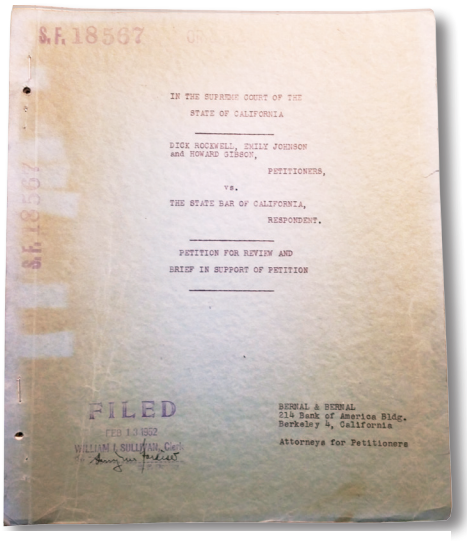
A "Manifestly Unfair" Bar Examination:

The October 1951 Test and Its Aftermath

BY KYLE GRAHAM*

EDITOR'S NOTE: *"A Second Look" is a series of articles that provides new perspectives on noteworthy decisions by the California Supreme Court.*

The California bar examination came under renewed scrutiny last year, with falling passage rates feeding criticisms that the minimum score required to pass had been set too high. This controversy was quelled only by the California Supreme Court's decision to leave the minimum score where it stood, at least for the time being. This was not the first time that the state bar examination has generated controversy. This installment of "A Second Look" ventures back to the early 1950s, when an administration of the test led to special hearings before the Legislature, a push by frustrated applicants to have the Supreme Court regrade their exams, and a messy public spat between the members of the Court.


S.F. 18567

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

DICK ROCKWELL, EMILY JOHNSON and HOWARD GIBSON,
PETITIONERS,
vs.
THE STATE BAR OF CALIFORNIA,
RESPONDENT.

PETITION FOR REVIEW AND BRIEF IN SUPPORT OF PETITION

FILED
FEB 1 3 1952
WILLIAM L. SULLIVAN, Clerk
By Virginia Price Deputy

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ROCKWELL ET AL. v. STATE BAR OF CALIFORNIA, PETITION FOR REVIEW AND BRIEF IN SUPPORT OF PETITION.
IMAGE: CALIFORNIA STATE ARCHIVES

The October 1951 administration of the bar examination consisted of 25 essay questions, one of which was optional.[1] When the initial round of grading was complete, it was discovered that only 15 percent (160 out of 1041) of test-takers had received passing scores of 70 percent or higher.[2] A "reappraisal" of 326 exams that had come somewhat close to receiving a passing score more than doubled the number of successful applicants.[3] The overall pass rate of 37.5 percent nevertheless remained on the low side. Although four administrations of the fall examination over the prior 18 years had yielded lower pass rates, the average pass rate for fall exam administrations between 1946 and 1950 had been quite a bit higher, at 50.9 percent.[4]

The release of the October 1951 exam results led to an uproar. One contemporary observer wrote, "Almost immediately after the announcement of the October, 1951 results, there arose a great hue and cry. Something must be wrong. The examination must have been unfair. Or it must have been unfairly graded. The bar in general, and the Bar Examiners in particular, must be concentrating on reducing competition for themselves by keeping aspirants out."[5]

A representative of the Committee of Bar Examiners sought to explain the exam results in the January 1952 edition of the *Journal of the State Bar of California*. He wrote that "the examination and its grading were substantially the same" as in recent years, and "the only remaining factor which could account for [the results] is a drop in the quality of the applicants, and that is the conclusion which we Bar Examiners have arrived at."[6] The author added that "this does not necessarily mean a decline in the quality of the applicants below a reasonable norm, but more likely a decline from an abnormal high which obtained in 1948, 1949 and 1950 — not a decline at all, therefore, but rather a return to normal."[7]

Hearings Before the Legislature

Neither the public nor legislators were completely persuaded that test-takers, as opposed to the test itself, were to blame for the poor results on the October 1951 exam. Within two months of when the test results were released, a state Senate Interim Judiciary Committee convened hearings on the bar exam and how it had been graded. The two dozen witnesses included unsuccessful test-takers, law school deans, and State Bar officials.[8] Goscoe Farley, the secretary to the Committee of Bar Examiners, told the interim committee that the test had been fair, and the results not all that surprising. He explained that in administrations of the bar exam prior to World War II, pass rates had usually been between 40 to 45 percent. Results sagged during the war "because the law schools had very few students, and the ones they had didn't seem to be top students." But "[a]t the end of the war veterans returned and the law schools had four, five, and six, sometimes eight applications for every seat

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they had in the law school, so the school selected the best students," leading to higher pass rates. Now, Farley surmised, "I think the schools are getting back to normal."[9] Other witnesses made similar comments, with multiple law school deans defending the bar examination and — echoing similar comments made in connection with the ongoing legislative review of law school accreditation standards — attributing the poor results to substandard law schools that were being allowed to survive.[10]

The interim committee wasn't convinced. It was noted at the hearings that on five of the questions, fewer than one-quarter of examinees received a passing grade.[11] Another issue raised during the hearings concerned the reappraisal process for exams that had not quite earned a passing score on initial review. Three attorneys were responsible for these reassessments, which consisted of simple pass-or-fail determinations. Their overall grading patterns disclosed that one of the reappraisers was relatively generous in giving a passing grade; the second, more moderate; and the third, rather harsh.[12] This discrepancy informed a perception that whether an examinee passed on reappraisal depended at least as much on the identity of his or her reviewer as on the correctness of his or her answers. Furthermore, there appeared to be a marked difference in pass rates between reappraisals occurring early in the review process and reassessments of similarly situated examinations that happened later, with the later-reviewed exams being assessed more favorably.[13] This shift also suggested that the reappraisers were not applying consistent standards to the tests before them.

After the hearings concluded, the interim committee adopted a resolution that embraced several findings and requests. This resolution, issued on February 2, 1952, observed at its outset that "[t]here is no suggestion of dishonesty, favoritism, intentional severity or carelessness in the conduct of the examination."[14] The poor results upon first grading of the examinations were instead the result of "[u]nusual difficulty in at least three of the questions" and "[s]trictness of grading."[15] The resolution also noted that the resuscitation of a large number of examinations through reappraisal was "a radical departure from the original purpose of reappraisement which was to remedy iniquities in a relatively few borderline cases."[16] Furthermore, although each of the reappraisers "was competent and conscientious," their "lack of uniformity may have worked substantially to the advantage of certain students and the disadvantage of others."[17] The resolution further observed that "[m]any of the persons adversely affected by the decision of the reappraisers are veterans of World War II who sacrificed several years of their normal scholastic life in the service of their country."[18]

The resolution then segued into a request to the California Supreme Court. The Court was asked to "[d]etermine, after investigation and hearing, whether the 47 students whose original marks were between 65 and 67.1 percent and who were failed by the Board of Reappraisers should not be admitted to the bar without further examination,"[19] to "[r]eview the papers of students receiving original marks between 63.75 and 65 percent to determine if the procedures which were followed with regard to this group resulted in substantial injustice to any of the 48 applicants who were failed,"[20] and to "[m]ake such further inquiry concerning the papers between 60 and 63.75 percent as will satisfy the court that no students in that category should have been reappraised and passed."[21] The resolution further requested that the Court and the Committee of Bar Examiners consider several changes in the administration and grading of the bar examination, including "the giving of a reasonable number of alternative questions in each examination," and "[e]stablish[ing] a base, perhaps at a level 5 percent below the average percentage of success in the bar examinations of the preceding five years, above which there must be no failures."[22]

The Supreme Court, Bar Grader?

The Supreme Court did not rush to accept the invitation to review scores of bar examinations. But some frustrated applicants were not prepared to wait. Within days of the resolution's issuance, six petitions were filed with the California Supreme Court by October 1951 test-takers who sought further review of their failing grades. These actions, brought on behalf of eight petitioners in all, invoked section 6066 of the Business and Professions Code. This statute, enacted in 1939, provides, "Any person refused certification to the Supreme Court for admission to practice may have the action of the board, or of any committee authorized by the board to make a determination on its behalf, pursuant to the provisions of this chapter, reviewed by the Supreme Court, in accordance with the procedure prescribed by the Court."

The petitions attacked the October 1951 bar examination as arbitrary and unfair. One of the six petitions, filed on behalf of three unsuccessful applicants, alleged that "the standards used by the Committee of Bar Examiners of the State Bar in determining the qualifications of applicants for certification to this Court are arbitrary and capricious," and that, as applied by the reappraisers, these standards "have resulted in a deprival of the equal protection of the law for these petitioners and others similarly situated."[23] The petitioners asked the Court to "review the refusal of the Committee of Bar Examiners to certify them to this Court for admission to the State Bar of California," with such review to include "the production before it of the particular examination papers of the petitioners and other[s] similarly situated, including therein all

papers within the reappraisal group, together with the records of the graders in the original gradings."[24] The petitioners included as exhibits to their petition not only the scores they received on each of the 24 questions answered, but also their law-school transcripts, with the prominent notations that all were military veterans.[25]

Another petition asked the Court to direct the Committee of Bar Examiners "to submit to the Court all of the 24 examination papers of the petitioner along with the related material, including the questions, and that the Court, itself, or, if it prefers, an appointed referee, make the appropriate findings concerning the alleged disparity between the grades assigned and the grades deserved, the average juristic quality of the petitioner's examination papers, and whether under a reasonable grading system they deserve an average passing grade."[26] This petitioner — an émigré jurist from Austria, who had come to America in 1940 seeking refuge from Nazi oppression — related that he already had published several articles in American legal periodicals, and had been an attorney in the United States Department of the Army for several years prior to taking the bar examination.[27]

The petitioners must have realized that they had a tough case. This was not the first time that frustrated test-takers had asked the California Supreme Court to take a second look at their examinations, and the Court had made it clear that it would not review the substance of a bar examination answer in anything other than truly exceptional circumstances. Less than two decades before, it had resolved, "The attitude of this Court is that if any dissatisfied applicant can show that he was denied passage of the state bar examinations through fraud, imposition, or coercion, or that in any other manner he was prevented from a fair opportunity to take the examinations, this Court will be willing to listen to his complaint. Inability to pass the examinations, which are successfully passed by other applicants, will, of course, not be inquired into by the Court. Also, . . . one's general qualifications are not to be substituted for the requisite knowledge of law which one must possess in order to be admitted into the legal profession."[28] The subsequent enactment of Business and Professions Code section 6066 had not made the Court much more willing to intervene. In 1941, the Court rejected another unsuccessful bar applicant's plea to review his examination, with the majority emphasizing that the petitioner "makes no charge of fraud, imposition or coercion, and does not assert that he was denied a fair opportunity to take the examination."[29]

Unsurprisingly, the Supreme Court declined the petitioners' requests for further review of their test answers. The Court summarily denied all six petitions on May 8, 1952.

Justice Carter Dissents

But the decision was not unanimous. Associate Justice Jesse Carter would have granted the petitions. Carter also took the unusual, if not unprecedented, step of filing a written dissent to the order denying the petitions.

Carter's dissent, which Associate Justice B. Rey Schauer also signed, quoted the interim Senate committee's resolution in its entirety. Carter also emphasized that no applicant had received a grade higher than 80.8 percent on the October 1951 examination, a fact he characterized as proof that "the examination was manifestly unfair."[30] The dissent also called out Farley's concession, made in a speech given just a week before, that "inadvertently three or four questions out of the twenty-four contained problems that had not been adequately covered at most law schools."[31] Carter rejoined, "when the future of more than a thousand applicants who have spent three years of time, money, and labor in the study of law is at stake, . . . there should be no room for such 'inadvertence' on the part of the Committee of Bar Examiners."[32]

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Carter's dissent continued, "I am convinced that petitioners herein have made out a prima facie case for a review by this Court of the October, 1951 bar examination and that the petitions should be granted and a complete record of all proceedings before the State Bar relative to said examination certified to this Court for such determination as may be warranted."[33] Carter acknowledged that "the granting of these petitions may place a heavy burden on this Court because of the effort required for a full review of the proceedings involved in said examination."[34] Nevertheless, he was "convinced that the matter is of such great importance to the public, the applicants and the law schools in this state and elsewhere as to justify the undertaking."[35]

Justice Carter's dissent was filed on May 12, 1952. But that does not quite end the story. Carter wanted his dissent to be published in the official reports. When it did not appear in the advance sheets, he spoke to the press. A resulting article in the June 5, 1952, edition of *The San Francisco Chronicle* featured the headline, "Carter Says Dissent in Bar Exam Suppressed." The article quoted Carter as saying, "I am convinced that

the suppression was at the instigation of the Chief Justice (Phil S. Gibson) without consulting a majority of the court."[36]

Gibson denied ordering the suppression of Carter's dissent.[37] Carter nevertheless continued to repeat the essence of his charge to reporters, in what was now being described as a "bitter internal quarrel" within the Court.[38] Ultimately, Carter's dissent was never published in the bound volumes of the official reports. The members of the Court did agree, however, that in the future, dissenting opinions to minute orders in which no majority opinion was filed would be forwarded to the publishers for possible inclusion in the advance sheets.

Epilogue

The furor over the October 1951 bar examination led to changes in the test, including reinstatement of the prior practice of allowing test-takers to answer only four questions out of every five presented.[39] And as for the eight petitioners who asked the Supreme Court to regrade their exams, this short story has a happy ending. All of them eventually passed the bar examination. Six were admitted to the bar in 1952; the other two in 1953.[40] ✯

ENDNOTES

1. Graham L. Sterling, Jr., "The October 1951 California Bar Examination," *J. of the State Bar of Calif.* 27 (Jan.–Feb. 1952): 37, 41.

2. Senate Interim Judiciary Committee, *Progress Report to the Legislature* (March 1952), 15, 20.

3. *Id*. at 23–24.

4. Sterling, at 40; Senate Interim Judiciary Committee, at 15.

5. Sterling, at 37.

6. *Id*. at 43 (italics in original omitted).

7. *Ibid*.

8. See Don Thomas, "Students Who Flunked Bar Test Tell Stories at Probe," *Oakland Tribune*, Feb. 1, 1952, 5.

9. Senate Interim Judicial Committee, at 15.

10. See Thomas, at 5.

11. Senate Interim Judicial Committee, at 20.

12. *Id*. at 19, 23, 24.

13. *Id*. at 24, 26–27.

14. *Id*. at 24.

15. *Ibid*.

16. *Ibid*.

17. *Ibid*.

18. *Ibid*.

19. *Ibid*.

20. *Id*. at 24–25.

21. *Id*. at 25.

22. *Ibid*.

23. Brief in Support of Petition for Review, *Rockwell et al. v. State Bar of California* (No. SF 18567, Feb. 13, 1952), at 4.

24. Petition for Review and Brief in Support of Petition, *Rockwell et al. v. State Bar of California*, (No. SF 18567, Feb. 13, 1952), at 9.

25. *Id*. at Exhs. A, B, C, A(1), B(1), and C(1).

26. Petition for Review and Brief in Support of Petition, *Koessler v. Committee of Bar Examiners* (No. SF 18562, Feb. 4, 1952), at 7.

27. *Id*. at 3, 4. Koessler's petition explained that he had been a practicing lawyer in Vienna for two decades, only to be "compelled, by the [N]azi 'Anschluss' of Austria, to leave his country of origin." He emigrated to the United States in 1940, and became an American citizen in 1945. *Id*. at 4.

28. *In re Admission to Practice Law* (1934) 1 Cal.2d 61, 64.

29. *Staley v. State Bar of Cal.* (1941) 17 Cal.2d 119, 121.

30. *Koessler v. Committee* (No. SF 18562) et seq., dissent from denial of writ petitions (Carter, J.), 10.

31. *Ibid*. Here, Carter was quoting comments by Farley, as they appeared in "State Student Association Names Goscoe Farley 'Man of the Year,'" *The Recorder*, May 2, 1952, 1.

32. *Ibid*.

33. Dissent by Carter, J., at 13–14.

34. *Id*. at 14.

35. *Ibid*.

36. Phil Gibson, Memorandum in re Publication of Dissents to Orders Denying Petitions for Writs (1952), in *California Supreme Court Justice Jesse W. Carter: An Interview Conducted by Corinne L. Gilb* (1959) 260; see also "Carter Lashes Out At Court Failure To Print Dissent," *Daily Independent Journal* (San Rafael, CA), June 5, 1952, 1.

37. Memorandum by Gibson, at 260.

38. *Id*. at 262–263.

39. "State Student Association Names Goscoe Farley 'Man of the Year,'" *The Recorder*, May 2, 1952, 1, 6.

40. This information was obtained through searches performed on the State Bar of California's website, ***www.calbar.ca.gov.***

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