aim of determining minimum competence."<sup>174</sup> In reaching its finding, the court implicitly accepted the Bar Examiners' argument that although an initial low passing score had been set when the Multistate Bar Examination (MBE) was added to the Pennsylvania Bar Examination in 1972,<sup>175</sup> the intention had been to raise the score after a review of the test results.<sup>176</sup> It rejected the plaintiffs' allegations that the adjustments violated the equal protection clause by disproportionately affecting blacks

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168. *Id.* Scores were raised between February, 1973 and July, 1976. *Id.* at 895.

169. *Id.* at 886.

170. *Id.* For example, the court observed, "For the ten year period from 1933 to 1943, no Black was admitted to the practice of law in Pennsylvania. . . . [F]rom July 1950 to the end of 1952, thirty Black candidates from Philadelphia County took a total of forty-three examinations, some individuals being examined two or more times, and . . . only six of them passed." *Id.* at 886-87.

171. *Id.* at 887. The court noted that as early as 1953, the Chancellor of the Philadelphia Bar Association appointed a Special Committee to "investigate the allegation of discrimination in the grading of bar examinations." *Id.* That committee, known as the "Hastie Committee," was chaired by the late William G. Hastie, a former Judge of the United States Court of Appeals for the Third Circuit. *Id.* & n.1. Subsequently, in 1970, the chancellor appointed Peter G. Liacouras, then Dean of the Temple University Law School, to chair another committee to "investigate the claims of possible discrimination against black law students." *Id.* (citation omitted).

172. *Id.*

173. *Id.*

174. *Id.* at 896.

175. Prior to 1972, the Pennsylvania Bar Exam was entirely essay in format. *Id.* at 888. In February, 1972, the Board added the Multistate Bar Exam (MBE) to its Bar Examination. *Id.*

176. *Id.* at 889-91. In support of its argument, the Board noted that the percentage of passing applicants "was much higher than it had been prior to the introduction of the MBE and significantly higher than that of other states." *Id.* at 891. The Board then contended that the scores were raised from 55 to 60 to remedy this relatively high passage rate. *Id.* at 891-92.

and minorities.<sup>177</sup> Responding to the plaintiffs' argument, the court stated that to establish an equal protection violation it was the settled law that plaintiffs must demonstrate that "actions having racially disproportionate impact were done with a discriminatory intent or purpose."<sup>178</sup> The court then found that it could not "draw an inference of discriminatory intent and purpose on the basis of the plaintiffs' showing of a disproportionate impact"<sup>179</sup> since the Bar Examination was neutral on its face and rationally served the important state interest of protecting the public from incompetent lawyers.<sup>180</sup>

In refusing to find discriminatory intent, the *Delgado* court rejected the plaintiffs' contention that the Bar Examiners had prior knowledge of the adverse effect on minorities of raising the passing score.<sup>181</sup> The court acknowledged that the Board was in possession of an expert's report stating that raising the passing score would have a "profound effect" on the percentage of blacks who passed the Bar Exam.<sup>182</sup> However, it observed that the report also stated, "No matter where the passing score is set, except at the very bottom, more blacks than whites will be failed."<sup>183</sup>

The court did not discuss or analyze whether the discrimination was "a motivating factor"<sup>184</sup> as opposed to the sole motivation. For example, there was no indication that, as a result of the report, the Board analyzed the extent to which the examiners could set a lower passing score that would both ensure competence and have the least racially disproportionate impact on minorities. Indeed, the record demonstrates that once the report indicated that there was not one passing score which had *no* racially disproportionate impact, the Board did not even attempt to discover whether

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177. *Id.* at 890. The court noted, however, that, in setting the passing score for the February, 1972 exam administration, Judge Wilkinson, then Chairman of the Board of Bar Examiners, "believed that the appropriate passing grade for a combined essay-MBE examination should be somewhere between 60 and 70." *Id.* However, when Wilkinson asked the National Conference of Bar Examiners (NCBE) and the Educational Testing Service (ETS), which had prepared the MBE, to advise him regarding the establishment of a passing score, "neither organization was willing to recommend a passing score." *Id.* However, in setting the passing score, the court observed that "the Board has always been concerned exclusively with determining what grade in its view demonstrated minimum competence to practice law." *Id.*

178. *Id.* at 895 (citing *Personnel Adm'r v. Feeny*, 442 U.S. 256 (1979); *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977); *Washington v. Davis*, 426 U.S. 229 (1976)). The court also pointed out that, under the Supreme Court's decision in *Arlington Heights*, the plaintiffs were not required to show that the challenged action was motivated solely by an intent to discriminate, but they did have to show that "a discriminatory purpose has been a motivating factor in the decision." *Id.* (citing *Arlington Heights*, 429 U.S. at 265-66).

179. *Id.* at 896.

180. *Id.*

181. *Id.* at 895.

182. *Id.*

183. *Id.* at 894.

184. *Id.* at 895 (emphasis added).

it could establish a score that minimized that impact without sacrificing competence.<sup>185</sup>

This observation is particularly interesting in light of the plaintiffs' second argument that the Pennsylvania Bar Examination was not rationally related to the Board's goal of ensuring minimum competence.<sup>186</sup> In advancing this argument, the plaintiffs produced a good deal of expert testimony that there were numerous, significant defects in the accuracy and reliability of the Pennsylvania Bar Examination.<sup>187</sup> Moreover, one of the plaintiffs' experts testified that the Pennsylvania Bar Examination was not capable of measuring minimal competence to practice law because the Board had made no determination as to "what constitutes incompetent performance by an attorney."<sup>188</sup>

However, without directly addressing the opinions of the plaintiffs' expert witnesses, the court rejected the plaintiffs' attacks on the Pennsylvania Bar Exam. In doing so, the court held that the appropriate standard of review for judging the constitutionality of a state bar exam under equal protection analysis was whether it bears a "rational relationship" to the goal of ensuring minimum competence.<sup>189</sup>

The court's reasoning on this point was limited to references to *Tyler* and its progeny. The court concluded from those decisions that other courts had found the use of essay and multiple choice tests to be rationally related to testing lawyer competence, even in the absence of model answers, and even where different graders were using different methods of grading essays<sup>190</sup> and grading on a subjective basis.<sup>191</sup>

The court's apparent unwillingness to address evidence in the form of apparently undisputed expert testimony is quite troubling in what otherwise appears to be a thorough and well-reasoned opinion. Once again, this

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185. There is no discussion whatsoever in the case regarding whether such a score level could be established. This absence was no doubt due to the court's observation that the expert had concluded that "[n]o matter where the passing point is set, except at the very bottom, more blacks than whites will be failed." *Id.*

186. *Id.* at 896.

187. *Id.* at 896-97. For example, one expert testified that, in his opinion, "the constitutional law essay questions used in 1972 were not fit for use by law schools and that the model answers to the two constitutional law questions were not correct." *Id.* Another expert testified, "In connection with the MBE, . . . a multiple choice test on legal subjects is of questionable validity because, unlike a mathematics multiple choice test, very few of the wrong answers are patently wrong and many of them are arguably correct." *Id.* at 897.

188. *Id.*

189. *Id.* at 896 (citing *Washington v. Davis*, 426 U.S. 229 (1976); *Schwartz v. Board of Bar Examiners*, 353 U.S. 232 (1957); *Tyler v. Vickery*, 517 F.2d 1089 (5th Cir. 1975), *cert. denied*, 426 U.S. 940 (1976); *Chaney v. State Bar of Cal.*, 386 F.2d 962 (9th Cir. 1967), *cert. denied*, 390 U.S. 1011 (1968); *Pettit v. Gingerich*, 427 F. Supp. 282, *aff'd per curiam*, 582 F.2d 869 (4th Cir. 1978)).

190. *Id.* at 897 (citing *Richardson v. McFadden*, 563 F.2d 744 (4th Cir. 1976); *Tyler v. Vickery*, 517 F.2d 1089 (5th Cir. 1975)).

191. *Id.* (citing *Tyler v. Vickery*, 517 F.2d 1089 (5th Cir. 1975)).

court, as so many others considering this question have done, appears to have relied too heavily on a presumption of credibility and good faith action by the state Bar Examiners. This tendency is particularly surprising in this case because the tone of much of this court's opinion suggests that it genuinely appreciates the significance of the problem of a racially disproportionate bar passage rate. For example, although the court rejects the plaintiffs' claims and denies relief, it nevertheless concludes by saying that it is "convinced . . . that the Blacks, for reasons which have not been presented in this litigation, are failing the Pennsylvania Bar Examination in disproportionate numbers. . . . [T]he record of their disproportionate failures cries out for an in-depth study to ascertain the reason."<sup>192</sup>

### B. Reflections on the Judicial Record

The history of judicial challenges to bar examinations that appear racially discriminatory in their impact has been discouraging, inhospitable, and, to some extent, irrational. The prospect for the future of such legal challenges is bleak.<sup>193</sup>

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192. *Id.* at 898. The court went on to observe that, when such a study is conducted, it "should include a comparative analysis of the answers of those applicants who failed to pass with the answers of those who received a passing grade. It was testified at trial that the applicants' answers were not available to the plaintiffs for the period covered in this litigation because it was the practice of the Board to destroy the applicants' answers after a period of time." *Id.* at 898 n.4.

This suggestion seems to imply that such a comparison might reveal that otherwise comparable answers were given different grades and that the practice of the Board in not maintaining their applicants' answers for a reasonable period of time, especially in light of their awareness of the existence of this problem, was itself suspect and should be corrected. It is also disturbing to note that, at least in the state of Pennsylvania, no such in-depth study was subsequently conducted, despite this court's clarion call for one.

193. In describing the prospects for the future of racial discrimination legal challenges to the bar exam as "bleak," I mean only to suggest that it looks that way to me. The inhospitable attitudinal bent of the judiciary to such challenges and the current national mood against affirmative action and any policies aimed at leveling the playing field and providing opportunities to minorities and women, who have for so long been the victims of officially sanctioned discrimination by the organized bar, leave me with a heavy heart.

The institutional opposition by the bar to minority participation in the law is legion. For example, it was not until 1964 that the Association of American Law Schools' Committee on Racial Discrimination could first state that no member American law school reported denying admission to any applicant on the basis of race or color. SEGAL, *supra* note 7, at 3. Consider, for example, Dr. Segal's moving description of the American Bar Association reaction to the first black attorney admitted to membership:

In 1912, racism within the legal community was so rampant that a storm arose over the "inadvertent" election of the first three black attorneys to the American Bar Association by its Executive Committee. When the Executive Committee discovered that it had unknowingly elected three members "of the colored race," the committee rescinded its prior action, stating that "the settled practice of the Association has been to elect only white men to membership."

*Id.* at 17.

Though the ABA did, ultimately, declare these men to be members, thereafter it passed a resolution requiring all recommendations for membership to be accompanied by the disclosure

### 1. Discouraging History

Courts have ruled in favor of state bar examiners almost without exception.<sup>194</sup> Most often courts dismiss summarily, relying almost exclusively on the good faith word of the bar examiners themselves, thereby denying plaintiffs an opportunity to have a full and fair hearing in court.<sup>195</sup> As the dissent pointed out in *Tyler*, summary judgment is particularly inappropriate in cases where motive is a pivotal issue.

Of course, this is not meant as a blanket indictment of state bar examiners across the nation. But given the stakes involved and the troubled racial history of this country, it seems especially unfair to disallow these plaintiffs a chance to have such claims heard on the merits. The trial setting provides an opportunity to test the credibility of the witnesses by cross-examination before a jury, rather than relying solely on their testimony by affidavit.<sup>196</sup> Such uniform losses by these plaintiffs have no doubt deterred others from even attempting to prosecute what may be meritorious claims.<sup>197</sup>

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of the race and sex of the prospective member. *Id.* That resolution remained in place for more than 30 years and was not rescinded until 1943. *See id.* at 19.

To this day, of the 23,000 black lawyers and judges in America, over 18,000 are members of the National Bar Association (NBA), which is a national black bar association, and have joined either in addition to, or instead of, joining the American Bar Association. Unfortunately, the current growth and vitality of the NBA is a sad and continuing reminder of the continuing need for such an organization. *See* Revius O. Ortique, Jr., *The National Bar Association—Not Just an Option!*, 53 JUDICATURE 390 (1970).

194. *See supra* part III.A.1-5.

195. *See, e.g., supra* notes 57-59 and accompanying text.

196. By rough analogy to a criminal proceeding, these results are similar to the situation where the accused defendant denies by sworn affidavit that he committed the crime charged or even had the opportunity to do it and the case is dismissed for lack of any material issue of fact because the court believes that the accused has sworn his innocence in good faith. Similarly, in the civil context, if corporate officers charged by their shareholders with breaches of their fiduciary duties were to deny by sworn affidavit that they committed the offense or even had the opportunity to do it, the case would be dismissed for lack of any issue of material fact should the court be impressed in a like manner with the defendants' good faith. These examples illustrate both the logical and practical absurdity of allowing defendants to escape liability by summary judgment solely on the strength of their sworn affidavits of innocence and lack of opportunity. Nevertheless, this is precisely what has occurred time and time again when minority plaintiffs challenge bar examiners in court. Clearly, in both the criminal and civil examples cited, the proper response should be, if a prima facie case has been made out, that those accused, notwithstanding their good faith denials, must stand trial and have their credibility tested in the crucible of cross-examination before a jury, which under our system is the best test for determining the truth.

197. It can also be argued that so many failed challenges to bar examinations might have actually discouraged some blacks from even going to law school in the first place, since the prospects of passing the bar appear to be so dim.

## 2. *Inhospitable History*

Historically, courts have been inhospitable to claims of racial discrimination in state bar examinations. As shown previously,<sup>198</sup> the language and tone of many of these courts' opinions has been decidedly condescending, dismissive, insensitive, and hostile to entertaining the plaintiffs' causes of action. The reasons for such an attitude are not altogether clear, although it is not unreasonable to infer that such responses might relate to the fact that the plaintiffs' attacks have been directed at the very system that initially validated the judges themselves. Thus, judges who identify with the current system on some level may perceive an attack on the system as an attack on themselves and their own credibility and worth as products of the current system.<sup>199</sup>

In trying to understand such underlying hostility, it is also important to consider both the geographical and generational context in which these cases arose. Most arose in Southern states, whose history of race relations has been, at best, dreadful, and, at worst, shameful. That sad part of our

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198. See *supra* notes 90-96 and accompanying text.

199. There is no way to determine definitively why some judges appear to be hostile and unreceptive to attacks on the bar examination. There may be a number of different explanations or only one. However, one possible source of such judicial hostility may be a heightened sense of personal identification with the bar examination system by the judges themselves. As successful products of that system, they may feel a personal stake in perpetuating their own personal, as well as the public's, perception of it as a fair meritocracy. However, it might be argued that judges should feel a similar personal allegiance when they preside over cases where attorneys are sued for malpractice. I suggest that the two situations are distinctly different. When plaintiffs challenge the bar examination system, they are claiming that it is a biased process that does not truly measure or reward merit alone. By implication, some may feel that if the system is tainted, to some extent those who bear its imprimatur are similarly tainted. In contrast, when an attorney is sued for malpractice, the plaintiff is not attacking the system that judged him fit to practice; rather, they are leveling a personal accusation at a particular attorney's handling of a particular case. In essence, they are not saying that the system is blameworthy but that the attorney is personally blameworthy in his conduct of a particular case. The cause of the attorney's malpractice may have been incompetence, which, to some extent, does implicate the system that produced him. However, it may also have been due to a host of factors that are all personal to the attorney and do not necessarily implicate the system, such as inefficiency, inattention, malfeasance, etc. Consequently, a judge hearing an attorney malpractice case is far less likely to feel personally implicated than when hearing a challenge to the bar examination itself. In fact, a judge hearing a malpractice case would reasonably view the system as "good," in the sense of establishing sensible standards of attorney conduct, and the individual attorney as blameworthy, to the extent that he violated those standards. Thus, in being called upon to rule in favor of a plaintiff suing an attorney, judges could reasonably view themselves as defending the system. However, in being called upon to rule in favor of a plaintiff challenging the bar examination on the basis of illegal bias, judges could reasonably view themselves as endorsing an attack on the system. Some judges could understandably view such an attack on the system, by implication, as an attack on themselves. As a consequence, in an effort to defend themselves, such judges might well feel the need to defend the system in ways that do not afford a full and fair evaluation to the plaintiff's case. I am not suggesting that this judicial resistance is always either conscious or intentional, although sometimes it may be. More often than not, it is more likely an unconscious and unintentional reaction to a subtle and perceived affront to their status as the deserving products of a fair meritocracy.

nation's history saw all levels and branches of government, particularly in the South, conspire to create and perpetuate a system of racial bigotry and white dominance.<sup>200</sup> Perhaps it is idealistic to believe that the 1970s and 1980s saw the disappearance of all remaining vestiges of these attitudes from the minds of state officials, such as members of state boards of bar examiners or the judiciary.

In addition, most of the state officials and judges who reviewed the actions of the various bar examiners grew up during a time when minorities were virtually nonexistent in our nation's law schools. As a result, few, if any, of them had any exposure to minority students or professors in their law school classes. It is not unreasonable to suggest, as the dissent in *Tyler* noted,<sup>201</sup> that some of these judges and officials probably still harbored presumptions of racial inferiority about blacks, in general, and aspiring black lawyers, in particular—presumptions that colored their judgment when they considered the plaintiffs' claims of discrimination in bar examinations.<sup>202</sup>

### 3. Irrational History

Lastly, the history of judicial challenges to bar examinations has been somewhat irrational because of the courts' not infrequent refusal to apply simple logic. In *Tyler*, for example, the court held that Title VII standards did not apply to the plaintiffs' equal protection claim because, under the terms of the act, the Bar Examiners were not "employers" or "an employment agency."<sup>203</sup> But the plaintiffs had not claimed that Title VII applied by its terms; rather, they urged the court to apply the standards of Title VII by analogy.<sup>204</sup>

The plaintiffs argued that although the Bar Examiners might not be "employers" or "an employment agency" by definition, they so strikingly resembled the categories defined therein that they should be treated the

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200. See *supra* note 135 and accompanying text (discussing the voting rights cases, where under the official state and local policy, black voters were identified by such methods as using different color cards or tickets or the letter "c," for colored, beside their names; state and local officials in the South not only instituted and utilized these blatantly discriminatory systems but, when challenged, vigorously defended them in court).

201. *Tyler v. Vickery*, 517 F.2d 1089, 1106 (5th Cir. 1975).

202. The optimistic view is to consider this perspective wholly generational and, therefore, a problem of the past which fades daily as that generation of lawyers and officials grows older and retires. However, a more realistic view is that the prospects for a radically different experience for the lawyers of today and even tomorrow are not terribly hopeful, given statistics that indicate that only about 10% of the law school population consists of minorities and that there has been only a 0.1% increase in the number of black lawyers in the last 10 years. See YAMAKI ET AL., *supra* note 6, at 9-10 (law school minority populations); Carey & Parker, *supra* note 25, at A1 (black lawyers).

203. *Tyler* 517 F.2d at 1096.

204. *Id.* at 1095. See also material on U.C.C. Article 2 and use of rules by analogy, *infra* note 206.

same vis-à-vis their alleged discrimination.<sup>205</sup> In other words, if Title VII prohibits an employer from excluding a minority from a particular job through utilization of an employment test that does not test the skills required for the job in question, why should the bar examiners be allowed to utilize a similar type of test that excludes minorities from working anywhere in the entire state?

Application of rules of law by analogy from one area of the law to another similar area is common practice. In fact, it is done with increasing frequency in many fields.<sup>206</sup> However, although the court in *Tyler* referred to the plaintiffs' analogical argument in its recitation of the facts, the court did not address it in the analysis or holding. Instead, the court addressed the plaintiffs' claims as if they had asserted jurisdiction under Title VII directly and then dismissed that claim with a wave of the hand in their oft-cited not-an-employer reference.<sup>207</sup>

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205. *Tyler*, 517 F.2d at 1096.

206. A particularly illustrative example is Article 2 of the Uniform Commercial Code (U.C.C.), which specifically applies only to the sale of goods. However, Article 2 has been applied in a great many contexts that do not expressly involve the sale of goods. Such cases fall into two general categories: sales of goods with non-goods and sales of goods with services. A minority of courts apply Article 2 only to the goods sold in the transaction, while the majority apply Article 2 to the entire transaction or not at all depending upon whether the "predominant purpose" of the whole transaction was a sale of goods. "[I]n the overwhelming majority of cases, Article 2 has been found applicable." 1 JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE 26 (3d ed. 1988) (citations omitted); see, e.g., E. Allen Farnsworth, *Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code*, 30 U. CHI. L. REV. 666, 678 (1963) ("Is it not possible that the general obligation of good faith with the merchant's objective standard may be extended by analogy to contracts not literally within the purview of the Code? The comments to the Code suggest the possibility of such extension.") (citing U.C.C. Sec 1-102, comment 1); see also E. Allan Farnsworth, *Implied Warranties of Quality in Non-Sales Cases*, 57 COLUM. L. REV. 653 (1957) (suggesting that sales warranties should be extended by analogy to bailments and contracts involving only the provision of services as opposed to goods); Cecil J. Hunt, II *The Price of Trust: An Examination of Fiduciary Duty and the Lender-Borrower Relationship*, 29 WAKE FOREST L. REV. 719, 770-71 n.321 (1994) (noting that the U.C.C.'s express application to the sale of goods can be reasonably extended to the context of a commercial loan).

Article 2 of the Code applies only to the "sale of goods." However, it can be applied to the lender-borrower relationship from any one or more of three different perspectives: (1) by analogizing the underlying purposes and policies behind the rules pertaining to both types of transactions (The U.C.C. provides that it should be 'liberally construed and applied to promote its underlying purposes and policies[.]'); or (2) by characterizing their relationship as a "mix" of a transaction involving both goods and services; or (3) by characterizing the borrowed funds in a loan transaction as "goods" in and of themselves.

Hunt, *supra*, at 770-71 n.321 (citations omitted).

207. See *Tyler*, 517 F.2d at 1096 (concluding that the Georgia Board of Bar Examiners was neither an "employer," an "employment agency," nor a "labor organization" within the meaning of Title VII). It is interesting to note that all subsequent cases faced with this question cite *Tyler* for the proposition that Title VII does not apply to the equal protection analysis of a challenge to a bar examination, and *Tyler's* exact language has been reiterated in other cases. See, e.g., *Woodward v. Virginia Bd. of Bar Examiners*, 598 F.2d 1345, 1346 (4th Cir. 1979).

#### 4. *A Bleak Future*

For a number of reasons, the future of constitutional challenges to bar examinations is bleak. First, there appears to be a general judicial hostility to any suit alleging racial discrimination by bar examiners. Second, the courts have consistently refused to apply Title VII standards, even by analogy, to bar examination challenges.<sup>208</sup> Third, and perhaps most significantly, the future looks bleak in light of the Supreme Court's recent decision in *Wards Cove Packing Co. v. Atonio*,<sup>209</sup> wherein the Court implicitly overruled *Griggs v. Duke Power Co.*<sup>210</sup>

Although courts have consistently refused to apply the standards enunciated in *Griggs* to bar examination challenges, as long as *Griggs* remained good law it provided a powerful framework for resolving discrimination claims by giving plaintiffs the hope that they might someday persuade a court to apply its standards in the context of a bar examination challenge.

Under *Griggs*, a plaintiff who charged an employer<sup>211</sup> with discrimination was initially required to establish a prima facie case of discrimination.<sup>212</sup> That case could consist of statistics evidencing a racial imbalance in the workforce in order to prove a disparate impact by the employer's practices.<sup>213</sup> If the plaintiff was successful in establishing his prima facie case, the burden then shifted to the defendant,<sup>214</sup> who could raise the affirmative defense of business necessity.<sup>215</sup> To the extent the defendant proved such necessity, the plaintiff could then rebut that proof by showing that a less discriminatory standard existed which the defendant had failed to utilize<sup>216</sup> and, that therefore, the defendant's actions were a pretext for intentional discrimination.<sup>217</sup>

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208. This refusal was based solely on the reasoning that since bar examiners were neither employers nor employment agencies, Title VII did not apply by its own terms. See *supra* notes 67-70 and accompanying text discussing *Tyler*.

209. 490 U.S. 642 (1989).

210. 401 U.S. 424 (1971).

211. See *supra* notes 60-69 discussing the employer employment agency theory of Title VII as applied by analogy.

212. See *Griggs*, 401 U.S. at 432; see also Reginald Leamon Robinson, *The Impact of Hobbes's Empirical Natural Law on Title VII's Effectiveness: A Hegelian Critique*, 25 CONN. L. REV. 607, 609 (1993). Professor Robinson noted that, even after Title VII was amended, "[t]hese amendments proved ineffective, and in 1989 the Court decided *Wards Cove Packing Co. v. Atonio* which severely weakened the *Griggs* disparate impact approach. As a result, Congress passed the Civil Rights Act of 1991 . . . , the purpose of which was to counteract the Supreme Court's more conservative jurisprudence." Robinson, *supra*, at 609 (citations omitted).

213. *Griggs*, 401 U.S. at 432.

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

Under *Wards Cove*, the *Griggs* standard was altered in two very important ways. First, the affirmative defense of business necessity, a rather strict standard and usually difficult to meet,<sup>218</sup> was eliminated.<sup>219</sup> In its place, the defendant now need only show a legitimate business purpose for his practice<sup>220</sup>—a much less stringent standard.<sup>221</sup> Second, under *Wards Cove*, a defendant has the burden of production only on the issue of business necessity, while the burden of persuasion ultimately rests with the plaintiff.<sup>222</sup> But most importantly, in *Wards Cove*, the Supreme Court rejected the use of statistics alone as evidence of racial imbalance in the workforce and as probative of the racially disparate impact of an employer's practices.<sup>223</sup> Instead, under *Wards Cove*, in order to prove a prima facie case, the plaintiff must now establish a narrower comparison between the racial composition of the relevant workforce and the otherwise qualified labor pool.<sup>224</sup> Through its holding in *Wards Cove*, the Supreme Court signaled a "future constriction of the use of broad statistical comparisons previously allowed under *Griggs*."<sup>225</sup>

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218. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 658-59 (1989).

219. *Id.*

220. *Id.*

221. *Id.* In determining whether this test had been met, the *Wards Cove* Court noted that "the dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer." *Id.* at 659. However, the Court also pointed out that, in order to be considered "legitimate employer goals," the justification had to be more than just a mere insubstantial one "because such a low standard of review would permit discrimination to be practiced through . . . spurious . . . employment practices." *Id.* However, the Court also concluded that "there is no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business for it to pass muster." *Id.*

222. *Id.* at 657-60. Thus, under *Wards Cove*, employers need only plead, but not prove, a legitimate employment goal. *Id.* at 660. The burden then shifts to plaintiffs to identify with specificity the particular employment practice that they claim violates Title VII. *Id.* In support of its holding that the burden of persuasion must rest on the plaintiff, the Court in *Wards Cove* quoted 42 U.S.C. § 2000e(2)(a) (1988): "The persuasion burden here must remain with the plaintiff, for it is he who must prove that it was 'because of such individual's race, color,' etc., that he was denied a desired employment opportunity." *Id.*; see also Robinson, *supra* note 212, at 638.

With this 1989 decision, the Court redefined the thrust of Title VII and limited Griggs['] liberal scope of liability. *Wards Cove* thus established a new touchstone. Under *Wards Cove*, employers needed to prove only that challenged practices served legitimate goals 'in a significant way.' This rule could be viewed as undermining Title VII's goal of absolute equality in the workplace and as supplanting Griggs' liberal liability threshold. To this extent, *Wards Cove* redefined Title VII.

Robinson, *supra* note 212, at 638.

223. *Wards Cove*, 490 U.S. at 660-61.

224. *Id.* at 661.

225. Kenneth Williams, *A Legal Challenge to Bar Examinations*, 16 T. MARSHALL L. REV. 537, 539 n.24 (1991) (quoting *Recent Cases*, 103 HARV. L. REV. 806, 808 n.21 (1990)).

## 5. A Ray of Hope

### a. Equal Protection

Although the future of challenges to bar examinations is bleak, it is not altogether dark. While the courts have refused to apply the highest standard of strict scrutiny in equal protection challenges against bar examinations, there is some evidence that a challenge based on the lower rational relationship standard could be successful. In *Sharif v. New York State Education Department*,<sup>226</sup> a recent gender discrimination challenge based upon this lower standard, a court struck down as unconstitutional a state educational department policy; the court found the policy not rationally related to the state's purpose.<sup>227</sup>

In *Sharif*, the plaintiffs sued the New York Education Department for violating the Fourteenth Amendment Equal Protection Clause and Title IX of the Education Amendments.<sup>228</sup> The plaintiffs claimed the department's policy of relying exclusively on high school Scholastic Aptitude Test (SAT) scores in awarding merit scholarships illegally discriminated against females.<sup>229</sup> The stated goal awarding merit scholarships was to reward academic achievement in high school.<sup>230</sup> However, it was adduced that the SAT's primary purpose is to predict academic performance in the first year of college.<sup>231</sup> Focusing on the state's stated scholarship goal of rewarding academic achievement in high school, the plaintiffs made a compelling case that it was contradictory to reward high school achievement based on a test that did not measure such achievement, but rather only potential college performance. By focusing the court on this clear contradiction between the stated goal and the means to achieve the state's policy, the plaintiffs successfully argued that the state failed to validate its exclusive reliance on the SAT as a rational, gender-neutral basis for awarding merit scholarships.<sup>232</sup>

The equal protection arguments successfully advanced in *Sharif* regarding validation and exclusive reliance on a standardized test could readily be

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226. 709 F. Supp. 345 (S.D.N.Y. 1989).

227. *Id.* at 348.

228. *Id.* Under Title IX all federally funded educational programs are prohibited from discriminating on the basis of gender. *Id.* at 360 (citing 20 U.S.C. § 1681(a) (1988)).

229. *Id.* at 348.

230. *Id.* at 364.

231. *Id.*

232. The plaintiffs' evidence of disparate impact was primarily statistical. For example, they demonstrated that for the academic year 1986-87, girls represented 53% of the applicants for the state merit scholarships, *id.* at 355 n.26; however, only 43% of the scholarship recipients were girls that year, *id.* at 355. The plaintiffs argued that this gender-based disparate impact was the result of the state's use of a testing standard that was not rationally related to its purpose and therefore deprived them of equal protection under the law. *Id.* at 348; see also Kary L. Moss, *Standardized Tests as a Tool of Exclusion: Improper Use of the SAT in New York*, 4 BERKELEY WOMEN'S L.J. 230, 238 (1989-90) (discussing *Sharif*).

applied to any bar examination challenge. The essence of the argument would be that under the Equal Protection Clause, sole reliance on the bar examination as a basis for admitting attorneys to practice law is not rationally related to the state's goal of ensuring minimum competence among licensed attorneys.

This argument has two components; the first is definitional and the second involves a problem of measurement. The state's goal of protecting the public by ensuring the minimum competence of its attorneys suffers from a serious definitional problem—quite simply, no one has been able successfully to define “minimum competence.” And, to the extent such a state of competence does exist, it has not been established whether the bar examination can, in fact, measure that ability.

### *b. Title VII*

Beginning with *Tyler*, the courts that have considered the issue consistently hold that Title VII is inapplicable to discrimination challenges against bar examinations. Blindly obedient<sup>233</sup> to the reasoning in *Tyler*, courts find that because bar examiners are neither an “employer” nor “an employment agency,” Title VII by its terms does not apply to claims of racial discrimination against state bar examiners.<sup>234</sup>

The scope of the term “employer” under Title VII is quite broad.<sup>235</sup> State and local governments have long been considered employers under Title VII.<sup>236</sup> Thus, because a board of bar examiners performs a sovereign function of the state,<sup>237</sup> it can be argued that these state boards are, in fact, “agents” of the state and should therefore be treated the same as the state. Such an argument is supported by *Woodard v. Virginia Board of Bar Ex-*

233. See W. Sherman Rogers, *Title VII Preemption of State Bar Examinations: Applicability of Title VII to State Occupational Licensing Tests*, 32 HOW. L.J. 563, 602 (1989) (analyzing the Fifth Circuit's decision in *Tyler* and its progeny and concluding that, “[f]or whatever reason, the Fifth Circuit's statement seems to have been blindly accepted by other courts without scrutiny”).

234. See, e.g., *Woodard v. Virginia Bd. of Bar Examiners*, 598 F.2d 1345, 1346 (1979); *Parrish v. Board of Comm'rs of Ala. State Bar*, 533 F.2d 942, 949 (5th Cir. 1976); *Delgado v. McTighe*, 442 F. Supp. 725, 730 (E.D. Pa. 1976). But see *Woodard v. Virginia Bd. of Bar Examiners*, 420 F. Supp. 211, 213 (E.D. Va. 1976).

235. An employer is defined as “a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person.” 42 U.S.C. § 2000e(b) (1988) (emphasis added).

236. See Pub. L. No. 92-261, 86 Stat. 103 (1972) (codified as amended at 42 U.S.C. § 2000e(a) (1988) (amending definition of “person” to include governments, governmental agencies, and political subdivisions); see also *Florida v. Long*, 487 U.S. 223, 228 n.1 (1988) (noting how the 1972 amendments to Title VII made states and local governments “employers” under Title VII for the first time); see generally Rogers, *supra* note 227, at 563.

237. See *Sparks v. The Character & Fitness Committee of Kentucky*, 818 F.2d 541 (6th Cir. 1987) (holding state bar examiners performed quasi-judicial function of state supreme court).

*aminers*,<sup>238</sup> in which the District Court for the Eastern District of Virginia expressly found that a Board of Bar Examiners was an “employer” under Title VII because the Board was acting as the state’s agent in performing the function of licensing attorneys to practice in that state.<sup>239</sup> In so holding, the *Woodard* court said that it was

satisfied that the Board is an agent of the state which unquestionably employs the requisite number of persons. The statutory definition of employer includes agents of persons employing fifteen or more persons. The Board’s statutory origin, its role in performing the sovereign function of licensing professions, and the statutory restrictions placed on its authority are the primary factors supporting the Court’s conclusion that an agency relationship exists.<sup>240</sup>

Notwithstanding this conclusion, the court found that principles of federalism militated against extending Title VII’s test validation standards to professional licensing examinations.<sup>241</sup> On appeal, the Fourth Circuit relied on *Tyler* in holding that the state Board of Bar Examiners was neither an “employer” nor “an employment agency.”<sup>242</sup>

In the year prior to *Woodard*, the Supreme Court clarified the “employer” issue by holding that an employer covered by Title VII could not escape the Act’s jurisdiction merely “by delegating discriminatory programs to [others]. . . . Title VII applies to ‘any agent’ of a covered employer.”<sup>243</sup> Additionally, in Title VII jurisprudence, the Second Circuit has held that the term “employer” is “sufficiently broad to encompass any party who significantly affects access of any individual to employment opportunities, regardless of whether that party may technically be described as an ‘employer’ of an aggrieved individual as that term has generally been defined at common law.”<sup>244</sup> The judicial pronouncement suggests that there is no analytical or policy reason why state bar examiners should not be held to Title VII standards.

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238. 420 F. Supp. 211 (1976), *aff’d*, 598 F.2d 1345 (4th Cir. 1979).

239. *Id.* at 213 n.3.

240. *Id.* (citations omitted).

241. *Id.* at 214. In so holding, the court reasoned, “The Supreme Court has recognized ‘that the States have a *compelling interest* in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions.’ ” *Id.* (quoting *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975) (emphasis added by *Woodard* court)).

242. *Woodward v. Virginia Bd. of Bar Examiners*, 598 F.2d 1345, 1346 (4th Cir. 1979).

243. *Los Angeles Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 718 n.33 (1978) (citations omitted).

244. *Spirt v. Teacher Ins. and Annuity Ass’n*, 691 F.2d 1054, 1063 (2d Cir. 1982), *vacated and remanded*, 463 U.S. 1223 (1983) (citations omitted).

## IV. THE MYTH OF THE BAR EXAM AS A TEST OF MINIMUM COMPETENCE

A. *Definitional Barriers*

In an open forum designed as a comprehensive review of its bar examination procedure, the New Mexico Supreme Court found that

[t]he fallacy in the professed rationale [of ensuring minimum competency] for the existence of the bar examination is that none of the expert witnesses could define minimum competency. Not only in New Mexico, but in all states, . . . one is left with the anomalous situation of adhering to a licensing system for the state bar which though purporting to safeguard the public from practitioners who do not meet minimum standards of competency, cannot define the standard it uses. The obvious question is how one can adequately measure a criterion that eludes definition.<sup>245</sup>

Clearly, in order for a bar examination to be a legitimate test of minimum competence to practice law, it must be rooted in a reasonable definition of the very quality it professes to measure. However, not only have bar examiners noticeably failed to articulate a reasonable definition, but they have also failed to enunciate any definition at all.

In *Delgado v. McTighe*,<sup>246</sup> one of the plaintiffs' experts testified that "the bar examination could not measure minimal competence to practice law unless some determination was made as to what constitutes incompetent performance by an attorney."<sup>247</sup> The American Bar Association's (ABA) Section of Legal Education and Admissions to the Bar issued a report in 1979 that attempted to define lawyer competence.<sup>248</sup> That report identified three basic elements of lawyer competence: 1) the capacity to perform fundamental skills including analysis, legal research, and communication; 2) knowledge of the law and legal institutions; and 3) the ability and motivation to apply skills and knowledge to legal tasks with reasonable proficiency.<sup>249</sup>

Similarly, the American Bar Foundation (ABF) made an attempt to define lawyer competence by utilizing a survey of Chicago lawyers to so-

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245. Susan E. Brown & Claire Levay, *Melendez v. Burciaga: Revealing the State of the Art in Bar Examinations*, B. EXAMINER, May 1982, at 4, 6; see *supra* notes 165-177 and accompanying text (discussing *Delgado v. McTighe* and describing how neither the officials from the Educational Testing Service, which designed the Multistate Bar Exam, nor the National Conference of Bar Examiners could advise the Pennsylvania Bar Examiners as to what passing score would ensure minimum competence).

246. 522 F. Supp. 886 (E.D. Pa. 1981).

247. *Id.* at 897.

248. AMERICAN BAR ASSOCIATION SECTION OF LEGAL EDUCATION AND ADMISSIONS TO BAR, REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON LAWYER COMPETENCY: THE ROLE OF THE LAW SCHOOLS (1979) [hereinafter ABA REPORT].

249. *Id.* at 9.

licit their views on the skills and knowledge necessary to practice law.<sup>250</sup> That survey compiled the following hierarchy of skills and knowledge comprising legal competence: 1) the ability to marshal facts; 2) the ability to gather facts; 3) the ability to instill confidence in others; 4) effective oral expression; 5) the ability to read and comprehend written judicial opinions, statutes, and other sources of law; 6) knowledge of substantive legal principles; 7) the ability to conduct legal research; 8) the ability to conduct effective negotiations; and 9) the ability to draft precise legal documents.<sup>251</sup>

In commenting on both the ABA and ABF reports, several experts in the field have concluded that "the bar examination does not assure competence in basic lawyering skills, although it does test knowledge of the law and the ability to analyze legal problems."<sup>252</sup> Similarly, others have argued that "the bar examination is totally unrelated to . . . the successful practice of law"<sup>253</sup> and is little more than a memory test.<sup>254</sup> Reports by such experts have concluded that the examination is "indefensible, a psychometric anachronism, on the grounds that it assertedly fails to satisfy the minimum requirements of test validity."<sup>255</sup> A leading critic concluded that it is "unthinkable that a group can study bias in a test without ever having defined that criterion (adequacy of attorney functioning) that the test is to predict."<sup>256</sup> Still other critics have characterized the bar examination as nothing more than an achievement test "designed to assess specific accomplishments in a student's legal education."<sup>257</sup>

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250. AMERICAN LAW INSTITUTE-AMERICAN BAR ASSOCIATION COMMITTEE ON CONTINUING PROFESSIONAL EDUCATION, A PEER REVIEW SYSTEM: DISCUSSION DRAFT 11 (1980) [hereinafter ALI-ABA COMMITTEE DRAFT].

251. *Id.* at 154.

252. Stephen P. Klein, *Summary of Research on the Multistate Bar Examination*, B. EXAMINER, Aug. 1983, at 10, 13; see also John F. O'Hara & Stephen P. Klein, *Is the Bar Examination an Adequate Measure of Lawyer Competence*, B. EXAMINER, Aug. 1981, at 28, 29. Dr. Klein, perhaps the most prominent defender of the bar exam on the basis of statistical correlations, has further acknowledged that "[n]o studies have attempted to correlate MBE (Multistate Bar Exam) scores with 'success as a lawyer' because of the difficulty of obtaining agreement as to a valid measure of success." See Rogers, *supra* note 233, at 590.

253. Edward F. Bell, *Do Bar Examinations Serve a Useful Purpose?*, 57 A.B.A. J. 1215, 1216 (1971). The author also concludes that to the extent that the bar exam's purpose is to determine lawyer competence, "that purpose has not been accomplished. There are many grossly incompetent lawyers practicing law today who have passed a bar examination that failed to eliminate them and to prevent them from practicing on an unsuspecting public." *Id.*

254. *Id.*

255. RICHARD S. BARRETT, COMMISSION ON TESTING AND PUBLIC POLICY, CONTENT VALIDITY IN EMPLOYMENT TESTING 89 (1989) (draft report); see also Emsellem, *supra* note 5, at 44.

256. Symposium, *The Minority Candidate and the Bar Examination*, 5 BLACK L.J. 120, 178 (1977).

257. Alfred E. Carlson & Charles E. Werts, *Relationships Among Law School Predictors, Law School Performance, and Bar Exam Results*, 3 REPORTS OF LSAC SPONSORED RESEARCH 211, 214 (Sept. 1976). *But see* Erwin N. Griswold, *In Praise of Bar Examinations*, 60 A.B.A. J. 81 (Jan. 1974).

Moreover, in an uncharacteristic display of candor, the court in *Richardson v. McFadden*,<sup>258</sup> although ruling against the plaintiffs' challenge to a bar examination, concluded that the bar examination did not adequately measure lawyer competence:

While the Bar Examiners do not concede that they would lose under [Title VII], we believe the record is inadequate to demonstrate either "criterion" ("predictive"), "content," or "construct" validity under professionally acceptable methods. Thus, if we were to determine that Title VII standards were applicable, it would be necessary to reverse and declare the South Carolina Bar Examination constitutionally invalid.<sup>259</sup>

Significantly, the New York State Bar Association also concluded that the New York Bar Examination did not ensure lawyer competence.<sup>260</sup> The Bar Association commissioned a study on lawyer competence and the Bar Examination.<sup>261</sup> The commission charged with conducting the survey concluded that "[n]either the multiple choice nor the essay examinations can ensure that students have adequate lawyering skills to enable them to engage in the practice of law."<sup>262</sup>

Defenders of the bar examination in its current state counter these criticisms by arguing that there is a strong statistical correlation among the criteria for successful performance on the bar, achievement on the Law School Admission Test (LSAT), and law school grades (LGPA).<sup>263</sup> These statistical correlations clearly indicate, they contend, that candidates who perform well on the LSAT and achieve a high LGPA are more likely to pass the bar.<sup>264</sup>

This analysis forms the basis for arguments that the answer to racially disproportionate bar performance is improvement in the academic preparation of minority law school students both before and during law school. The argument is that increased academic preparation before law school yields higher LSAT scores, which, in turn, produce higher law school grades. And the combination of higher LSAT scores and LGPAs results in significantly higher minority bar passage rates.

This line of reasoning contains at least two fundamentally erroneous assumptions. First, the theory wrongly assumes that the performance on the LSAT is *strongly* correlated to success in law school. In fact, as a predictor of success in law school, the LSAT is wrong more than fifty

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258. 540 F.2d 744 (4th Cir. 1976).

259. *Id.* at 746-47.

260. See THE NEW YORK STATE BAR ASSOCIATION, FINAL REPORT OF THE SPECIAL COMMITTEE ON LAWYER COMPETENCY 52-54 (1988) [hereinafter NEW YORK STATE BAR ASSOCIATION].

261. See *id.* at 48.

262. *Id.* at 54.

263. See generally KLEIN & BOLUS, *supra* note 3, at 2-3.

264. *Id.*

percent of the time,<sup>265</sup> and *particularly* so with respect to minority students.<sup>266</sup>

Second, the theory wrongly assumes that a positive correlation among bar passage rates, LSAT scores, and LGPAs has a direct relationship to bar candidates' abilities to practice law competently. Positive correlations between two different measures, such as LSAT/LGPA and bar passage, may evidence nothing more than the fact that each index is measuring essentially the *same thing*, that is, the same legal skills and knowledge.<sup>267</sup> While, to those not familiar with statistical analysis, a high statistical correlation "would seem to corroborate the very validity of the bar examination, . . . indeed it should suggest the contrary."<sup>268</sup> As one noted expert in the testing field has concluded, "[A] high correlation is not something you should have striven for in the first place. . . . Why do you want a high correlation? The higher the correlation, the more you're measuring the *same thing*."<sup>269</sup>

While the bar examination may be an excellent test of the ability to *study* law competently, it does not necessarily indicate the ability to *practice* law competently. In fact, legal educators and practitioners now widely acknowledge that the bar examination is really just a rite of passage which "functions more as an exit examination, a law school comprehensive, than as a professional entrance examination."<sup>270</sup> Moreover, many legal experts have concluded that "the bar exam was doing the wrong thing at the wrong time; it tests one's ability to take tests. . . . [E]xaminers should not be trying to validate a person's educational experience, but rather one's character and fitness for practice."<sup>271</sup>

265. Derrick A. Bell, Jr., *Law School Exams and Minority-Group Students*, 7 BLACK L.J. 304, 307 n.5 (1981) ("LSAT scores are only statistical predictions that are accurate less than fifty percent of the time.").

266. James C. Hathaway, *The Mythical Meritocracy of Law School Admissions*, 34 J. LEGAL EDUC. 86, 86 (1984) (indicating that over the course of a law school career, the LSAT is a "particularly inaccurate predictor of academic success for various subgroups including men, younger students, and members of racial minorities").

267. Brown & Levay, *supra* note 245, at 7; see also Carlson Werts, *supra* note 257, at 220.

268. Brown & Levay, *supra* note 245, at 7.

269. *Id.* at 12 (testimony of Dr. Ralph Hoepfner before the New Mexico Supreme Court) (emphasis added) (citations omitted).

270. Erica Moeser, *At the Gap: Bar Admissions Issues That Are Relevant to the MacCrate Discussion*, in THE MACCRATE REPORT 83, 84 (Conference Proceedings, Minneapolis-St. Paul, Minn., Sept. 30-Oct. 2, 1993).

271. *Id.* at 138-39. It should be noted that, as the reporter for a discussion group, the author was expressing the views of the members of her group, and not just her own. For example, she concludes by noting, "There was widespread agreement among this discussion group that the MacCrate Report and this conference could serve as a catalyst for improvement of the legal profession throughout one's career." *Id.* at 139.

At another point in the conference, John O'Neill, Academic Program Coordinator for West Publishing Co., in commenting on the enormous costs in both time and money imposed on students by the existence of the bar exam, concluded that "[t]hese particular resources of cost and

### B. Measurement Barriers

The state's goal of ensuring minimum competence through administration of a bar examination also suffers from a significant measurement problem. To the extent that the goal of the bar examination is accurately to screen out those persons who are incompetent to practice law and correctly to identify those who are competent, at best the exam is a highly imprecise measurement that may ultimately cost society more than benefit it. In a study conducted by the New Mexico Supreme Court, one of the expert witnesses identified two groups that the bar examination does not detect particularly well.<sup>272</sup> He described them as "false positives" and "false negatives."<sup>273</sup>

Utilizing a cost/benefit analysis,<sup>274</sup> the expert described the results of a study he conducted in an effort to measure the ability of the bar examination to distinguish between false positives and false negatives:

Hypothesizing, based on his expertise in testing, that the bar examination has a validity coefficient of .30, [he had] calculated that in a state with a bar examination failure rate of 16 percent [84% passage rate], the following would occur: 73 percent of the people sitting for the bar examination would be correctly identified as being competent; 5 percent would be correctly identified as being incompetent; 11 percent unqualified would pass; and 11 percent qualified would fail. If, however, the pass rate were lowered to a 31 percent failure rate [69% passage rate], the following happens: 61 percent of the bar candidates would be correctly identified as being competent; 8 percent of those who take the test will be accurately identified as incompetent; 8 percent will pass the examination though they are incompetent; and 23 percent of the qualified will fail the examination though they are competent to practice law.<sup>275</sup>

As a consequence of his study, Dr. Barrett demonstrated that by changing the failure rate from 16% to 31% the identification of positive-failures increased only slightly from 5% to 8%.<sup>276</sup> However, the false-negatives increased significantly from 11% to 23%, more than double.<sup>277</sup> From this study, Dr. Barrett concluded that "whatever cost there is to

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study time should be put toward programs that would improve a recent graduate's competencies in serving the needs of their clients. It is clear that the current Examination does not serve this function." *Id.* at 150.

272. Brown & Levay, *supra* note 245, at 9.

273. *Id.* Dr. Richard Barrett defined false negatives as "those who are unqualified yet pass the examination" and false positives as "those who are qualified yet fail the bar." *Id.* He also identified two additional relevant categories as "those who are qualified to practice and pass the bar, [and] those who are unqualified to practice and are failed by the bar examination." *Id.*

274. Dr. Barrett described this form of analysis as "one of the most sophisticated concepts in testing." *Id.*

275. *Id.* at 9-10 (citations omitted).

276. *Id.*

277. *Id.*

failing qualified people goes up very fast. Whatever benefit there is from failing unqualified people is accrued only fairly slowly."<sup>278</sup>

Clearly, excluding qualified applicants from the practice of law and passing unqualified candidates imposes a very high cost on society. This is especially true if a significant percentage of those who are qualified but excluded are members of racial groups that in our society have been historically underrepresented in the law.

The most reasonable way to ensure that qualified applicants pass the bar exam and, in effect, do not become "false negatives" is to apply a very strict analysis to bar examinations. Such an analysis would put the burden on the bar examiners to demonstrate, on an ongoing basis, that their exams have been professionally validated as being maximally capable of identification and exclusion of the incompetent, while being minimally susceptible to exclusion of the competent.<sup>279</sup> Any bar examination that failed to satisfy such standards would hardly be rationally related to the state's purpose and should, therefore, be held to be violative of the Equal Protection Clause of the Fourteenth Amendment.<sup>280</sup>

## V. THE CAUSES AND SOURCES OF RACIALLY DISPARATE BAR PERFORMANCE

### A. Educational Deficiencies

Fifteen years ago in *Delgado v. McTighe*,<sup>281</sup> Judge Broderick observed that the record of disproportionate bar failures by minorities "cries out for an in-depth study to ascertain the reason."<sup>282</sup> However, both before and since that time, very little effort has been devoted to discovering the reasons for this disproportionality.<sup>283</sup> Research that does exist in this area reveals one common conclusion. All of the studies agree that, among both minority and white bar applicants, there is a significant correlation among LSAT scores, law school grades, and bar passage rates.<sup>284</sup>

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278. *Id.* at 10.

279. As suggested *supra*, notes 252-71 and accompanying text, this would involve a psychometric evaluation of the bar examination to assure that it meets modern testing standards of having predictive, content, and construct validity. Curiously, most state bar examiners and courts considering the question have refused to hold the bar exam to these known standards of validity.

280. *Cf.* Brown and Levay, *supra* note 245, at 14 ("The exclusion from practice of qualified individuals, whether minority or majority culture, is too high a price to pay for adhering to outmoded and superseded attorney licensing practices.").

281. 522 F. Supp. 886 (E.D. Pa. 1981).

282. *Id.* at 898 (referring to the disproportionately high failure rate of blacks taking the Pennsylvania Bar Examination).

283. A significant exception to this trend is, of course, the current study being conducted by the LSAC headed by Dean Ramsey. See *supra* notes 24-32 and accompanying text.

284. See, e.g., Stephen P. Klein, *An Analysis of the Relationship Between Bar Examination Scores and an Applicant's Law School Admissions Test Scores, Grades, Sex and Ra-*

As a consequence of this conclusion, the prevailing wisdom, as noted in *Delgado*, is that “[t]he differences in the percentages failed will be eliminated only when the blacks as a group, come to the examination as well prepared as are the whites.”<sup>285</sup> In short, many have blamed the causes of disproportionate bar failure rates by minorities on the relatively poorer educational preparation that minorities receive before entering law school. As a result, proposed solutions to the disproportionate failure rate have focused on the long range goal of improving the “educational pipeline” through which minority students pass on the way to law school.<sup>286</sup>

### B. Socio-Psychological Factors

However, this long-range view fails to take into account the extent to which “socio-psychological factors”<sup>287</sup> may adversely affect the academic performance of minority students, before and during law school and, ultimately, on the bar examination. The core of this socio-psychological perspective is the self-concept<sup>288</sup> of the minority student in the academic environment and the extent to which it is either positive, and thereby empowering, or negative, and thereby disabling.<sup>289</sup>

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*cial/Ethnic Group*, 49 B. EXAMINER 14, 16 (1980); Klein, *Bar Examinations*, *supra* note 4, at 30; Klein, *On Testing*, *supra* note 4, at 18, 19-20 (correlating the MBE and law school grades); Brown & Levay, *supra* note 245, at 7 (correlating the MBE and law school grades); KLEIN & BOLUS, *supra* note 3, at 10-15; Carlson & Werts, *supra* note 257, at 262.

285. *Delgado*, 522 F. Supp. at 894 (quoting the report of Dr. Robert Bernreuter, who was retained by the Philadelphia Bar Association in 1972 to perform an analysis of the Pennsylvania Bar Examination).

286. See, e.g., MASSACHUSETTS BAR REPORT, *supra* note 11, at 25. This process is referred to as “front loading the law schools with confident, motivated, intellectually stimulated and prepared students.” *Id.* at 25-26.

287. Vaughns, *supra* note 3, at 431. Recent psychological studies have explored and documented a positive, though not determinative, correlation between self-concept and academic achievement. *Id.* at 431-32 n.25 (citation omitted). As such, these “socio-psychological factors . . . may, albeit indirectly, affect law school academic performance and bar exam performance.” *Id.* at 431.

288. Bernadette M. Gadzella & James David Williamson, *Study Skills, Self-Concept, and Academic Achievement*, 54 PSYCH. RPTS. 923, 932 (1984). “Self-concept” is a nonintellectual factor that relates to a person’s perception of himself and the world around him, *id.*; self-concept can impact on, among other things, that person’s academic achievement, *id.* at 927-28.

289. Jim Cummins, *Empowering Minority Students*, 56 HARV. EDUC. REV. 18, 21-22 (1986). Various types of learning environments promote the type of academic confidence necessary for competitive academic achievement; students from “dominated” societal groups are either “empowered” or “disabled,” depending upon the quality of interaction received in the educational setting. *Id.* at 21; see also Vaughns, *supra* note 3, at 460 (“Studies indicate students of color succeed academically if they have a healthy sense of their own identity and self-worth and feel positively towards the learning environment.”).

### 1. *The Law School Experience*

Students at all levels of education tend to perform at the level of the expectations of authority figures around them, especially their teachers.<sup>290</sup> Unfortunately, in law schools, all too many law school professors tend to have low academic expectations for students of color<sup>291</sup> and tend to communicate those expectations to both minority and white students in a myriad of subtle, and not so subtle, ways.

The most obvious way that professors communicate their low expectations for minority students is by failing to call on students of color in the classroom with any frequency. Similarly, when such students are called on in class, their responses are frequently not probed very deeply, nor are their answers followed up on in the general class discussion.<sup>292</sup> These patterns of behavior quickly and clearly communicate a message to the entire class about the extent to which the professor values the voices, contributions, perspectives, and academic ability of minority students.<sup>293</sup>

During my first year as a law professor, a white colleague told me that he was very sympathetic to the plight of minority students in law school. As evidence of this sympathy, he told me that it was his practice not to call on minority students at all in class in order to spare them from the embarrassment and humiliation attendant upon speaking in class. While that professor was obviously motivated by what he perceived to be positive, sympathetic motives, implicit in his comment was an assumption regarding the inability of minority students to contribute to the class discussion if called upon. Or, at the very least, his comments reflected a perception that minority students would be more fragile and thus more negatively impacted than white students by the normal experience of speaking in class.

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290. Cf. Jay M. Feinman & Marc Feldman, *Achieving Excellence: Mastery Learning in Legal Education*, 35 J. LEGAL EDUC. 528, 531 (1985) (“[A] large body of research and years of experience demonstrat[e] that widely distributed learning outcomes are more a product of ineffective schooling than of the abilities of the students.”); see also RACIAL ISOLATION IN THE PUBLIC SCHOOLS, *infra* note 307, at 99.

291. See Vaughns, *supra* note 3, at 429. Professor Vaughns notes that, “given the large differential in the traditional law school predictors, law faculty tend to make negative assumptions about the potential of students of color, specially admitted, to perform well in law school.” *Id.* “[Feinman and Feldman] note that most law students possess the basic prerequisites for learning the law. But for minority students admitted under affirmative action programs, they opine that many teachers reject this proposition, asserting that a significant number of law students are so deficient in ability or preparation that efforts to improve their academic performance significantly are infeasible.” *Id.* n.15 (analyzing Feinman & Feldman, *supra* note 290, at 531 n.10). Since the faculty cannot distinguish between students of color who were “specially admitted” and those who were not, I suggest that, in practice, many law professors assume that all students of color, regardless of their academic credentials and preparation, were so admitted, and consequently the faculty entertain and communicate their low academic expectations indiscriminately with respect to all minority students.

292. See *infra* part V.B.1-4.

293. See *infra* part V.B.3.

Quite honestly, I was stunned by my colleague's admission. It seemed clear to me that he had no idea how demeaning and presumptive his comments were about his minority students' abilities. I asked him what he did when a minority student raised his hand to volunteer. His response was that they never did!<sup>294</sup>

By refusing to call on minority students in class, my colleague was summoning up within them the memories of the years when they had been held back. They were no doubt reminded of elementary and secondary school where they were similarly excluded from the dynamic of classroom discussion.<sup>295</sup> As a result, it came as no surprise to me that minority

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294. Reflecting on that conversation, I was reminded of the parable of the elephant, the chain, and the rope: A small child and her father went to a local circus. Entering the bigtop, the child was particularly awestruck by the many enormous, powerful elephants that appeared to be held in check by nothing more than a short, thin piece of ordinary rope wrapped around one of the elephant's huge hind legs and fastened to a small metal stake in the ground. The child, fascinated by this simple and seemingly inadequate restraint on such powerful beasts, asked her father how such a big, strong animal could be held down by such a small rope. Equally perplexed, her father in turn asked the same question of the elephant's trainer. "Well," the trainer responded, "we get that question all the time. It's really quite simple." The trainer explained that when the elephants were still quite young, and not yet so strong, the trainers put huge, powerful chains on their legs and anchored the chains to the biggest, strongest things around, such as a big tree or a truck. When the young elephants struggled to get free, they were held fast by the big chains and strong anchors.

As the little elephant grew, the trainers used smaller and smaller chains, and less and less formidable anchors. By the time the elephants had become full-grown, the chains had been reduced to nothing more than a small rope attached to a metal spike in the ground. In that way, the trainer explained, each elephant, remembering the chains of its youth, associated the feeling of the rope on its leg with the feeling of the chains, and by then it was so convinced in its own mind that it could not break free, it did not even try anymore. "So you see," concluded the trainer, "the rope is not really holding the elephant back; it's just a reminder. The elephant is holding itself back. In fact," added the trainer, "this system works so well, that sometimes all we have to do is show the elephant the rope and it settles right down and doesn't give us any trouble at all."

I could not help but think of my colleague's minority students as being in a situation analogous to that of the elephants in the parable.

295. Cf. Harold B. Gerard, *School Desegregation: The Social Science Role*, 38 AM. PSYCHOLOGIST 869, 874 (1983).

There are fairly consistent findings that teachers pay more attention to white than to minority pupils. . . . [T]here is also evidence that teachers underrate minority children. In our own data we found that teachers who tend to undervalue the achievement of minority pupils as compared with whites—and most teachers do—tend to have an adverse affect on the performance of minority children in their classes.

*Id.*; see also Ralph Scott, *Gender and Race Achievement Profiles of Black and White Third-Grade Students*, 121 J. PSYCH. 629, 634 (1987).

Test scores often mirror empirical shortcomings, including validity and reliability questions. Nonetheless, the extensive range of the subjects' attainments on the CAT [California Achievement Test] seemingly serve notice that individualized curricular planning [that] enabl[es] students to become actively engaged in classroom activities through frequent and accurate responses to stimuli relevant to classroom tasks . . . may be required if compensatory programs are to provide many poor and minority youth with viable schooling enrichment.

*Id.* (citations omitted).

students did not volunteer to speak in his class. Unwittingly, he had sent them a message; they had heard it and reacted accordingly.<sup>296</sup>

Minority students who find themselves in a law school environment where they are *suspected*, rather than *respected*, by their professors may reasonably feel alienated.<sup>297</sup> That sense of alienation can have a negative

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296. See Vaughns, *supra* note 3, at 458. The author observes that "students of color also bring a sense of low self-esteem which is difficult to overcome when they encounter overt or subtle treatment in a law school classroom that further undermines their self-confidence. Whether or not the instructor is well-intentioned, students of color may harbor debilitating resentment or perform less well if they perceive their treatment in the classroom as an indication that they are less able than their white counterparts." *Id.* at 458-59 (citing Gerard, *supra* note 295, at 874 (discussing data, in the context of studying the effects of desegregation, that demonstrates a tendency on the part of classroom teachers to underrate minority students, with consequences that adversely affect their performance in the classroom)).

I have a rather vivid memory of a similar incident when I was in the third grade. I was one of only a handful of children of color in the class. The class had been asked to write essays on what we saw in our minds when we daydreamed and to read those essays aloud to the rest of the class. When my turn came, I read my essay and told, in my own visually descriptive way, of seeing a beautiful meadow with bright flowers, a babbling brook, colorful birds, and a beautiful blue sky. When I was done, I looked around. The class was absolutely silent. Thinking that I had done a good job, I looked up to the teacher for approval. She stared at me with a stern and disapproving look that I will never forget and asked, "What book did you copy that out of?" No matter how I tried to assure her that I had not copied it but had written it myself, she insisted that it was "impossible" for it to be my own original work. She then launched into a stern lecture to the entire class about the sin of copying things out of books rather than doing one's own work and used me as an example.

I was humiliated by that experience and branded as a cheater by my teacher and my classmates for the rest of the year! I never spoke again in that class. Soon afterwards, I developed a serious stuttering problem that I struggle against to this day. It was years before I wrote another essay for a teacher and, when I did, I was careful to make it plain and simple so as to avoid any attention or suspicion.

The noted African-American playwright August Wilson, author of such works as *Fences* and *The Piano* and recipient of numerous Tony Awards and a Pulitzer Prize, responded similarly when asked why he had not finished high school. *Charlie Rose* (PBS television broadcast, Feb. 18, 1994). Because no one believed that he had actually written the things he produced, he was the object of much suspicion and harassment. *Id.* For him, it was the choice between writing or staying in school. *Id.* He chose writing.

297. Professors are not the only ones who foster this sense of being "suspected" rather than "respected." To the extent that some professors communicate a suspicion and low expectation in the classroom, some white students often will adopt their professors' attitude and treat the minority students in the same fashion. In fact, to the extent that white students harbor independent suspicions of their own regarding the intellectual capacity and qualifications of minority students to be in law school, they may well see in these professors' attitudes an implicit ratification of their own negative presumptions.

A few years ago I had one black student and one wheelchair-bound student in a large first-year course. I emphasized the importance of not attempting to grapple with the demands of law school alone and strongly encouraged the students to form study groups. Several weeks into the course the black student and the wheelchair-bound student came to my office and informed me that, despite their vigorous efforts, they had been unable to get into any study groups. Or, as they put it, they couldn't even "buy their way into a study group." I reassured them that there couldn't be anything personal involved since it was so early in the first semester no one in class really knew anyone yet. I asked them to be patient and trust that I would do something to help them. During the next several weeks, I highlighted those two students in my class and called on them repeatedly, probing deeply and following up extensively. They rose to the

impact on their ability to learn and achieve in the classroom. One scholar writing about this process of alienation has observed that “[i]f students are in an environment in which they feel that the instructor does not value their contributions or behaves in a manner that is insensitive or demeaning, whether it be well intentioned or otherwise, such an environment may adversely affect the learning experience.”<sup>298</sup>

In this environment, minority law students, although admitted and registered as any other student, are not treated as legitimate members of the law school community. Instead, they are treated as guests in another’s house—provided with all of the superficial courtesies of a guest who is told, “Make yourself at home,” while made to feel the clear, but unspoken, subtext: “Don’t get too comfortable; hurry up and leave soon; but, above all, do not forget that this is really our house, not yours!”

## 2. *A Hostile Learning Environment for Students of Color*

Being continually treated as a guest in another’s house can create what reasonably may be described as an adverse, and possibly even hostile, learning environment. At the core of this racially hostile environment in America’s law schools, there still exist “lingering perceptions that African-Americans (and presumably other minorities) are inherently inferior.”<sup>299</sup> America has a long and shameful history of racial discrimination against black people. Much of that discrimination was based on a “scientific” racism<sup>300</sup> that purported to prove through the “general philosophy of biological determinism . . . [that] hierarchies of advantage and disadvantage follow the dictates of nature; stratification reflects bid-

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challenge and performed extremely well in these class discussions. I then frequently spoke about them and their excellent classroom contributions to my colleagues who taught other first-year courses in my section. As a consequence, I heard that they were being called on frequently in one or two other classes as well. Within a few weeks, they came back to my office and told me that they had now received a great many invitations to join study groups—some from one or two of the so-called “best groups in the class.” As they put it, “[W]e now have to beat them off with a stick.” At the end of the year, both students finished academically in the top 10% of the class.

298. Vaughns, *supra* note 3, at 432. The author also notes that “[t]o the extent that students feel inferior and alienated in the classroom setting, they are discouraged and, therefore, may perform less well or as ‘expected’.” *Id.* at 460. By performing “as expected,” the author is referring to data that suggest that students tend to perform according to the expectations of the authority figures around them, especially teachers. See Feinman & Feldman, *supra* note 290, at 531. Therefore, as the saying goes, the students will live either “up to” or “down to” the expectations that are powerfully communicated to them.

299. Vaughns, *supra* note 3, at 458 (citing Richard Delgado et al., *Can Science Be Inopportune? Constitutional Validity of Government Restrictions on Race-I.Q. Research*, 31 UCLA L. REV. 128, 194 (1983) (discussing the controversy surrounding race-based theories of inferiority and psychological injury to African-American children)).

300. STEPHEN JAY GOULD, *THE MISMEASURE OF MAN* 80 (1981).

ogy.”<sup>301</sup> As recently as 1964, the eighteenth edition of the Encyclopaedia Britannica described the characteristics of black people as having “ ‘a small brain in relation to their size,’ along with woolly hair.”<sup>302</sup>

To be sure, as a nation we have come a long way since 1964. However, it has been perceptively observed that “[f]ew will deny that the racial equality goals that a few decades ago seemed in sight are now further away than ever. . . . Equality, experience tells us, did not follow the enactment of civil rights laws or victories in the courts.”<sup>303</sup> Instead of eliminating racial discrimination, in many cases much of the civil rights legislation has done no more than to drive discrimination “underground, where it flourishes even more effectively.”<sup>304</sup> The presumption of incompetence,

301. *Id.* The author states that “scientific racists and sexists often confine their label of inferiority to a single disadvantaged group; but race, sex, and class go together, and each acts as a surrogate for the others.” *Id.*

302. *Id.* at 111. If my own experience is any guide, many blacks and whites in the current generation of lawyers, judges, and law professors grew up with this type of “scientific” information being taught to them in school as fact!

303. DERRICK BELL, *CONFRONTING AUTHORITY* 148 (1994). Professor Bell argues that since the time, just a few decades ago, when we thought so much good was about to be accomplished, “the plight of the poor and the disadvantaged is not much eased by social programs, which no matter how ambitiously undertaken, seem able to deliver only food without nutrition, welfare without well-being, job training without employment opportunities, and legal services without justice.” *Id.*

304. *Id.* at 149. Witness the reactions to the O.J. Simpson verdict and the Million Man March. See generally Abigail Thernstrom, *Two Nations, Separate and Hostile*, N.Y. TIMES, October 12, 1995, at A23 (describing a “white backlash” to affirmative action, the O.J. Simpson verdict, and the Million Man March).

Bell and Thernstrom are suggesting that in the post-civil rights era most overt signs of racial discrimination have disappeared. Gone are the “whites only” signs in public places. However, what remains are the feelings of white superiority and black inferiority that provided the intellectual foundation for our national segregationist system in the first instance. As a consequence, whites who still feel that blacks are inherently inferior, but who are no longer free to express such views openly without fears of at least social, if not outright legal, sanction, have turned to more subtle, or underground, ways to express their views. Examples of this more subtle or underground racism are many and varied. They range from the deep racial divide exposed following the not guilty verdict in the infamous O.J. Simpson case, to the persistence of racial discrimination in mortgage lending and rental housing, to the increasingly heated national debate over affirmative action, to the debate over the great disparities in sentencing for possession of crack, versus powder, cocaine. Andrew Hacker, for example, eloquently discusses this more subtle, but continuing, legacy of racism in the recently published, expanded version of his famous book *Two Nations: Black and White, Separate, Hostile, Unequal*. Writing about the continuing resistance of whites to integrated housing, Hacker states:

To the minds of most Americans, the mere presence of black people is associated with a high incidence of crime, residential deterioration, and lower educational attainment. Of course, most whites are willing to acknowledge that these strictures do not apply to all blacks. At the same time, they do not want to have to worry about trying to distinguish blacks who would make good neighbors those who would not. To which is added the suspicion that if more black families arrive, it would take only one or two undesirables to undermine any interracial amity. . . .

Americans have extraordinarily sensitive antennae for the coloration of neighborhoods. In virtually every metropolitan area, white householders can rank each enclave by the racial makeup of the residents. Given this knowledge, where a family

which many law professors and law students have regarding minority law students, provides a vivid and pernicious example of this “underground racism.”<sup>305</sup> As we have seen, “expectation is a powerful guide to action.”<sup>306</sup> The power of such expectations is particularly strong in the teacher-student relationship. In a report analyzing racial isolation in public schools, the United States Commission on Civil Rights described the well-documented power of such expectations in an educational context by observing that

studies have highlighted the effect of teacher expectations on student performance. In one study, teachers were told that certain students, who actually had been selected at random, had especially high ability. As a result, their own expectations for those students rose and the students’ performance markedly improved. It seems likely that a similar relationship exists for student attitudes. Indeed, some studies suggest that students tend to adjust to what they perceive their teachers’ expectations to be and to aspire and perform accordingly.<sup>307</sup>

Such presumptions and expectations by law professors generally, but particularly with respect to minority students, can be especially damaging.<sup>308</sup> The “influence of law professors extends well beyond the classroom. . . . [They] are both the gatekeepers and molders of the profession.”<sup>309</sup> As a result, to the extent that they conduct themselves with insensitivity<sup>310</sup> in the classroom and act like “Hessian-trainer[s]”<sup>311</sup> with

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lives becomes an index of its social standing. While this is largely an economic matter, proximity to blacks compounds this assessment. For a white family to be seen as living in a mixed--or changing--neighborhood can be construed as a symptom of surrender, indeed as evidence that they are on a downward spiral.

If you are black, these white reactions brand you as a carrier of contaminations. No matter what your talents or attainments, you are seen as infecting a neighborhood simply because of your race. . . . It opens wounds that never really heal and leaves scars to remind you how far you stand from full citizenship.

ANDREW HACKER, *TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL* 43 (1995).

305. GOULD, *supra* note 300, at 65.

306. *Id.*

307. 1 RACIAL ISOLATION IN THE PUBLIC SCHOOLS, A REPORT TO THE U.S. COMMISSION ON CIVIL RIGHTS 99 (1967) (citations omitted).

308. These negative presumptions and expectations need not be, and most often probably are not, conscious and deliberate. Rather they are the unconscious products of living in a society steeped in negative and stereotypical images of minorities and women. See generally Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

309. Robert J. Borthwick & Jordan R. Schau, *Gatekeepers of the Profession: An Empirical Profile of the Nation’s Law Professors*, 25 U. MICH. J. L. REF. 191, 193 (1991). The authors emphasize that “[t]oday, the role of law professor includes control over the only training experience common to all members of the legal profession: attendance at law school.” *Id.*

310. A vivid, if perhaps somewhat dated, example of such pedagogic insensitivity, was related by Professor Bell, *supra* note 303, at 16. Bell tells a story about being warned by a recent black graduate of his law school about a property teacher who every year would illustrate the concepts of trespass and adverse possession with a hypothetical about a “Negro sneaking

“arrogance transformed into a pedagogical device,”<sup>312</sup> many minorities (and women) will continue to disengage and become alienated from the learning process. This alienation cannot help but have a direct and negative effect on students’ academic performance as well as their internal perceptions of intellectual self-worth and confidence. More importantly, majority male students, learning from their professor’s example, will carry those negative presumptions and expectations with them into their practice of law, and the same will affect their interactions with clients, colleagues, judges, staff, and applicants for jobs.

### 3. A Hostile Learning Environment for Women

The sense that the law school classroom may be a hostile learning environment for students of color also appears to apply to women.<sup>313</sup> In a comprehensive study of the graduating class of 1989, Suzanne Homer and Lois Schwartz discovered that most of the women “convey[ed] an overriding sense of isolation and dissatisfaction with what they perceive[d] as a hostile legal educational system.”<sup>314</sup> Moreover, their study revealed that these feelings were “not limited to women who were having social or academic difficulties in law school. Women who were ‘performing well’ often expressed the same feelings.”<sup>315</sup>

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late at night into a watermelon patch.” *Id.* Professor Bell’s mentor told him not to protest when the story was told, but rather to sit quietly and take it. *Id.* The property professor did tell the story and Bell did not protest. *Id.* Perhaps Bell’s current criticism of Harvard Law School is, in some small part, a result of the pent-up frustration borne from remaining quiet during his property professor’s insulting and demeaning story.

More contemporaneously, I recently had a number of black students come to my office to complain about a white colleague, who, in teaching a class on professional ethics, created a hypothetical involving a black man raping a white woman. When the students asked him what the relevance of the race of the perpetrator and the victim was, he told them that their respective races were not relevant at all and to disregard them in framing their response to the ethical problem presented. Their question to me was, if race was irrelevant, then why was it included in the facts? I had no answer for them except to applaud their having brought it to the professor’s attention, rather than just sitting quietly and taking it.

311. Borthwick & Schau, *supra* note 309, at 196.

312. Michael H. Levin, *Fear and Loathing at Harvard Law School*, HARVARD MAGAZINE, Mar.-Apr. 1995, at 44, 46.

313. See Suzanne Homer & Lois Schwartz, *Admitted but Not Accepted: Outsiders Take an Inside Look at Law School*, 5 BERKELEY WOMEN’S L.J. 1, 5 (1989-90). These observations are equally as true with respect to women as they are for students of color. Women in law schools tend to report feelings of isolation, alienation, and of being *suspected* and not *respected* in much the same ways as students of color. Clearly, “women of color” in law school bear the heaviest burden of all in this respect because of the intersection of gender and race. See *id.* at 8 (discussing a study conducted at Yale Law School from 1984 to 1987, in which women described their feelings of alienation in legal education as “a process of ‘self extrication,’ or the rigorous exclusion of feelings and personal beliefs”); see generally Taunya Lovell Banks, *Gender Bias in the Classroom*, 14 SO. ILL. L.J. 527 (1990).

314. Homer & Schwartz, *supra* note 313, at 5.

315. *Id.* at 4; see also Catherine Weiss & Louise Melling, *The Legal Education of Twenty Women*, 40 STAN. L. REV. 1299, 1330 (1988).

Their sense of isolation and dissatisfaction was based in large measure on what they described as the dominant white male model of the structure of legal education.<sup>316</sup> Catherine Weiss and Louise Melling identified the same structural and institutional source of women's isolation:

We increasingly saw ourselves as women in a white male community.

The environment reminded us and our men-peers that the profession did not yet reflect women's presence. . . .

The physical environment made us feel both invisible, images of women noticeably absent, and conspicuous, incapable of camouflage. Entirely absent were images of women and men of color. These surroundings kept us distrustful, reminding us that the institution that admitted us had traditionally denied entrance to women and people of color. The pictures, the furniture, the male professors—all indicated that the place had always belonged to white men.<sup>317</sup>

One of the most significant ways in which women's sense of isolation is manifested is their silence in the classroom. Professor Guinier noted that women described this process as "a dynamic in which [they] feel that their voices were 'stolen' from them during their first year."<sup>318</sup> Similarly, Weiss and Melling describe it as "[t]he drowning of women's speech in a flood of men's voices."<sup>319</sup> This silencing process is apparently so pernicious that even women who had been active class participants in college classes suddenly and startlingly fall mute in the law school classroom.<sup>320</sup>

Many women feel that the burden of silence in the law school classroom falls most heavily on women of color:

[W]omen of color indicat[ed] that they participated less than any other group. Strikingly, a majority of women and people of color indicated that they *never* asked questions or volunteered answers in class, in contrast to nearly two-thirds of white males who stated that they had done both with some frequency. The data thus confirm what many of us have experienced or observed as law students, and what has been

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316. Homer & Schwartz, *supra* note 310, at 3.

317. Weiss & Melling, *supra* note 315, at 1322-23 (citation omitted); see generally Lani Guinier, *Of Gentlemen and Role Models*, 6 BERKELEY WOMEN'S L.J. 93 (1990-91). Upon returning to Yale Law School ten years after her graduation, Guinier noticed "the traditional portraits of larger-than-life white men," Guinier, *supra*, at 93, and concluded that "the gigantic male portraits symbolized my alienation as a student from class, race, and gender privilege. Law school, as a professional school, was simply more homogeneous with even more explicitly homogenizing institutional norms . . . than I had either expected or previously experienced." *Id.* at 94 n.4; see also Lani Guinier et al., *Becoming Gentlemen: Women's Experiences at One Ivy League School*, 143 U. PA. L. REV. 1 (1994).

318. Guinier et al., *supra* note 317, at 4.

319. Weiss & Melling, *supra* note 315, at 1302. The authors suggest that this alienation process is particularly significant because it "affects the legal profession and everyone it touches. What we do in law school shapes what we will do as lawyers, which in turn affects the lives of others. Until women share equally in the learning and thus in the practice, teaching, and making of law, we will be disabled in shaping society to fit women's needs." *Id.*

320. See *id.* at 1333.

verified by every study which has addressed the issue. Although we are present in increasing numbers in the classroom, we are present only to listen and not to speak.<sup>321</sup>

In addition to the structural and institutional factors described by Professor Guinier and others, Weiss and Melling have identified four additional and interrelated factors that contribute to the silencing of women in the law school classroom. First, they suggest it is a consequence of the hostility many professors and male students feel towards their presence.<sup>322</sup> Second, they attribute it to the law school style of argumentation, which they describe as a "generalized aggression" directed "against every person and every issue."<sup>323</sup> Third, they describe "nonconversation," a type of classroom speech pattern in which primarily men speak only to demonstrate their intellectual and verbal prowess, and no one listens or responds to anyone else.<sup>324</sup> Fourth, they describe a type of male showmanship engendered by "classes dominated by argument or nonconversation."<sup>325</sup>

The hostility felt by women in the law school classroom occasionally manifests itself as "direct derogation of [their] minds and bodies" by their male colleagues.<sup>326</sup> More frequently, however, this hostility is the product of "a kind of willful deafness toward what women-students say, accompanied by an absence of eye contact, a physical turning away."<sup>327</sup> Whether done by their male colleagues, their professors, or both, the insulting, excluding, or drowning out of women in the classroom reflects great pedagogic insensitivity by the law professor. After all, it is the professor who is primarily responsible for such behavior, either through active participation or simply by not establishing a more disciplined classroom environment. Unfortunately, in such hostile environments, classes "become a closed cir-

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321. Homer & Schwartz, *supra* note 313, at 29 (citation omitted).

322. Weiss & Melling, *supra* note 315, at 1335 (citation omitted).

323. *Id.*

324. *Id.* Additionally, the authors describe this type of elitist and self-centered disconnection, a situation in which

[n]o one listened to each other. The teachers didn't listen to the students. The students didn't listen to the teachers. The students didn't listen to one another. There was no joint project to learn something. In class, the teacher would say something. The student would respond. The teacher's response would have nothing to do with the student's comments.

*Id.* at 1341.

325. *Id.* at 1335.

326. *Id.*

327. *Id.* at 1336. One student reported:

There were times when women made points, and they were ignored or trivialized. Five minutes later, a man would make the same point, in three parts, and it was discussed. I hated that . . . . We were interrupted or pounced on. . . . Some professors . . . would always call on the men first when the men had their hands up, or they would always call on all the men first and then call on the women . . . . The men don't raise their hands, they just speak out, and they're very loud, and they just start shouting over each other.

*Id.*

cle of men [that is, some] women start to behave as if they weren't there, as if they didn't deserve to participate as fully in their education as their classmates."<sup>328</sup>

Just like their classmates of color, as well as many other law students, women who are being silenced and suffocated in the classroom pay a very personal price in the form of "genuine and tremendous 'psychic injury' to their self-esteem."<sup>329</sup> In this respect, Homer and Schwartz found that "57% of women of color, 50% of white women, and 41% of men of color agreed that they no longer felt intelligent and articulate in law school, in vivid comparison to only 25% of white men. . . . [L]oss of confidence was experienced by 43% of women of color, 36% of white women, 30% of men of color, and only 19% of white men."<sup>330</sup> This pattern was so pervasive that the study's authors concluded that white men were having a vastly different experience in law school "from the rest of us."<sup>331</sup> It is, therefore, not surprising to find that with respect to grades in two first-year courses, the study concluded that "women were not . . . performing as well as men, at least in the critical first year."<sup>332</sup> No doubt this results at least partly from the silencing, excluding, marginalizing, and ridiculing environment.

A recent study conducted by the Law School Admission Council (LSAC) on the differences in the law school experiences of men and women con-

328. *Id.* at 1337. This atmosphere within the classroom is clearly within the professor's ability to control and change. More subtle and perhaps more destructive behavior occurs outside the classroom, where women who dare to attempt to participate in class are punished and thereby silenced by both male and female colleagues who ridicule them based on "ideas about women's sexuality." See Guinier et al., *supra* note 317, at 51 n.128. In this context, Professor Guinier noted that

[o]ne woman student reported hearing negative comments about her frequent class participation while in a stall in the women's bathroom. Although married, she was decried as a "man-hating lesbian." She reports that she almost dropped out of law school that day. Another woman reported that she was called a "feminazi dyke" for her frequent comments in first-year classes. This student, who is Jewish, immediately stopped speaking in all her first-year classes. Still another woman said she felt "like wherever I went [the hissing] would follow me. It really shut me up."

*Id.* Professor Guinier also observed that although these put downs occur outside of classes in informal student relations, "they are normalized by and may reproduce behavior that is performed within the classroom." *Id.* at 52.

329. Cathaleen A. Roach, *A River Runs Through It: Tapping into the Informational Stream To Move Students from Isolation to Autonomy*, 36 ARIZ. L. REV. 667, 671 (1994).

330. Homer & Schwartz, *supra* note 313, at 33.

331. *Id.*

332. *Id.* at 30. But see Janet Taber et al., *Gender, Legal Education, and the Legal Profession: An Empirical Study of Stanford Law Students and Graduates*, 40 STAN. L. REV. 1209 (1988). In that study, the Stanford researchers

found no statistically significant difference in the number of men and women elected to Order of the Coif. They extrapolate this finding to provide evidence that all men and women at Stanford are performing comparably. . . . However, they do not consider the fact that the top ten percent of the class elected to Order of the Coif is not necessarily (or even logically) representative of the performance distribution among men and women in the other 90%.

Homer & Schwartz, *supra* note 313, at 13.

cluded there were “wide disparities in the experiences of men and women after they entered law school.”<sup>333</sup> Central in these disparities was the finding that many women who overachieved in earlier stages of the academic pipeline tended to perform less well than their male counterparts and received lower grades in law school.

Although the LSAC study failed to identify definitively the underlying causes for these disparities, its author, Dr. Linda F. Wightman, suggested that the disparity was due primarily to what she termed a “chilly classroom environment for women.”<sup>334</sup> Moreover, she concluded that at least part of the explanation for these gender-based disparities lay in the fact that “women’s self-concept is being undermined”<sup>335</sup> in classroom environments that are cold and inconsistent “with their way of problem-solving.”<sup>336</sup> To this extent, the experiences of both women and people of color are quite similar. The law school classroom is for both groups a learning environment that is cold, alienating, hostile, and therefore different from what affects their white male counterparts.

To the extent that performance on the bar exam is in any way correlated to academic performance in law school, the psychic injury done to women and students of color by being isolated and silenced in the classroom reflects itself first in lower academic performance, then, predictably, in lower success rates on the bar exam. As a consequence, their academic performance, especially in the first year, is as much, if not more, a function of such “isolation factors than traditional index numbers like GPA’s and LSAT’s.”<sup>337</sup>

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333. Ken Myers, *Study of Gender Difference Finds 1-L Women Draw Lower Grades*, THE NATIONAL LAW JOURNAL, Jan. 30, 1995, at A17.

334. *Id.*

335. *Id.*

336. *Id.* The study also revealed that even though women are receiving lower grades than men, the evidence indicated that they are spending “a lot more time studying than men.” *Id.* While the results of this study clearly indicate that a lot more work needs to be done to understand fully what is going on in law school classrooms with respect to women and their self-image, Dr. Wightman concludes that, “We are learning that women are coming out of that first year of law school with a very different self-concept than men are.” *Id.*

337. Roach, *supra* note 329, at 676. Dean Roach goes on to observe that those who are generally described as outsiders, which includes minorities and women (especially if they are older),

experience increased isolation with resulting increased psychological and academic hardships. . . . [S]tudies report that a typical behavioral response to this isolation is increased passivity and non-assertive behavior, including asking fewer questions of faculty members. In turn, this passivity clearly affects grade point averages. . . . [A]cademic self-concept, rather than the traditional cognitive skills, is a significant predictor of academic success.

*Id.* at 677 (citation omitted).

#### 4. *Academic Support Programs and Stigmatization*

Another source of the low self-image that afflicts minority law students and women is the existence of potentially stigmatizing academic support programs.<sup>338</sup> Although not all law schools have special academic support programs for minority students, the vast majority do, in one form or another.<sup>339</sup> Despite the apparently altruistic motives of such programs, the implicit message that “support programs relay to minority students is not encouragement and empowerment; the message is incompetence and the predictive certainty of failure.”<sup>340</sup>

Almost without exception, law school academic support programs select students to participate on the basis of such “objective criteria” as low Law School Admissions Test (LSAT) scores and undergraduate grade point averages (UGPAs).<sup>341</sup> Most academic support programs do not explicitly select students to participate on the basis of race. However, since minority students enter law school with relatively lower statistical predictors, such as LSAT scores and UGPAs, they comprise a highly visible and disproportionate percentage of students who are either invited or required to participate in these programs. As a consequence, even before these minority students attend their first law school class, by having been selected to participate in one of these programs, they have received an implicit message from the law school that says, “You are going to have problems.”<sup>342</sup> This message can be particularly negative because, with

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338. See generally Leslie G. Espinoza, *Empowerment and Achievement in Minority Law Student Support Programs: Constructing Affirmative Action*, 22 U. MICH. J. L. REF. 281 (1989) (describing the systemic inadequacy of most academic support programs). Espinoza argues that because the law schools that employ such programs do not understand the counter-productive psychological damage that they inflict on minority students, such programs will never succeed unless they are properly restructured. *Id.* at 286-92.

339. See *id.* Espinoza notes that in a 1988 report issued by the Minority Affairs Committee of the Law School Admissions Council (LSAC), of 128 schools that responded to the LSAC questionnaire, “81 law schools have a minority recruitment program, 51 have a summer orientation program, 59 have a tutorial program, 32 have a legal writing program and 58 have other special programs for minority students.” *Id.* at 281, n.4. (citing LAW SCHOOL ADMISSION COUNCIL MINORITY AFFAIRS COMM., SUMMARY REPORT ON THE LSAC QUESTIONNAIRE ON SPECIAL LAW SCHOOL PROGRAMS FOR MINORITY STUDENTS 5 (1988)).

340. *Id.* at 282; see also Stephen R. Ripps, *A Curriculum Course Designed for Lowering the Attrition Rate for the Disadvantaged Law Student*, 29 HOW. L.J. 457, 462 (1986) (noting that “classification of minority students into a collective, homogeneous body, funneled into segregated remedial classes branded these students as different and caused their failure to fully integrate on campus”); Roach, *supra* note 329, at 675 (“[A] ‘message of incompetence’ or failure can be telegraphed to the student in a myriad of ways, including actions by professors who have lower expectations of minority students. In short, it seems apparent that minority student isolation may be more extreme than that of traditional law students, with far-reaching effects on self-esteem and motivation.”).

341. Espinoza, *supra* note 338, at 286-89.

342. *Id.* at 288.

rare exception, the structure and focus of these special support programs is remedial in nature.<sup>343</sup>

By sending such a negative message to the minority student and the whole law school community, law schools stigmatize minority students. Such stigmatization has the counterproductive effect of "damag[ing] the students' self-expectations . . . [and] creat[ing] self-doubt in the minority student,"<sup>344</sup> effects which surely undermine the potential effectiveness of the programs. With this burden placed upon them from the beginning of their law studies, minority students have tended to adopt an attitude of survival over one of achievement.<sup>345</sup>

As a result, many minority students labor under a type of numbing pessimism and self-doubt, reinforced by their professors, their majority counterparts, and the law school administration. This self-doubt often manifests itself in the form of marginalization and disengagement from the learning process, poor preparation, and, ultimately, poor performance. The manifest expectation of failure becomes a type of self-fulfilling prophecy—feeding upon itself with distressing and devastating results. Unlike the "little engine that could," which surmounted its challenges by reciting the mantra "I think I can, I think I can," minority law students, suffering under the stigmatizing badge of a special and "remedial" support program, must struggle mightily against an official chorus that belittles at every turn, "We *don't* think you can, we *don't* think you can." These unreasonable burdens make the plight of the minority law student who fails all the more tragic and the success of the minority law student who excels all the more worthy of praise and admiration. The bitter irony is that an academic support program does not have to be remedial in focus and, therefore, stigmatizing in result. It is quite possible to design, structure, and implement an academic support program that is empowering and challenging in both tone and content. Such programs tend to build minority students up, rather than to weigh them down.<sup>346</sup>

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343. *Id.* at 290.

344. *Id.* at 289.

345. See generally Nerissa Bailey-Scott Skillman, *Misperceptions Which Operate as Barriers to the Education of Minority Law Students*, 20 U.S.F. L. REV. 553, 554 (1986). Skillman points out that the primary misperception that operates as a barrier to the education of minority law students is that both "faculty and students often misperceive the academic standard for minority students as being one of survival, rather than excellence. . . . Psychological studies have shown over and over again that a subject's level of achievement will be determined by the experimenter's articulation of the standard to be achieved." *Id.*

346. See *infra* part VI, discussing the concept of "wise schooling." At my own law school, Touro Law Center in Huntington, New York, we have discovered that by creating an academic support program for all minority students, without regard to statistical indicators, and involving active participation of minority law professors and successful upper-class minority students as teaching assistants, the sense of stigma is significantly reduced and the sense of empowerment is greatly enhanced.

### 5. *The Power of Law School Grades*

Unfortunately, within the law school culture, grades matter all too much and exert a pervasive, and sometimes devaluing, power. Ideally, grades should simply be a reflection of academic performance in particular courses at particular times. Instead, they have taken on the significance of being the ultimate metaphysical measure of a student's intelligence and personal value.<sup>347</sup> This emphasis on grades has particularly devastating effects on both minority and majority law students.

In a recent article appearing in the *Harvard Alumni Magazine*, a survey of the Harvard Law School reunion class of 1969 indicated that due to the law school's " 'scarifying emphasis on grades . . . men of outstanding undergraduate attainment, Rhodes scholars and junior Phi Betes, let mediocre grades in law school convince them that they were mediocre men.' " <sup>348</sup>

If a law school's "scarifying emphasis on grades" can have this effect on the best and the brightest of privileged majority males, who have had every academic reinforcement of their intellectual worth, it is hardly surprising that minority students, many from difficult economic and educational backgrounds, would suffer even more under the weight of this burden. As a consequence, minority law students, who are not performing well academically and who are already numbed by the ambient chorus of intellectual suspicion, see their low grades as a measure of their intelligence rather than their performance.

Predictably, for minority law students, low first-year grades can establish a self-reinforcing negative expectation of failure that feeds on itself in a familiar pattern of self-fulfilling prophesy. In addition, such grade patterns and the expectations that they engender contribute mightily to the prevailing mindset of survival rather than excellence<sup>349</sup>—law school is perceived as an adverse, perhaps even hostile, learning environment, where minority students' prospects are survival at best, failure at worst. As a result, like the elephants in the child's parable,<sup>350</sup> many minority law students continue holding themselves back, failing to succeed, and fearing to take the risk of committing themselves fully to the maximum effort required to excel.<sup>351</sup>

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347. See Skillman, *supra* note 345, at 556.

348. Levin, *supra* note 312, at 47 (quoting Dr. David Reisman, Harvard law class of 1934).

349. Espinoza, *supra* note 338, at 289.

350. See *supra* note 294.

351. See Espinoza, *supra* note 338, at 289 n.33 (citing Portia Y. T. Hamlar, *Minority Tokenism in American Law Schools*, 26 HOW. L.J. 443, 536 (1979) (discussing the LSAT's effect, Hamlar cites a Mexican American Legal Defense and Education Fund (MALDEF) study, which notes that "lack of confidence can be a dominant cause of a student's academic problems"))).

### 6. *Effects on Bar Exam Performance*

Coming out of the hostile learning environment of a law school that doubts their intellectual value and tells them so in many subtle, and not so subtle, ways, minority law students then face the bar exam with the anecdotal knowledge that students of color fail on their first attempt in disproportionate numbers. So pervasive is this expectation of failure that it is a matter of common belief among many minority law students that, for them, the first administration is for practice and passing comes later, on their second or third attempt.<sup>352</sup>

However, the student's focus on the eventual passage rate of minorities is misplaced. This is because the very data used to demonstrate the relative parity of the eventual passage rates between minority and majority candidates also discloses that "minority applicants who fail the exam on the first attempt *disproportionately do not sit for the examination again.*"<sup>353</sup>

Consequently, although eventual passage rates may be relatively equal between minority and majority candidates, the rates reflect the ultimate success of only a fraction of the minority candidates who initially took the bar exam. Clearly, focusing on the eventual passage rates is misleading and understates the adverse racial impact of the examination.<sup>354</sup> Permanently losing so many promising and potentially qualified minority applicants because of a seriously flawed examination has a serious effect on the profession and the public interest.

Because so many minority law students focus on the expectation of failure on their first attempt and eventual passage later on, predictably, the self-fulfilling prophecy is fulfilled, at least on their first attempt, with all too great frequency. But approaching the bar examination with a psychological expectation of failure is not an inherent function of being a mi-

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352. This view has been fueled by reports that suggest that the real or eventual bar passage rates for minorities is "twice their initial rate. . . . Thus, there was only a 2 to 3 percentage point difference between the minority group's share of the test taking population and their share of those licensed to practice." Klein, *supra* note 4, at 30. Similarly, the New York State Board of Law Examiners, in a letter to the Association of the Bar of the City of New York, responding to that Association's report on admission to the bar in New York, concluded that " 'eventual pass rates' of minority and majority candidates 'demonstrate access by minorities to the profession' and that the bar examination is not a differential deterrent to becoming a lawyer." See REPORT ON ADMISSION TO THE BAR IN NEW YORK, *supra* note 6, at 14 (citation omitted).

353. Maurice Emsellem & Richard S. Barrett, *The Bar Examination Debate (Continued)*, 16 T. Marshall L. Rev. 531, 534 (1991) (quoting YAMAKI ET AL., *supra* note 6, at 5) (emphasis added).

354. YAMAKI ET AL., *supra* note 6, at 5. The Yamaki report indicated that the eventual passage rate for the whole pool of African-American applicants remained (at least in California) at 48%, versus 84% for nonminorities. *Id.* Furthermore, the failure rates of retakers was 39% for African-Americans, versus 11% for nonminorities. *Id.*; see also Emsellem & Barrett, *supra* note 353, at 534.

nority in America. Rather, it is the reasonable and foreseeable consequence of a law school learning environment that tends, from its very beginning, to grind down and devalue the minority candidate's sense of self-esteem, self-worth, and self-confidence. That education has taught the minority student the law, along with deeper and more ominous lessons that only intensify the internal wounds that are the legacy of growing up as a person of color in America.<sup>355</sup> Tragically, for too many law students of color, law school teaches self-doubt and to hold oneself back—to expend less and to expect less.<sup>356</sup>

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355. See generally BELL, *supra* note 303, at 154 (“Of all the injuries inflicted by racism on people of color, the most corrosive is the wound within, the internalized racism that leads some victims, at unspeakable cost to their own sense of self, to embrace the values of their oppressors.”) (citations omitted); see also ARTHUR ASHE & ARNOLD RAMPERSAD, *DAYS OF GRACE: A MEMOIR* 127-28 (1993). Therein, Arthur Ashe poignantly confesses that

segregation had achieved by that time what it was intended to achieve: it left me a marked man, forever aware of a shadow of contempt that lay across my identity and my sense of self-esteem. Subtly the shadow falls on my reputation, the way I know I am perceived; the mere memory of it darkens my most sunny days. I believe that the same is true for almost every African-American of the slightest sensitivity and intelligence. . . . I don't want to overstate the case. I think of myself, and others think of me, as supremely self-confident. . . . Still, I also know that the shadow is always there; only death will free me, and blacks like me, from its pall.

ASHE & RAMPERSAD, *supra*, at 127-28. Clearly, if Arthur Ashe, a man who achieved brilliant and unparalleled success in an arena that had been traditionally barred to black people, felt a “shadow of contempt” from which only death could free him, minority law students in a hostile learning environment may also feel the weight of that “shadow”.

356. These lessons are exacerbated by the shocking dearth of minority law professors in our nation's law schools. See Espinoza, *supra* note 338, at 292-93. The absence of minority faculty only serves to reinforce the minority law student's impression that law is a “white man's world,” in which it is difficult to see minorities participating as full members. See *id.* The presence of minority faculty, in more than token numbers, provides

concrete role models for minority law students. They dispel the myth of preordained mediocrity for minorities. . . . Minority faculty, though they may be marginalized and undermined by some, do represent power. Statistically, their presence means a higher retention of minority students. Their perceived accessibility creates a resource for advice and support. Minority faculty inspire confidence by their example; they provide perspective by their shared cultural experience.

*Id.* at 293. (citing, *inter alia*, Skillman, *supra* note 345, at 532 (stating that the “study found that the presence of minority faculty had a positive (statistically significant) relationship upon the retention rate of first-year black students”).

In addition, Professor Espinoza observed, “There is indeed a woefully inadequate number of minority law professors. The recent Society of American Law Teaching (SALT) study found that twenty-eight law schools have no minority faculty, thirty-two have only one, twenty have only two, and only fourteen law schools (excluding historically black schools) have more than two minority faculty.” Espinoza, *supra* note 338, at 290 (citing Charles R. Lawrence III, *Minority Hiring in AALS Law Schools: The Need for Voluntary Quotas*, 20 U.S.F. L. REV. 429, 441 (1986)).

## VI. A MODEST PROPOSAL FOR A SOLUTION TO THE PROBLEM OF RACIALLY DISPARATE BAR PERFORMANCE

Improving the quality of the educational preparation of minority law school applicants, as some have suggested, is certainly a desirable goal. However, it should be pursued for its own sake and not as a solution to the problem of racially disparate bar performance. Current law school applicants, and later bar exam candidates, are perfectly capable of meeting the challenge of excelling in law school and passing the bar if their law school learning environment is significantly improved. By significant improvement, I do not mean to suggest anything having to do with course selection or substantive course content. Rather, I am referring to the negatively reinforcing law school learning environment imposed on students of color by their professors, majority peers, and school administrators.

The best hope for both a long- and short-term solution lies in what Professor Claude Steele describes as “wise schooling.”<sup>357</sup> The essential characteristic of wise schooling is a commitment by faculty and administrators to communicate to minority students that they “see value and promise in [them] and to act accordingly.”<sup>358</sup> In sum:

The wisdom of these tactics is their subtext message: “You are valued in this program because of your academic potential—regardless of your current skill level. You have no more to fear than the next person, and since the work is difficult, success is a credit to your ability, and a setback is a reflection only of the challenge.” The black students’ double vulnerability around failure—the fear that they lack ability, and the dread that they will be devalued—is thus reduced. They can relax and achieve.<sup>359</sup>

The keys to wise schooling are assuring, valuing, challenging, and inspiring students. By assuring minority students that they will not suffer a negative blow to their sense of self-worth and self-identity, they are thereby encouraged to risk failure and expend maximum effort. By being valued, the students understand that there are no negative assumptions

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357. Claude M. Steele, *Race and the Schooling of Black Americans*, THE ATLANTIC MONTHLY, Apr. 1992, at 68, 75 (observing that “[w]ise schooling may indeed be the missing key to the schoolhouse door”).

358. *Id.* at 75.

359. *Id.* The author illustrates the success of this approach with a comparison to the movie *Stand and Deliver*, which tells the story of Jaime Escalante, a math teacher who utilized a similar technique of “assurance and challenge” to teach inner city kids at an East Los Angeles Chicano school to master calculus and ultimately to “ace” the state math exams. Similarly, in describing the unparalleled success experienced by Xavier University in producing record numbers of black medical students, a spokesman said, “What doesn’t work is saying, ‘You need remedial work.’ What does work is saying, ‘You may be somewhat behind at this time but you’re a talented person. We’re going to help you to advance at an accelerated rate.’” *Id.* at 75-76.

about their intellectual capacity and ability to learn. As a consequence, minority students are willing to engage in the learning process, confident that they are capable of learning, and, more importantly, confident that they are perceived by the authority figures around them as being capable.

When instructors challenge their students to meet high standards and expend maximum effort, minority students understand that their instructors have confidence in their potential to reach those goals. And, even if they are unsuccessful in reaching them, “[f]rustration will be less crippling than alienation.”<sup>360</sup> Inspired students will be willing to strive repeatedly for excellence when they are encouraged to recognize such failures as temporary setbacks, not total defeats. The students will not so easily take failure as a

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360. *Id.* at 78. The author observes that “[h]ere psychology is everything: remediation defeats, challenge strengthens—affirming their potential, crediting them with their achievements, inspiring them.” *Id.*

A striking example of the power of such psychological factors was highlighted in a recent *New York Times* article on the work of Professor Steele, who is a professor of sociology at Stanford. See Ethan Watters, *Claude Steele Has Scores To Settle*, N.Y. TIMES, Sept. 17, 1995, § 6 (Magazine), at 45, 45-46. In describing experiments that Professor Steele had conducted, the author observed that

Steele . . . has a different take [than other scholars on why African-Americans score significantly worse on standardized tests the whites]. While they have tried to find an answer to the black-white testing gap by analyzing factors like economic status, family structure and educational opportunities, Steele has looked into the test-taking situation itself and has found new evidence of “a beast” stalking black test takers.

“Our idea,” Steele says to the group, “was that whenever black students concentrate on an explicitly scholastic task, they risk confirming their group’s negative stereotype. This extra burden, in situations with certain characteristics can be enough to drag down their performance. We call this burden stereotype vulnerability.”

In the first experiment Steele describes, he and Joshua Aronson from the University of Texas gave two groups of black and white Stanford undergraduates a test composed of the most difficult verbal skills questions from the Graduate Record Exam. Before the test, one group was told that the purpose of the exercise was only to research “psychological factors involved in solving verbal problems,” while the other group was told that the exam was “a genuine test of your verbal abilities and limitations.”

“This is what we found,” Steele says, placing a transparency onto the overhead projector. As the information in the bar charts sinks in, people sit up in their chairs. There are several audible “hmmms,” a muffled “wow!” Then a professor at the back of the room asks: “Did you give the groups the same test?”

Steele smiles and says, “Yes.” The question speaks to the startling nature of the results. As the graphs indicate, the blacks who thought they were simply solving problems performed as well as the whites (who performed equally in both situations). However, the group of black students who labored under the belief that the test could measure their intellectual potential performed significantly worse than all the other students.

Steele’s idea of stereotype vulnerability is not that the student consciously or unconsciously accepts the stereotype (as other social scientists have speculated), but rather, as Steele says, that they have to contend with this whisper of inferiority at the moment when their mental abilities are most taxed. In trying not to give credence to the stereotype, Steele theorizes, the students may redouble their efforts only to work too quickly or inefficiently.

mandate on their personhood and a measure of their intelligence, but more as a challenge. By eliminating the stigma that restrains the spirit to achieve, minority students will be free to reach their true potential. If proof were needed, the fact that “erasing stigma improves black achievement is perhaps the strongest evidence that stigma is what depresses it in the first place.”<sup>361</sup>

While the concept of making the student feel valued may sound overly simplistic, it is not easily accomplished. However, when it is, the results can be truly outstanding. The difficulty in accomplishing this goal in the law school culture lies in overcoming the entrenched, negative views of minority achievement potential. In addition, it will require law schools to place a great deal more emphasis on teaching than they currently place. Only in this way will law professors be taught to do something that they

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361. Steele, *supra* note 357, at 77. The author also observes that the power of wise schooling is so great that it can even overcome “the barriers of poverty.” *Id.* at 76. In this context, the author relates the story of James Comer, a child psychiatrist at Yale University, who over a 15-year period,

transformed the two worst elementary schools in New Haven, Connecticut, into the third and fifth best in the city’s thirty-three school system without any change in the type of students—largely poor and black. His guiding belief is that learning requires a strongly accepting relationship between teacher and student . . . to establish a valuing and optimistic atmosphere in which a child can—to use his term—identify with learning.

*Id.*

Recently, results of the implementation of Steele’s wise schooling at the college level were released. The 21st Century Program, established at the University of Michigan in 1991, was designed to counteract “stereotype vulnerability.” See Marilyn Elias, “*Inoculating*” *Minority Students Against Prejudice*, USA TODAY, Aug. 10, 1995, at D6; Joanne Jacobs, *Affirmative Treatment Enrichment*, THE SACRAMENTO BEE, June 28, 1995, at B7. Each year, the program takes approximately 250 freshman (5% of the incoming class) and enrolls them in demanding academic seminars and special study groups. See Elias, *supra*; Connie Leslie, *You Can’t High-Jump if the Bar Is Set Low: A New Prescription To Help Black Kids Succeed*, NEWSWEEK, Nov. 6, 1995, at 82, 82. The group of students, which includes whites and economically disadvantaged minority students, is selected at random and housed in the same dorm. Leslie, *supra*. The students are told that they are going to be held to high standards but that they are capable of succeeding. *Id.* The workshops they attend demand a mastery of their courses beyond the normal requirements and emphasize collaboration on projects. Elias, *supra*. The results are dramatic.

Outside of the 21st Century Program, black freshmen have a 1.98 grade point average (GPA), while whites have a 2.86. Jacobs, *supra*. Within the program, blacks average a 2.89 GPA, and whites do about one-tenth of a point better. *Id.* Not only do blacks who participate in the program get higher grades, but their dropout rate plummets from 30% to 10%. Elias, *supra*. The cost of the program? About \$150 per student. Jacobs, *supra*. Based on these results, officials at the University of Michigan have announced plans to expand the program to include 25% of incoming freshmen. Elias, *supra*.

now know very little about—how to teach.<sup>362</sup> Teaching, after all, is what law students and their prospective employers expect.<sup>363</sup>

Ironically, there is little or no effort made in law schools to train law professors how to teach effectively.<sup>364</sup> With little or no direction or training in how to teach, law professors do the only thing they can—that is, they teach as they were taught. In so doing, they also “teach what [they] have lived.”<sup>365</sup> As a consequence, law professors not only devise their own methods of teaching out of virtually whole cloth, but they also imbue that method with a value system that is socially, economically, politically, and philosophically a product of their own lives and experiences. Many students who do not share the professor’s socioeconomic class experiences of the world are left out of this value system and either never break in or suffer a “painfully long adjustment period.”<sup>366</sup>

Whether law schools, and law professors in particular, are willing to undergo such a fundamental change in the way they value teaching is an open question. However, whether such wise schooling can be effective in creating more productive and successful students, and ultimately in resolving the problem of racially disparate bar performance, is almost beyond doubt. In the law school where I teach, Touro Law Center, we have developed a nonstigmatizing minority support program that is based on the wise schooling model. The first minority class to complete three years in this program and take the bar examination passed on the first attempt at a rate of eighty-five percent. This class had a greater than twenty percent increase in passage rate over the class before it, and the passage rate differed insignificantly from that of the majority students in the class.<sup>367</sup>

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362. See Vaughns, *supra* note 3, at 429. The author notes that “[a]s legal educators, law faculty are, in fact novices. Although law professors are well adept at ‘inundating students with substantive and procedural rules of law, [they] rarely if ever provide any guidance or instructions in methods of learning.’ ” *Id.* (quoting Paul T. Wangerin, *Learning Strategies for Law Students*, 52 ALB. L. REV. 471, 471 (1988)); see also Jay Feinman & Marc Feldman, *Pedagogy and Politics*, 73 GEO. L.J. 875, 882 (1985).

363. See Douglas D. McFarland, *Students and Practicing Lawyers Identify the Ideal Law Professor*, 36 J. LEGAL EDUC. 93 (1986). McFarland found that there was a striking difference between students’ concept of an ideal professor and how law teachers viewed themselves. Whereas law professors positively valued research and writing, students and lawyers rejected these priorities in favor of concentration on classroom instruction. See *id.* at 103.

364. I recall with amusement and surprise my own entry into academics on the raised side of the lectern. In essence, the administration and faculty said, “Here is your class roster of students and schedule of when the class meets, there is your classroom, good luck and good bye!” I am sure that every law professor has had a similar initiation into the mysteries of law teaching.

365. Rachel F. Moran, *Commentary: The Implications of Being a Society of One*, 20 U.S.F. L. REV. 503, 511 (1986).

366. Espinoza, *supra* note 338, at 292.

367. Moreover, it is interesting to note that in the current first-year class, the top-ranked person is a minority student who was a very active participant in our program. In addition, two other members of the program received the American Jurisprudence Awards for the best exam performance in two different first-year classes.

Based on this experience, we have every reason to expect this trend to continue.

## VII. CONCLUSION

The problem of disparate bar performance along racial lines is very troubling and has only in relatively recent years begun to receive the type of serious attention and study that it deserves. The recently instituted LSAC bar study will accomplish much toward the goal of providing important insights into the true nature and extent of this problem.

However, even the LSAC bar study is inadequate for the task. What is needed is the compilation of comprehensive and ongoing data regarding bar exam candidates and their test results. This can be accomplished only if each state removes the current prohibitions on collecting race and gender data on bar candidates. Perhaps national legislation on this issue is needed in order to ensure uniformity across jurisdictions. But whether instituted on a state by state, or a national, basis, such data is essential to maintaining public faith in the fairness and meaningfulness of the bar exam.

The evidence appears to suggest some measure of widespread, although by no means universal, judicial hostility to bar examination challenges grounded on claims of racial bias. As a consequence, there is a substantially accumulated weight of judicial authority against the prospects of success for such suits. Viewed through this lens, the prospects for future race-based judicial challenges to the bar exam do not appear to be particularly bright. However, there are at least some rays of light that could inspire future plaintiffs and guide future courts having occasion to consider these issues.

The decision in *Sharif v. New York State Education Department*<sup>368</sup> provides a well-reasoned basis upon which a new generation of judges

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It is not surprising that until quite recently, our law school had five minority law professors on the faculty, two of whom were women and both of whom were tenured. As a result of leaves of absence and acceptance of visiting professor positions at other law schools, we now have only three minority law professors. Interestingly, for the past two years in a row, the president and vice-president of the student bar association have also been minority students. Quite recently, the editor-in-chief of the law review was a minority student and a very active member of our support program as a student and later as a teaching assistant. Last year, two students from our law school were selected to be clerks in the New York Court of Appeals. Both of these students were minorities and had been extremely active members of our support program as first-year students and later as teaching assistants. One of those students was an editor on the law review, and both were graduated in the top 10% of their class. Clearly, as suggested earlier, there appears to be a definite correlation between the presence of minority faculty members and the success of minority students.

Most importantly, we have a dean and an administration who fully support and fund our academic support program and participate in an ongoing and critical evaluation of our progress, our needs, and our performance. Finally, a survey of the program's graduates reveals that they perceive that it has truly made a difference in their educational success.

368. 709 F. Supp. 345 (S.D.N.Y. 1989); see *supra* part III.B.5.

could revisit the reach of the Fourteenth Amendment's Equal Protection Clause and Title IX of the Education Amendments to protect racial minorities and women from the irrational and inequitable reliance on standardized tests. The decision in *Woodard v. Virginia Board of Bar Examiners*<sup>369</sup> is also encouraging in view of its finding that, as agents of the state, boards of bar examiners are "employers" within the jurisdictional grasp of Title VII. Although, based on its sense of countervailing federalism concerns, that court declined to extend Title VII's test validation standards to the bar exam, it provided a well-reasoned position on the appropriate reach of the statute.<sup>370</sup> As such, it could provide a firm intellectual foundation upon which to build future cases that would urge that the state be held to the same standards as any ordinary business or trade union, in being precluded from limiting minorities access to employment under the guise of unrelated and irrational testing procedures.

In addition, it also is becoming quite evident to some that the bar examination is not a legitimate test of a student's ability to practice law competently, but, rather, nothing more than a law school synthesizing experience, more akin to a law school comprehensive examination than a professional entrance examination.<sup>371</sup> Some feel that the bar exam does not successfully ensure professional competence and that it statistically, and unfairly, screens out more qualified than unqualified applicants. Too much is at stake for both the bar examination candidate and the public to allow this to continue.<sup>372</sup> As an alternative, some have called for a new, invigorated look into the process of licensing lawyers, in order more accurately to ensure competence, without sacrificing fairness.

The process of revision of the bar examination will take time to complete. In the meantime, the proper focus lies in concentrating not only on the quality of the candidates that sit for the bar exam, but also on the law school educational environment that produces those candidates. Negatively reinforcing law school environments that damage the self-esteem of minorities and women and cause them to disengage and become alienated from the classroom and the law school environment can have severe and damaging effects on the most vulnerable students—effects the significance and duration of which are probably impossible to measure accurately. This damage can, and often does, manifest itself in lower academic performance during law school, as well as in self-fulfilling expectations of failure on the bar exam. There is no pedagogical or structural reason for any law school to maintain such environments, especially when viewed in terms of the enormous, and clearly unintended, costs that they impose on our students. As legal educators, we owe our students more, and we have

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369. 420 F. Supp. 211 (E.D. Va. 1976), *aff'd*, 598 F.2d 1345 (4th Cir. 1979).

370. See *supra* part III.B.5.b.

371. See *supra* note 270 and accompanying text.

372. See *supra* notes 278-80 and accompanying text.

a moral obligation to lift these institutional and structural barriers to excellence without delay.

Minorities have been underrepresented in the law for a very long time. One of many consequences of this exclusion has been to deprive minority communities of fair access to the legal process and to competent, affordable legal representation. An enlightened society cannot afford to shut so many people out of one of its most fundamental processes. The mark of oppression that has characterized race and gender in our society since its founding can no longer be allowed to exclude otherwise competent law students from full and fair participation in the legal process. Such exclusion is simply an unnecessary and counterproductive waste of valuable human capital. In our current competitive global economy, we waste our precious human resources at our peril.

There are effective and productive models upon which the nation's law schools should structure educational reform. The wise schooling approach offers potentially tremendous, positive results at very little cost. Should law schools and bar examiners truly embrace structural reform, or should law professors resolve to cease being part of the problem and affirmatively seek ways individually to contribute to the solution, the results could yield enormous benefits to the law school environment, to society in general, and to the individual students who entrust their futures and their psyches to us. On the eve of the twenty-first century and in an increasingly diverse world, the costs of maintaining the current legal teaching and licensing paradigms are too high. Should the system remain unchanged, a generation of qualified, idealistic minority and women law students will be marginalized and excluded by teaching and licensing traditions that not only fail to ensure competence, but also sacrifice fairness in the process.