

## The California Bar and the Public Interest

One of the great constants of bureaucratic behavior is the instinct to cover up potentially controversial and embarrassing information – even when vital matters of public interest are at stake. That’s the moral of a curious story involving the California State Bar and the President of the University of California.

For many years, the state bar associations that determine who can become a lawyer – mostly by administering and grading “bar exams” – have bemoaned the fact that a disproportionately large number of minorities fail the exams. For some years, it was suspected that the exams might be biased in some way, and many state bars, including California’s, responded by conducting studies and adding a “performance exam” that emphasized legal problem-solving rather than multiple choice questions. No evidence of bias in the exam itself was forthcoming, but the racial disparity remained and, in absolute terms, has grown worse in recent years. The best estimates are that only one-third of the blacks who started law school in 2001 successfully graduated and passed the bar on their first attempt (compared to about half of Hispanics and over two-thirds of whites).

Two years ago, Richard Sander, an economist and law professor at UCLA, published two studies arguing that much of the racial disparity was due to ambitious race-based affirmative action policies implemented by law schools. He contended that large preferences produced much lower minority grades in law school (half of black law students ended up in the bottom decile of their class); he argued this meant these students actually learned less than they would have at a less elite school. In one analysis, Sander found that blacks who passed up an elite school offer to attend a less elite school were half as likely to later fail the bar.

Sander’s studies were enormously controversial in legal circles, and put many liberals in a curious bind. They of course wanted to increase racial diversity in the legal profession, but the idea that affirmative action was impeding rather than facilitating that diversity in the ranks of practicing lawyers was anathema. Law school deans, for their part, were generally paralyzed. Any experiments that limited affirmative action at their schools would bring protests from student groups, and challenging -- perhaps fatal -- scrutiny from legal organizations and the legal community at the local and national levels. (The ABA, for example, which accredits law schools, pushes them hard to maintain preference programs). Most frighteningly, Sander’s data suggested that at many elite law schools, black graduates were failing the bar at six, eight, or ten times the rate of white grads. If the data on individual schools came out, those schools would be profoundly upset and might have a much harder time persuading minorities to enroll.

By 2006, there was a discernible scholarly consensus: Sander’s theses might be right, but the data at his disposal was limited in some ways and rather dated (from the mid-1990s). The responsible move was to find better data that would either confirm or refute his hypotheses. The location of that better data was very clear: it lay in the archives of the California Bar. The California Bar had more detailed records on its test-

takers than any other state, going back many years, and as one of the largest states with dozens of in-state law schools, it was the perfect place to compare the examine the effect of affirmative action – and other possible influences – on exam performance of minorities.

An ideologically diverse and accomplished research team, whose members have different expectations about what the new study might conclude but who are united in a desire to use data to answer these empirical questions, approached the California Bar in the summer of 2006. The five members of the team included Dr. Stephen Klein, a RAND psychometrician and a preeminent national scholar of bar studies; Vik Amar, a UC law professor and leading critic of Prop 209; econometrician Doug Williams, legal empiricist William Henderson, and Sander. The research team came highly recommended, with letters of support from leading national empiricists, independent peer reviews from the National Science Foundation, the endorsement of five members of the U.S. Civil Rights Commission, and independent funding to cover all of the costs of the proposed study. The team was willing to do the study in either of two ways: the bar could simply release the data (with individual identifiers removed, of course), or it could maintain it in-house and simply run the analyses specified by the research team.

The Bar was initially supportive, voting unanimously in September 2006 to have a subcommittee study the proposal. Then the stonewalling began. Several law school deans in October 2006 worried publicly and to the Bar, albeit without clear explanation, that the proposal might release “sensitive” information and might attack affirmative action (even though most of the research team, and its supporters, were long-time supporters of affirmative action). The Society of American Law Teachers, a left-leaning organization that had long advocated for greater diversity in the profession, wrote to the Bar to oppose the study on the grounds that it could lead people to place too much emphasis on bar exam performance. Finally, in January 2006, a staff member in the office of UC President Dynes wrote a long report criticizing the proposed study on a variety of unsustainable grounds, including the (completely unfounded) claim that the study would identify individual minority bar applicants who failed the bar and that the data was too limited to actually complete a study.

Some fragmentary data obtained by one of us suggests why the law schools feel so threatened by the idea of researchers examining bar data. At one elite California law school, the students who received a largest admissions preferences (mostly, but not entirely, nonwhites) had a bar passage rate of 19% in the summer of 2005. Students at the same school who did not receive a preference had a bar passage rate of 94%. The students receiving large preferences at this school did not have terrible incoming Law School Admissions Test (LSAT) scores and college grades; at other law schools, students with similar credentials passed the bar at rates of 70% to 75%. Yet this school not only fails to inform admitted students about how different groups of students – admitted under different admissions programs -- might fare differently when it comes to bar passage; the school's communications to students seemed affirmatively to suggest that all students enjoy the same high bar-passage rates. Whether students who entered through a

preference program were “mismatched” at the elite school or not, it’s pretty clear that this school let them down.

Feeling the pressure from California law schools, but perhaps realizing that none of the proffered objections really undermined the intellectual worth of the study, the Bar held a bizarre hearing in May, in which it listened to experts in the field praise the proposed study, but did not ask the experts any questions about possible limitations in or problems with the proposed research. Staff then issued a report recommending the study request be “denied”, with no explanation or analysis at all. When a member of the study team called the staff, he was told “you may never know the real reason for our decision.”

The California Public Records Act normally prevents bureaucrats from arbitrarily cutting off access to publicly-held information. Such information acts routinely exempt the judiciary, since it’s generally agreed that the deliberations of judges should not be disclosable. But CPRA may have inadvertently placed the State Bar under this judicial exemption (the Bar is supervised by the judiciary).

This is, perhaps, not the end of the story. A public records lawsuit, an investigation by a state assembly or senate committee, or a subpoena from the U.S. Civil Rights Commission might force the Bar to make its data available – though in any of these scenarios, the actual danger to testtakers’ privacy might be real, instead of imaginary. There are also the bars of 49 other states, though their much more limited archives make these clearly second-best sources. Or those seeking to evaluate the mismatch problem and hold law schools accountable may simply give up – having already spent many hundreds of pro bono hours making their case to the California Bar.

A generation ago, Justice Harry Blackmun wrote that for America “to get beyond race, we must first take account of race.” Last month, in the noteworthy school integration cases this Term, the current Supreme Court disagreed, saying effectively that to get beyond race, we must stop taking race into account. But nearly everyone agrees that in order to get beyond race, we must first know about and study the current racial realities. And if those who control the information are too paranoid to disseminate it, or to permit an honest analysis and discussion about it, then society’s attempts to solve this most vexing and enduring of problems seem doomed.

Listing of problems:

1) The California Bar has apparently twice in the past provided information to outside groups conducting research – to the Law School Admission Council’s “Bar Passage Study” in 1994, and to the “After the JD” study by the American Bar Foundation in 2001. In neither case did the Bar follow any laborious hearings procedure. What made these requests different? They were not asking any politically sensitive questions.

2) In its June 20<sup>th</sup> memo to the Committee of Bar Examiners, the staff provided the committee with no explanation of its recommendation that the data be request be denied. At the actual committee meeting, staff offered four reasons for denying the request:

a) Releasing the data would be a bad precedent because it might lead to other requests. (Two simple problems with this argument: (a) data has been released to other groups in the past, and (b) our proposal did not ask for actual release of data – it asked that the two researchers who currently consult for the bar on data issues (and have actual possession of the historical archives) be authorized to do analyses of the data, and share with us the analyses and interpretation of that data. Releasing individual records is quite different from releasing analyses based on the data (the bar already does the latter all the time – see its website).

b) The consent form bar-takers sign, authorizing use of their background data by the Bar, only authorizes research on the examination itself. (But the bar routinely uses this background data in public reports, and in the past it authorized Dr. Klein to do studies of law school admissions policies using this same background data.) [As I said earlier, Rick, I don’t see ANY consent provision on the forms the bar-takers sign. Indeed, the only “disclosure” of their info that is authorized is disclosure to the law school from which they graduated. I think, however, as long as individual names or individual identifying information is not turned over to the team, there is no disclosure in any event.]

c) Information on bar-takers race comes from the bar-takers themselves, and may thus be unreliable. (This is probably the silliest of the four arguments. Essentially all racial data in the United States is self-reported. The bar has been using these self-reports for over twenty years in reporting the results of the bar exam by race.)

d) It may be misleading to use actual bar *scores*, rather than pass-fail outcomes, in academic research, since bar-takers aren’t necessarily trying to maximize their score, but simply to pass the exam. (Any psychometrician can explain why raw scores are far more valuable in research than pass-fail outcomes; more to the point, in nearly all of the California Bar’s own studies over the past twenty years, it has used raw scores in its analyses.)

3) The Committee on Bar Examiners had two long hearings, in February 2006 and May 2006, purportedly to discuss the data proposal. Dr. Klein, the bar’s long-time psychometric consultant, was at both hearings, and at the May hearing several other experts attended. At no time during these hearings did staff ask the experts about any of the data objections cited above. Indeed, the only explicit discussions of the study were positive, even enthusiastic. Klein said at the February meeting that in his career, he had

rarely seen a study as well-designed as this one. The only questions raised about the study concerned its ability to address other factors related to bar passage, such as the effect of a bar-takers socioeconomic background, or the content of his courses (issues the proposers took seriously and developed methods of incorporating).

4) California Bar staff made what appears to be a deliberate attempt to exclude the proposers from the committee's eventual vote. After the May meeting, Gayle Murphy, Rick Sander and Steve Klein agreed to meet to discuss any residual problems the staff might have identified and discuss how best the data could be analyzed. Sander followed up with Murphy a few weeks later. Murphy first suggested a meeting for June 14<sup>th</sup>, but then decided that would not work. She then suggested setting the meeting for June 26<sup>th</sup>. The meeting was to include Murphy, Klein, Vik Amar, Sander, and Barbieri. Sander emailed Murphy to nail things down, and Amar tried to reach her by telephone. Murphy did not respond to either of us until the morning of the 26<sup>th</sup>, when she said it would be impossible to meet, but "I will be in touch with you later this week to talk some more." Sander responded that he would be out of town the 27<sup>th</sup> through the 29<sup>th</sup>.

On Wednesday the 27<sup>th</sup>, Murphy sent Sander an email stating the staff had decided to recommend against doing the study, and that the committee would meet to discuss this on the afternoon of the 29<sup>th</sup>. Sander tried to reach staff by phone, and finally reached Barbieri on the afternoon of June 28<sup>th</sup>. Sander objected that he had heard no reasons for the staff's recommendation, and that he would be on a flight back from Boston when the committee met for its discussion and vote. Barbieri said there was nothing to discuss, and that "you may never know the reasons for this decision." Barbieri, who had been friendly in the past and had told at least one person that the proposed study was a "great idea", then said he had a problem with Sander. Sander asked what he was talking about. "You make things up," Barbieri replied. "What do you mean by that?" Sander asked. "You say that the racial disparity on the bar exam is the biggest problem we face. It's not the biggest problem we face. The biggest problem is with maintaining the validity and reliability of the bar exam."

After speaking with Barbieri, Sander reached Alan Yochelson, who chairs the subcommittee dealing with the data request. Yochelson was disturbed both by the staff's failure to explain its reasoning and by fact that none of the study proposers would be able to attend the committee's discussion (Sander and Klein were out of town, and the other three proposers lived far from Los Angeles). He suggested that Sander come to the Saturday morning meeting, when his subcommittee on examinations would report back to the full Committee of Bar Examiners. Sander agreed. At the Friday afternoon meeting, the staff made its report, Yochelson argued against it on both procedural and substantive grounds, and the subcommittee voted (6-1?) to go along with the staff.

At the Saturday morning meeting of the full committee, the data-sharing issue was one of many on the Committee's agenda. When that item came up, Barbieri orally reported the four reasons note above for the staff recommendation. Sander was invited to speak, but he was cut off when he began to discuss the procedural problems with the staff's process and the failure to ask any experts about the staff's reasons. Sander was

asked to respond only to Barbieri's reasons. The Committee then voted (7-3?) to sustain the staff recommendation. There was no meaningful discussion at this meeting of either the reasoning of the staff or its procedure in suddenly moving from apparent cooperation with the proposed data analysis to its sudden dismissal.