The Board of Editors has chosen the auspicious theme of *The Legal and Judicial Professions: Reform, Education and Ethical Considerations* for this publication of the Ateneo Law Journal. With national elections just a few months away, it is worthwhile for both candidates and voters take stock of the crucial issues confronting the country. The exercise is particularly important for lawyers and law students considering that many of the candidates and their staff belong to the legal profession. These are the same people who will be occupying key positions affecting national governance.

If the candidates were to agree on the most important issue of this campaign, it would probably be the widespread poverty afflicting the nation. It is poverty – material, intellectual and moral – manifested in many ways and in many areas. One of the more debilitating strains may be found in our legal and judicial system.

Indeed, the destitution and decay in our ethical values as reflected in the deteriorating public perception of the legal profession, is a cause for deep concern. The administration of justice is built and exists on trust, and its continued viability depends on the faith and respect that it commands from its adherents. Just like its economic counterpart, this moral indigency presents equally urgent problems that should be identified, addressed and solved by us – the primary stakeholders and guardians of the law.

It is my hope that the cogent and courageous articles contained in this issue will not only spell out the problems as they exist but will also propose the politically difficult solutions that need to be administered.

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Towards Meaningful Reforms in the Bar Examinations

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* Retired Associate Justice, Supreme Court of the Philippines and Chair, Committee on the 2002 Bar Examinations. The author gratefully acknowledges the assistance of his son, Roger L. Mendoza, Ph.D., Alamarin Phillips Associate Professor of Economics, Drexel University, in the preparation of this paper, particularly Part IV on the calibration method as used for grading essay examinations in state bar examinations in the United States, and in arranging his meetings with officials of the Educational Testing Service (ETS) at Princeton, New Jersey and the New Jersey Board of Bar Examiners at Trenton, N.J., on 7 October 2002. He would also like to thank Robert B. Haller, Ph.D., John V. Dumont, Ph.D., John H. Yopp, Ph.D., Thomas Ewing, Margaret J. Murphy, Ph.D., and Susan Chyn, all of the ETS for their warm reception and helpful suggestions. He is equally indebted to Laura S. Brooks, Esq., and Audrey Marissa, Esq., both of the New Jersey Board of Bar Examiners at Trenton, N.J., for patiently explaining some of the procedures of the N.J. Bar Examinations. As a result of his conferences with these officials, he received confirmation of the validity of some of the ideas in this paper which have been gestating in his mind for several years.

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I. INTRODUCTION

Admission to the bar through a system of written examinations is a uniquely American tradition, which was transplanted into the Philippines in the early 1900's.[1] In fact, most of the current bar examination procedures and practices today are still the same as when bar examinations were first introduced in this country, largely through the efforts of Justice E. Finley Johnson and the American Bar Association of the Philippine Islands.[2] These include the appointment by the Supreme Court of an *ad hoc* Committee on Bar Examinations chaired by a member of the Court, the pure essay-type of questions, the assignment of a single bar examiner in each test area, the use of weighted averages in grading, the provision for adjusting the passing standard, and the anonymity of the bar examiners.

Over the years, changes in the bar examinations were essentially structural or procedural in scope, rather than substantive or methodological in nature. For example, the membership of the Committee on Bar Examinations, which started as three in the beginning in 1901, was increased to five in 1909 and then to eight in 1940. The bar examination subjects were increased from six[3] in 1906, to seven[4] in 1916, and then to eight[5] in 1922. In 1964, the coverage of the bar examinations was revised by the addition of some subjects[6] and the combination of existing ones.[7] In 1913, the tradition of determining the bar "topnotcher" began. In 1923, this was expanded to the "Top Ten" examinees. The office of the deputy clerk of court and the bar confidant was established

1. During the Spanish regime, the licensing of attorneys was based on an individual's attainment of the degree and title of *Licenciado de Juridicos* (Licentiate in Law), or its equivalent, followed in many instances, by a period of legal apprenticeship. *See also* DEAN C. WORCESTER, THE PHILIPPINES: PAST AND PRESENT 57-59 (1914).
2. Archival Collection of Letters of Elias F. Johnson, Bentley Historical Library, The University of Michigan, Ann Arbor, Michigan. Before coming to the Philippines, Mr. Justice Johnson was a member of the Board of Education and Bar Examiners of Michigan. He was the longest serving member of the Philippine Supreme Court (1903-1932).
3. Civil Law, Civil Procedure, Mercantile Law, Criminal Procedure, Private and Public International Law, and Practical Exercises.
4. Civil Law, Mercantile Law, Criminal law, Political Law, International law, Remedial Law, and Legal Ethics and Practical Exercises.
5. Land Registration and Mortgages was added.
6. Labor Law and Taxation.
7. Political Law, Public International Law and Private International Law were combined as one subject, while Land Registration and Mortgages were merged with Civil Law.

by the Supreme Court in 1926. In 1940, the bar examinations became a four-day series of examinations.

For almost a century now, the bar examinations have been the primary gauge of an applicant's preparation for the practice of law in this country. It is inconceivable that some other mechanism can be devised in the near future to replace the bar examinations. Thirty years ago, a proposal was made for the abolition of the bar examinations and the establishment in their place of a system of accreditation under which only graduates of accredited schools would be admitted to law practice. This proposal somewhat resembled the system of licensing attorneys, based on the attainment of an academic degree during the Spanish regime.[8] The proposal, while reported to have gained adherents shortly after it was made in 1975,[9] in the end, fizzled out. Yet, the bar examination process, like any other institution, is not without its shortcomings. Significant developments in the field of educational testing and measurement,[10] as well as in the administration of bar examinations, particularly in the United States,[11] underscore the need to introduce practical

8. WORCESTER, *supra* note 1. In the United States, graduates of law schools in the State of Wisconsin, approved by the American Bar Association, are exempted from taking the Wisconsin bar examinations. This is referred to as the "diploma privilege" in admission to the Wisconsin state of bar. *See* Rules on Admission to the Bar of the State of Wisconsin, SCR 40.02.
9. The proposal was made by Justice, later Chief Justice, Fred Ruiz Castro in 1975, following the example of Indonesia. *See* Irene R. Cortes, *Legal Education: The Bar Examination as a Qualifying Process*, 53 PHIL. L.J. 130, 144, 146 (1978). *But see* Justo P. Torres Jr., *Legal Education: The Philippine Experience*, 1 UNIV. OF THE EAST L.J. 18, 32 (1976).
10. These include, among other things, the evolution and development of standardized tests in the United States since the early 1950's. The inclusion of a non-graded equating section and the scaling of scores constitute some of the basic features of standardized tests administered by various institutions in the United States.
11. Some of the developments in the administration of the bar examinations in the United States since the 1960's and 1970's include the employment of multiple readers per testing subject, the multiple-choice questions of the written examinations, the use of the calibration method, the provision for character investigation.

    The current bar examination practice in the United States is described in a recent literature:

    > The sole means of initial entry to the profession in forty-nine states and most territories is a two-day pencil and paper examination written and graded by persons who are, or are supervised by, bar examiners. The bar examiners themselves are generally chosen and supervised by a state's highest court. Over the years, a National Conference of Bar Examiners (NCBE) has exerted increasing influence, developing standardized tests which individual states may purchase. These tests

are intended to produce consistency and validity in scoring. The NCBE's dominant product is the Multi-State Bar Examination (MBE), a one-day, two hundred question multiple choice examination, which tests six areas of law. MBE questions do not, and are not intended to, test the law of the state in which the bar examination is administered. Rather, successful takers are expected to apply multi-state law, allegedly the majority view of the application of legal principles. With 1.8 minutes per questions, an applicant is required to "ignore refinement and pick the proper response by drawing upon that assemblage of 'majority' rules, 'traditional' rules, and 'trends' which she presumably carries in her head."

The second day of the bar examination is generally devoted to essay questions. The essays may be created by the bar examiners of the state of administration to test that state's law, or by the NCBE. If created by the NCBE, the state graders may choose to use the NCBE's answers based on "majority" law or to grade based on local state law. As a supplement to the essay portion of the exam, many states have adopted one or more "performance test" questions, also developed and written by the NCBE. Originally more ambitious and comprehensive performance test questions are now ninety minutes in length, and one or two may be included with the more traditional essay questions. Unlike the state essays, these questions, in theory at least, do not depend on memorization, but require the applicant to "perform" a lawyering task (like writing a legal memo or drafting an opinion) based on a closed library of facts and authorities provided by the examinees. By July 2003, twenty-nine state will include one or more MPT questions on their bar exams.

In most states, the scores of the first and second days of the bar examination are combined. The passing score, determined by the bar examiners, is generally derived from the total.

In addition, applicants for admission in all but three states must successfully complete the Multi-State Professional Responsibility Exam (MPRE) also developed by the NCBE. The MPRE, allegedly testing the complex and nuanced areas of legal ethics and professional responsibility, is like the MBE, an easily graded but hardly subtle fifty question multiple choice test. Unlike the two-day bar exam, which is offered after graduation from law school, the MPRE is generally taken in the second year of law school and is scored separately. Like the bar exam, it may be repeated until a passing score has been obtained.

Finally, after successfully completing the MPRE and the state's two day bar exam, applicants must pass a "character and fitness" examination, usually conducted by lawyers (not bar examiners) named and supervised by the state's court system.

reforms in Philippine bar examinations arising from the following concerns:.

- The reliability of the bar examinations as a test of professional competence when examinees are tested solely on the basis of essay-type questions.
- The lack of consistency in grading procedures.
- The question of subjectivity or bias arising from the formulation of test questions and the reading and marking of test answers by a single individual (the bar examiner) in each test area.
- Significant year-to year variations in the level of difficulty of the examinations which, in effect, "penalize" or "reward" examinees, as the case may be.
- The time it takes to administer the bar examinations and release its results.
- The need for computerization or automations to facilitate testing, grading, and reporting of test results.
- The insufficient determination of an examinee's character and fitness for admission to the Bar.
- The need for a permanent bar examining authority with a tenured membership.

With the end in view of making the bar examinations a more reliable, equitable, and reasonable measure of legal competency, the following changes in the bar examinations are hereby proposed:

Structural and Administrative Reforms, particularly:

- the appointment of a tenured Board of Bar Examiners in lieu of the *ad hoc* Committee on Bar Examinations;

These three "tests" comprise the gateway to the profession for law school graduates. Once admitted, with minor exceptions, one is permitted to practice law until death or disciplinary action resulting in suspension or disbarment. Although an increasing number of states are suggesting or requiring participation in continuing legal education, a lawyer, once admitted, is never again tested on her continuing competence. Nor is there any limitation on what kind of law an attorney is admitted to practice. After admission as a "generalist," she may practice in any specialized area, regardless of whether she has received training in the particular substantive law during or after law school.

Kristin Booth Glen, *When and Where We Enter: Rethinking Admission to the Legal Profession*, 102 COLUM. L. REV. 1696, 1706-09 (2002) (citations omitted).

- the creation of readership panels for each subject area to address the issue of bias or subjectivity and facilitate the construction of test questions and the correction of examination books;
- the creation of an advisory committee to assist the Board and the Supreme Court and to address related issues in legal education to better prepare law school graduates in taking the bar examinations; and
- the provision for character and fitness investigation as a prerequisite for taking the bar examinations.

Changes in the design and construction of test questions, particularly:

- the introduction of a section on objective multiple-choice questions in the bar examinations;
- the formulation of essay test questions and "model" essays by more than one examiner; and
- the introduction of performance testing by way of revising and improving the essay examination on Legal Ethics and Practical Exercises. Performance testing will not only improve the overall validity of the bar examinations by testing for a broader range of lawyering skills, but will also emphasize skills training as a necessary part of the education of every lawyer.

Methodological reforms, particularly:

- the adoption of the calibration method to correct variations in the level of test difficulty and grader leniency;
- consideration of alternative grading methodologies, such as scaling, to promote test equity and further standardize levels of test difficulty; and
- further computerization or automation of the bar examinations to facilitate testing and the reporting of test results.

This article is accordingly divided into three parts corresponding to the foregoing areas of reforms. The first part deals with the structural and administrative mechanisms that are essential in carrying out the short-term and long-term proposals contained in this paper. The second part outlines suggested changes in the design and construction of the bar examinations. The third part offers a methodology for marking the bar examinations and identifies key areas that may require technological enhancements.

II. Structural and Administrative Reforms

A. *Board of Examiners*

1. Appointment and Term of Office

In lieu of the *ad hoc* Committee on Bar Examinations of the Supreme Court, a Board of Bar Examiners (the Board) should be created. Such Board should remain as an agency of the Supreme Court.[12]

The Board shall be chaired by a member of the Supreme Court to be designated as such by the Court. In addition to the chair, there shall be eight members who shall serve as bar examiners for each of the subjects in the examination. They shall also be appointed by the Supreme Court. Each member shall be at least thirty-five (35) years of age, a member of the bar, with a minimum of ten (10) years experience in the practice of law or law teachings and expertise in his/her assigned subject, and known for his/her probity.

The members shall have staggered terms of five years. Of the members first appointed, three shall serve for five years, the nest three for three years, and the last two for two years. Thereafter, their successors will have a regular term of five years. The staggered terms of office are intended to ensure continuity of policy, which is not possible under the present *ad hoc* committee set-up. No member may be appointed to serve for more than two consecutive terms, unless otherwise decided by the Supreme Court.

The identity of the bar examiners need not be confidential. Secrecy serves no useful purpose and only breeds unwarranted speculation, especially in the part of the examinees. It may be mentioned, in connection with this, that the members of the examining boards for various professions under the Professional Regulation Commission are publicly known, and no complaint has been heard that this makes them susceptible to influence. The selection

12. Three structural models of a bar examining authority exist in the United States, with minor variations from state to state. The first and most widely adopted is the *Supreme Court agency model* in which the bar examining authority is appointed by and responsible to the highest state court (*e.g.*, the New Jersey Board of Bar Examinees). The second is the so-called *bar association model* (*e.g.*, Alaska, California and Washington) in which the state bar association, or a committee thereof, assumes responsibility for examining applicants for admission to the bar and for setting the standards for the legal profession. The third is a collaborative or *hybrid model* (*e.g.*, Hawaii) in which the Supreme Court appoints and empowers the bar examining authority based on the recommendation of the state bar association. The author's preference is for a Supreme Court agency model, this being closer to our experience with the Court-appointed Committee on Bar Examinations.

of examiners who are known for their probity is the best guarantee of the integrity of the bar examinations.

Indeed, this is not the first time that the creation of a Board in place of the present *ad hoc* Committee on Bar Examinations is being proposed.[13] The creation of such a Board will professionalize the administration of bar examinations, reduce the associated costs of constituting and training bar committees, and do away with unnecessary secrecy in appointing the examiners.

The Bar Confidant of the Supreme Court shall serve as the *ex officio* secretary of the Board.

2. Compensation

The members of the Board shall receive such compensation for their services, and may be reimbursed for travel and other expenses incidental to the performance of their duties, as may be determined by the Court.

3. Powers and Responsibilities

The Board shall have the following powers and responsibilities:

- Subject to the approval of the Court, to adopt rules for the admission of qualified individuals to the Philippine Bar.
- To investigate the character and fitness of all applicants for admission to the Bar.
- To develop standards and policies for the preparation of test questions.
- To prepare, conduct and mark the bar examinations based upon principles of law and equity.
- To recommend to the Court the admission to the bar of successful examinees.
- To recommend to the Court the appointment of qualified readers for each examination.

13. *See* Amuerfina A. Melencio-Herrera, *Law and the Qualifying Process for Practice*, U.P. LAW ALUMNI YEARBOOK 79 (1980) (suggesting the creation of "a professional body of examiners," with a term of three years to "attain consistency in standard and expertise in methodology"); *see* Torres Jr., *supra* note 9 (deploring the lack of "uniformity and stability of policy regarding the nature, content and even style of bar tests" and proposing the conversion of the Bar Examiners' Committee into a "continuing body, with the terms, qualifications and compensation of its members determined by the Supreme Court.").

- To take steps towards the computerization or automation of the bar examinations.
- To determine the fees to be paid by each applicant for admission to the Bar, prior to and after the examinations.
- To adopt internal rules of procedures for the conduct of its duties.
- To recommend to the Court the appointment of staff and other assistants as may from time to time be necessary or proper.
- To render an annual report to the Court.
- To perform such other duties and responsibilities as may be assigned to it by the Court.

Thus, while the preparation, correction, and grading of examination booklets will be undertaken individually by the members of the Board, the other functions of the Board, such as the development of appropriate test standards, will be performed by them as a collegial body. This feature distinguishes the Board from the present *ad hoc* Committee on Bar Examinations.

B. Readership Panels

Readership panels shall be constituted for each subject area of the bar examinations.

1. Appointment and Functions

Board members, as bar examiners, shall chair their respective readership panels and shall be primarily responsible for the formulation of the multiple-choice and essay test questions. Each panel shall have such equal number of readers, at least two, as the Board may determine, to assist Board members in fulfilling their duties and responsibilities as individual examinees, particularly in the calibration of essay test answers and the marking of test booklets.[14]

The employment of readership panels has the following advantages:

- It addresses the issue of bias or subjectivity when there is only one examiner in the test area.
- It facilitates the correction of test booklets.
- It eliminates the "tailor-fitting" syndrome (i.e. the tendency of examinees to speculate on the identity of the bar examiners to try to fit their answers to the style and inclination of the perceived examiners).

14. The work of readership panels in calibrating test essays is discussed in Part IV of this paper.

Readers shall be members of the Philippine Bar for at least five years. They shall be selected by their respective bar examiners on the basis of competence and probity and recommended to the Court for appointment. They shall be considered as associate members of the Board, but they shall not have the power to vote upon any determination or decision of the Board.

2. Term and Compensation

Readers may be appointed for a term of three years and reappointed for a second and final three-year term. They shall be paid such compensation for their service, and reimbursed for such travel and other expenses incidental to the performance of their duties, as may be determined by the Supreme Court.

A. Bar Admissions Advisory Committee

1. Membership

Similar to the practice in several states or jurisdictions in the United States, an advisory panel or committee, to be known as the Bar Admissions Advisory Committee (the Committee),[15] may be established. The Committee shall be composed of representatives of the various law schools, incumbent or retired members of the Judiciary, and members of the bar, as may be determined by the Court. The Court shall select one of the members to serve as Chair, who shall act as liaison between the Court and the Board.

2. Purpose

The Committee shall meet at least once a year. It shall solicit critiques of each written examination and shall provide such critiques to the Board. The present practice whereby a committee of experts and law professors is convened by the University of the Philippines Law Center to "suggest" answers to test questions should be continued. The "suggested" answers can serve as critiques of the examinations.

The Committee shall attend the regular meetings of the Board and shall perform such other duties as may be requested by the Board or directed by the Supreme Court, particularly in instances where a potential or actual conflict of interest on the part of the Board or any of its members arises.

15. The Bar Admissions Advisory Committee herein proposed is largely modeled after a similarly named committee appointed by the Supreme Court of Louisiana. Rules Governing Admission to Practice Law in the State of Louisiana, § 10.

3. Compensation

Committee members shall receive such compensation for their services and shall be reimbursed for travel and other incidental expenses as the Supreme Court may determine.

D. Character and Fitness Investigation

There should be a systematic and more thorough screening of applicants for the bar examinations. The primary purpose of character and fitness investigation *before* admission to the Philippine Bar is to assure the protection of the public and to safeguard the administration of justice. As the American Bar Association, the National Conference of Bar Examiners, and the Association of American Law Schools aptly stated:

> The public is adequately protected only by a system that evaluates character and fitness as those elements relate to the practice of law. The public interest requires that the public be secure in its expectation that those who are admitted to the Bar are worthy of the trust and confidence clients may reasonably place in their attorneys.[16]

All examinees should be required to produce competent proof of good moral character through the completion of a standard character and fitness questionnaire.

1. Public policy

The concept of "good moral character" includes, but is not limited to, the qualities of honesty, candor, trustworthiness, observance of fiduciary responsibility and of the laws, and a respect for the rights of other persons. Membership in the Bar is not satisfied by proof that merely enables one to escape the meshes of criminal law.[17] On the other hand, "fitness" includes but is not limited to, the mental and emotional suitability of the examinee-applicant to practice law.

2. Factors to be considered

While the Board may consider any factor or circumstance that bears reasonably on an examinee-applicant's character and fitness, any of the following should be considered as basis for investigation and inquiry:

16. *Id.*

17. *In Re* Del Rosario, 52 Phil. 399 (1928).

a. Arrests or criminal charges, whether or not resulting in a conviction.

b. Any unlawful conduct such as making or procuring any false or misleading statement or omission of relevant information, including any false or misleading statement or omission on the application for admission to the Bar or in any testimony or any statement submitted to the Board.

c. Misconduct in employment.

d. Acts involving dishonesty, fraud, deceit, or misrepresentation.

e. Commission of an act constituting the unauthorized practice of law.

f. Any form of academic misconduct, including at the undergraduate level.

g. Membership in an organization which advocates the overthrow of the government by force or violence.

h. Abuse of legal process.

i. Litigation.

j. Neglect of financial responsibilities.

k. Neglect of professional obligations.

l. Violation of an order of a court.

m. Military misconduct.

n. Evidence of mental or emotional instability.

o. Evidence of drug or alcohol misuse, abuse or dependency.

p. Denial of admission to the Bar in any other jurisdiction on character and/or fitness grounds.

q. Disciplinary action by a lawyer disciplinary agency or any other professional disciplinary agency of any jurisdiction.

r. Conviction or a plea of guilty or "no contest" to any misdemeanor or felony.

s. Any other conduct which reflects adversely upon the character or fitness of the applicant.

3. Burden of Proof

The burden of proof should be on the examinee-applicant. No examinee-applicant shall be recommended for admission to the Bar by the Board unless such applicant first produces the required evidence of good moral character and the fitness necessary to practice law in this country.

III. Changes in Test Design

The bar examinations shall continue to be administered and graded on an anonymous basis. They shall consist of two main sections: one for multiple-choice questions and another for the essay questions, which shall included a performance test.

A. Essay Section

There shall be an essay section in the questionnaire in each of the following subjects:

a. Political Law and International Law

b. Labor Law

c. Civil Law

d. Taxation

e. Commercial law

f. Criminal Law

g. Remedial Law

h. Legal Ethics and Practical Exercises

The essay questions should be designed to test the examinee's ability to analyze a given set of facts, to identify the issues involved and the applicable principles of law; and the ability so as to reach to a sound conclusion. As in the New York State Bar Examination, the examinee should be asked to state his conclusion at the beginning of his answer, followed by his analysis and reasoning. The answer should be clear and concise and should be confined to the particular issues presented (i.e. it should not volunteer information that is not material).

Each of the eight Board members, as bar examiners, shall be responsible for constructing the essay-type questions for their designated subject areas. The essay question may cover two or more subject areas, whether or nor such areas are covered in any of the eight test subjects listed above.

The Board *en banc* shall determine the system of scoring the essays as well as the weight to be assigned to each test subject. The use of the calibration method for identifying a "model" essay and for marking the essays is proposed on Part IV of this article.

B. Performance Test

Forty years ago, Justice Labrador told a conference of legal educators that the Supreme Court, of which he was then a member, was deeply concerned that

the bar examinations were turning out large numbers of lawyers who were unprepared for law practice. For this reason, he said:

> [T]he Court, knowing that the intelligent application of the law is necessary for any practitioner, finds it absolutely essential that the bar examinations devote at least one-half of the questions to practical questions, with a view to determining whether a student has the intelligence and practical common sense necessary to apply corresponding legal provisions that he has studied from the law books, [otherwise] those who would pass the bar examinations become mere encyclopedias of legal provisions without [the] ability to apply them to particular cases, in situations brought before them when in practice.[18]

Since this conference, little, if any, has been done to address the problem. Of the eight essay subjects, it is Legal Ethics and Practical Exercises which is most in need of revision. The examination on this subject should be an important part of the bar examinations and should not be treated as a minor subject. It should consist of performing an assigned task using given resource materials. The task shall include the preparation of a brief in support of a motion, a memorandum evaluating grounds for objecting to the probate of a will, a simple complaint, or some other legal document. The assignment may raise an ethical issue as well. For this purpose, examinees should be provided with the "record" of the case containing the facts and a "library" containing cases, statutes, or regulations.[19] The exercises are similar to an open-book exam.

By transforming the essay question on Legal Ethics and Practical Exercises into a performance test, this portion of the examinations can help the Board assess the examinee's ability for case planning, problem-solving, factual investigation, and other skills that are critical to the competent practice of law but are not necessarily measured by the bar examination's traditional essay and multiple-choice questions. As the chair of the State Board of Law Examiners of New York noted when the performance question was first introduced in that state, "it will test candidates in situations very much like those encountered every day by practicing lawyers – that is, analyzing facts, identifying legal issues, and looking up the law to apply to those issues."[20]

18. Alejo Labrador, *The Bar Examinations as a Instrument of Legal Education*, 12 ATENEO L.J. 329, 330-31 (1963).

19. This proposal is inspired by the Multi-State Performance Test (MPT), which is a 90-minute skills and methods test designed and administered by the National Conference of Bar Examiners (NCBE) for the bar examinations in the majority of the American states.

20. Press Release, Court of Appeals, State of New York (Mar. 1, 2000).

C. Multiple-Choice Section

This proposed section is designed to be an objective examination containing approximately 150 to 200 questions. Examinees will be asked to choose the best answer from four stated alternatives. Credit will be given only if the examinee has selected the best answer. Examinees shall be asked to mark only one answer for each question, and multiple answers will not be counted.

One need not fear the possibility that multiple-choice questions may easily lend themselves to guesswork. To the contrary, this type of questions can be a combination of rigor and precision as the following question demonstrates:

> 10. City enacted an ordinance banning from its public sidewalks all machines dispensing publications consisting of commercial advertisements. The ordinance was enacted because of a concern about the adverse aesthetic effects of litter from publications distributed on the public sidewalks and streets. However, City continued to allow machines dispensing other types of publications on the public sidewalks. As a result of the City ordinance, 30 of the 300 sidewalk machines that were dispensing publications were removed.
>
> Is this City ordinance constitutional?
>
> (a) Yes, because regulations of commercial speech are subject only to the requirement that they be rationally related to a legitimate state goal, and that requirement is satisfied here.
>
> (b) Yes, because City has a compelling interest in protecting the aesthetics of its sidewalks and streets, and such a ban is necessary to vindicate this interest.
>
> (c) No, because it does not constitute the least restrictive means with which to protect the aesthetics of City's sidewalks and streets.
>
> (d) No, because there is not a reasonable fit between the legitimate interest of City in preserving the aesthetics of its sidewalks and streets and the means it chose to advance that interest.[21]

In 1982, when the author introduced multiple-choice questions in the University of the Philippines College of Law, allotting thirty per cent (30%) of the examination to them, the results were satisfying. For example:

21. National Conference of Bar Examiners, The Multistate Bar Examination 2003 Information Booklet 31 (2002).

12. A bill, as certified by the Speaker of the Batasan Pambansa and as signed into law by the President, fixes a uniform margin fee of 25% on all foreign exchange transactions with the exception of foreign exchange for the importation of "urea formaldehyde." However, the Journal of the Batasan Pambansa shows that what was exempted from the payment of the margin fee was the importation of "urea and formaldehyde." Philchem Company applied for foreign exchange to import urea and formaldehyde, but the Central Bank denied its request for exemption from the 25% margin fee. Philchem contemplates filing an action in court. As its counsel you are asked what the sate of the law is in case of conflict between the enrolled copy of a bill and an entry in the Journal. Which of the following should be your answer?

(a) The Journal entry should prevail.
(b) The question is still an open one.
(c) The enrolled copy of the bill is conclusive.
(d) The stenographic notes during the debates are conclusive.
(e) The report of the committee which recommended the bill is conclusive.[22]

A given question may involve a choice of the applicable statute, theory of liability, or comparable principle of law. Questions can be so designed as to require the examinee to analyze the legal relationships arising from a factual situation or to take a position as an advocate. Some questions could be designed to call for suggestions about interpreting, drafting, or counseling that might lead to more effective structuring of a transaction.

Indeed, multiple-choice questions can be an excellent exercise for developing precision on the part of examinees. Obviously, this type of questions requires corresponding care and precision in their construction on the part of examiners.

The bar examiners shall prepare the multiple-choice questions for their respective subject areas, which shall then be submitted to the Chair of the Board. As a law teacher, the author proposes that thirty per cent of the examination be devoted to this type of questions, but as much as forty per cent can be allotted for the purposes of the bar examinations. Ultimately, the Board *en banc* should determine the number of questions to be allocated to each subject area. Multiple-choice questions can reduce the percentage allotment to the essay questions and speed up the correction of bar examination booklets.

22. This question is taken from an examination given by the author at the University of the Philippines College of Law on Feb. 28, 1983.

In the United States, the multiple-choice portion of the bar examinations in 48 out of the 50 states is a standardized test known as the Multi-State Bar Examinations (MBE). It is designed, administered, and scored by the National Conference of Bar Examiners (NCBE). The MBE consists of two hundred multiple-choice questions covering six law subjects. It is given twice a year within a six-hour time frame for each sitting.[23]

Immediately following the examinations, the answer sheets should be delivered to the Office of the Bar Confidant for scoring. Both raw scores and scaled scores can then be computed for each applicant. The *raw score* and the *scaled score* will be discussed in detail in Part IV. At this point it is enough to state that the raw score is the number of questions answered correctly. Raw scores on different administrations of the bar examinations, even when weighted, are thus not comparable primarily because of differences in the difficulty of different administrations of the examination, so that any particular scaled score will represent the same level of performance from bar examination to bar examination. The purpose of reporting a scaled score is therefore to help ensure that no examinee is unfairly penalized (or rewarded) for taking a more (or less) difficult administration of the bar examinations.

IV. Methodological Reforms: The Calibration Mehod

The calibration method applies to the marking of the essay questions in the bar examinations. The multiple-choice portion of the examination does not require calibration because the correct answer, or the best possible answer, to a question is derived from a predetermined and fixed set of choices.

In the United States, the adoption of a calibration method of marking the essay question of state bar examinations[24] came about as a result of

23. The standardized test administered by the Educational Testing Service (ETS) for admission to various academic programs also contains multiple-choice questions which are scored by computerized key pads. These tests include the SAT (Scholastic Achievement Test), AP (Advanced Placement), TOEFL (Test of English as a Foreign Language), GRE (Graduate Record Examination), GMAT (Graduate Management Admissions Test), and MCAT (Medical College Admissions Test). The ETS formerly designed and administered the LSAT (Law School Admissions Test) before the Law School Admissions Council was formed. The author's meeting with ETS officials on Oct. 7, 2002 enabled him to explore possible areas of consulting with ETS, particularly in test construction and scoring of the multiple-choice section.

24. In some states, like New Jersey, the bar examining authority is responsible for the development and correction of the essay test questions. Other states rely on the standardized Multi-State Essay Examinations (MEE), which is prepared and administered by the National Conference of Bar Examiners (NCBE) either on a state-wide basis or for a particular state. Correction of the MEE is the exclusive responsibility of the participating state bar examining authority.

renewed interest in promoting consistency and equity in grading practices in the 1960's.[25]

Indeed, it is likely that the essay test questions in successive bar examinations may differ in the aggregate degree of difficulty or complexity. In addition, bar examiners and readers, as a group, may be stricter or more lenient in the reading of one administration of the examinations than in another. Calibration corrects for possible variations in test difficulty and graded leniency on the basis of what is deemed to be representative, as well as reasonable or acceptable, test answers. It helps ensure that the passing standard is relatively consistent over successive administrations of the bar examinations.

A. Basic Components of the Calibration Method

The calibration method has the following features:

a. appointment of readership panels for each subject or test area of the bar examinations;

b. adequate provision for "checks and balances" through multiple levels of calibration;

c. sampling procedures to select a reliable sample of essays;

d. built-in appeals process for examinees whose overall bar examination scores fall slightly below the passing standard;

e. scoring system that measures the performance of each examinee relative to the performance of the other examinees.

B. Calibration Procedures

The calibration of the written essays involves the performance of several procedures.

1. Setting Up the Readership Panels

The initial step in calibration is the constitution of readership panels for each subject are, consisting of a bar examiner, as Panel Chair and a number of

25. The Code of Standards for Bar Examiners, adopted jointly by the American Bar Association (ABA), the National Conference of Bar Examiners (NCBE), and the Association of American Law Schools (AALS) in 1987, recommended that "the bar examining authority [in each state] should adopt procedures for the calibration of the grades to assure uniformity of the grading standards."

readers (which range from two to six per panel in various American States). The readers are usually selected by the bar examiner and/or chair of the Board of Bar Examiners from the ranks of private practitioners and, in a few instances, from law school faculties.

Each Readership Panel is responsible for preparing the essay test questions for its assigned subject area months in advance of the administration of the bar examinations. Before an essay question is accepted for use, every point of law in the question must be thoroughly briefed and the particular question analyzed and approved by the Panel as a whole.

Finally, care should be taken so that no examiner or reader within the panel would have the opportunity to mark an examinee's booklet more than once in any given administration of the bar examinations.

2. Polling: Identifying Grading Parameters of Guidelines for Model Essays

Either immediately before or after the conduct of the examinations, the readership panels should be convened by the chair of the Board for the purpose of setting guidelines and defining the parameters in marking the essays.

The grading guidelines should include a list of the most salient elements or points that are deemed essential to cover both the relevant and material facts and aspects of the law. Equal emphasis should be given to what the panel and the experts in the field determine to be the "model answers" and what can be reasonably expected of an examinee. The readership panels may assign point values to each of these elements in this initial stage of calibration. This is usually done by dividing the perfect raw score of an essay by the number of predetermined elements. For example, assume that the essay question in Political Law and International law, just like the rest of the essay questions carries a perfect score of 10 points. Assume further that the panel has agreed that the model essay should contain, more or less, five basic elements or items. The presence of each item in the model essay would then gain the examinee 2 points (10/5), unless the panel decides to assign unequal point values to these elements.

3. Selecting the Sample Essays

Calibration need not be an intimidating term. It refers to the sampling by the examiners of a representative number of test booklets before starting to mark them. Alas, this is not quite possible if the examinee pool is large as in the 2002 Bar Examinations in which a total of 4,670 candidates took the exams.

The purpose of sampling is to obtain an unbiased (and defensible) estimate of the average answer which should be as precise as possible on the

assumption that the sampled test booklets are representative of the entire pool of examinees in a given administration of the examinations. The estimate must be as precise as possible given the resources of designing the sample and collecting the needed information for calibration purposes.

Because of its simplicity and utility, systematic selection with a random start (or *random sampling*) is generally preferred. The sample of test booklets is chosen from the pool of examinee booklets on the basis of a fixed or uniform interval between the sampling units (i.e., all of the essay test booklets which are randomly re-ordered from first to last after the bar examinations are held). The uniform interval between the test booklets is obtained by dividing the population size by the sample size,[26] dropping any decimals in the result. Next, the random starting number is selected by any unbiased method or computerized program of selecting random numbers. The selected random number is always between one and the uniform sampling interval inclusive. This random start ensures that, for all practical purposes, all essay test booklets have an equal opportunity of being part of the sample.

Thus assume that the readership panel on Political Law and Public International Law wishes to draw a sample of 31 essay test booklets (which is equivalent to one per cent of the entire pool of 3,100 bar examinees). Dividing the population size by the sample size (3100/31) yields a quotient of 100.00. Rounding downward gives a sampling interval of 100. The random starting number can be any number between 1 and 100.

Suppose that the selected random starting point between 1 and 100 is 36. The panel then starts by selecting the 36th test booklet and pulls every 100th booklet thereafter; next the 136th booklet and so on until the 3,036th booklet is chosen from the entire pool. This ensures that the sampled booklets are at least the required sample size (31 test booklets). Note that during random sampling, the test booklets are mixed together and then arranged in some numerical order (e.g., 1 to 3,100), regardless of the test booklet coding system used to guarantee the anonymity of the bar examinees.

26. A statistical formula is typically used to obtain sample size, whether calculated manually or through a statistical software program like SPSS or S.A.S. For an easy to understand, comprehensive treatment of sample size determination, *see* United States General Accounting Office, Using Statistical Sampling 47-68 (1992).

In some jurisdictions in the United States, the ideal sample size of test booklets can pose a problem to readership panels owing to the relatively large number of test booklets that would need to be reviewed. For this reason, states like New Jersey usually select approximately 1 percent of the examinees' pool to constitute its sample of essay test booklets, taking into account the usual implications on the estimate of confidence intervals.

4. Calibrating the Test Answers

After the sample of essay test booklets is drawn, the readership panels should "match" the samples against the grading parameters or guidelines it had previously established to determine the benchmark examinee answers and to assign or distribute points for marking the essays.

There are two basic scoring methods for assigning point values to essays: the *analytic scoring* and the *basic scoring*. In analytic scoring, a model answer is prepared and then broken down into specific points or elements that should be included in a good answer. In holistic scoring, readers are instructed to read each answer rapidly and make judgments about its overall quality, without making counts of particular elements. The answers are then grouped by level of quality.[27]

Either method should work as long as the essay test question is properly designed or structured. The readership panels of the New Jersey Board of Bar Examiners, for example, assign essay points using the analytic method. The number of calibrated elements or variables is initially determined, and then divided by the "perfect" (raw) score (i.e. the highest possible score of the essay). The resulting quotient is the point value to be assigned to each element (if it appears in an examinee's booklet). For example, if the readership panel for the Remedial Law question finds that the majority of the 31 sampled essays contain only four out of five basic elements or guidelines which the panel has earlier identified and approved and the perfect score for this essay is ten points, the panel may choose to assign 2.5 points for each of the four calibrated elements (10/4). A fraction of 2.5 points may be assigned to any element that is present in an examinee's essay but is not sufficiently developed in the judgment of the grader. If all of the five (or more) elements (identified by the panel at the polling stage) appeal in an examinee's essay, then bonus points may be assigned. The chair of the Board should determine whether and how bonus points are to be assigned to essay answers.

Other jurisdictions in the United States use the holistic scoring method by assigning scores based on a range or continuum of points that correlate with demonstrated performance, rather than the presence or absence of calibrated elements. The Board of Bar Commissioners of the State of Utah uses a five-point standard ranging from one (well below the average/calibrated essay) to five (well above average).[28] Maryland's State Board of Law Examiners' standard is a modified version of the Utah scale. The perfect essay score is six points. Grades between one and six represent varying and increasing levels of demonstrated competence depending on an examinee essay's relative

27. Julia C. Lenel, *The Essay Examination*, THE BAR EXAMINER 16 (1990).

28. Rules Governing Admission to the Bar of the State of Utah.

proximity to the calibrated model essay. A grade of zero is given only if the examinee fails to answer the question or if the answer is determined to be totally unresponsive to the question.[29]

After the calibration of the sampled essays is completed, the sampled test booklets are returned to the pool of examinee booklets. Readership panels are now ready to mark all of the examinees' essay booklets (including those which were sampled) using the benchmark answers and grading system approved at this level of calibration.

5. Scoring

The grades assigned by the readership panels for each essay are not computed by the staff to determine the total score for the essay section. Multiple-choice answers can be corrected either manually or through a computer scanning program.

The examinee's final grade should be based on the combination of scores from the multiple-choice and essay portions of the bar examinations. That is, there should be no minimum grade required to pass each section or each essay test question. The multiple-choice and essay test scores, as well as the overall or final examination grade, may be expressed in various forms or combinations, to wit:

a) Raw Scores

A bar examinee's score is generated from the number of questions that were correctly answered (for example, 150/200 in the multiple choice portion, 65/80 in the eight-question essay portion, and an overall raw score of 215/280). No deductions are made for incorrect answers. Although it is the simplest to administer, raw scoring is very rarely used on its own because it does not allow for meaningful comparisons of test performance.

b) Weighted Scores.

A raw score is converted into a fraction which is then multiplied by the assigned weight or factor to obtain a weighted score. In the previous illustration, a raw score of 150/200 in the multiple choice portion yields a quotient of 0.7500. The corresponding fraction for the essay portion is 0.8125 (65/80). Assume that the multiple-choice portion carries 40 per cent of the overall grade, while the essay portion is assigned the balance of 60 per cent. The examinee's weighted score in the multiple-choice portion is 30.00, and that in the weighted essay portion is 78.75 (over 100.00). There are, of course,

29. Bar Admission Rules of the State of Maryland.

variations to this practice, such as doubling the weight of the total essay score in relation to the score assigned to the multiple-choice section.

Weighted raw scores are simple and easy to understand. They allow for grade rankings as well as comparisons within a given administration of the bar examinations. In the Philippine context, score weighting assumes even greater significance because of the tradition, dating back to 1913, of determining and reporting the bar "topnotchers." In most instances, the bar examination grades of the top 10 or top 20 differ only by a fraction or by a few points.

Raw score weighting appears to be a convenient tool for retaining these fractional differences in examinee scores. However, weighted scores do not account for possible examination-to-examination fluctuations in the level of difficulty of a particular administration. This is precisely what score scaling seeks to solve.

c) Scaled Scores

In state bar examinations, the raw scores in the multiple-choice section are scaled, or statistically adjusted, by comparing the performance of current examinees to those of prior examinee pools. This comparison is achieved by statistically analyzing a particular examinee pool's responses to similar or equivalent questions which have appeared in prior multiple-choice examinations and then comparing them to the responses of prior examinee pools. The comparison reveals the relative level of knowledge of current examinees versus prior examinees and determines how many points should be added to or subtracted from the raw score which has been adjusted to account for the differences in difficulty of the questions appearing on different administrations of the bar examinations. The total essay score is also standardized using the same scales for the multiple-choice section.[30]

A particular scaled score on the multiple-choice or essay test, is therefore, indicative of approximately the same level of proficiency as the identical scaled score on any multiple-choice or essay test, regardless of differences in the raw or weighted raw scores.[31] Conversely, two examinees who

30. In most American states, scaling is a two-part process. The first portion summarized above is referred to as *equating*. It is typically used for the multiple-choice portion (MBE) of the bar examinations. The essay scores (in the MEE, MPT, and/or the state-administered essay sections) are then scaled based on the MBE scale, using the "equipercentile."

31. The Educational Testing Service (ETS), based in Princeton, New Jersey, is considered one of the foremost experts in standardized testing and measurement. Examinee scores for the ETS administered tests (TOEFL, AP, SAT, GRE, GMAT, MCAT) are scaled for reporting and notification purposes.

obtained the same final grade of 78.75, but who took the bar examinations in different years, could have different scaled scores. On a scale of 100 to 950 for example, the first examinee could potentially receive a scaled final score of 900, while the second examinee could have a lower score of 800, in spite of equal raw or weighted scores in the bar examinations.

As with other professional examinations in the United States, most jurisdictions have adopted the scaling method for scoring the bar examinations.[32] Scaling is generally considered as another layer of calibration because it is the most equitable system of reporting scores.

Statistical consulting is, at present, an integral part of the technical infrastructure of the majority of American bar examining authorities.[33] For the Philippines, however, application of scaling may pose some problems. One problem may be that statistical scaling of examinee scores can be costly because it needs to be performed for each and every bar examination and would most likely require the services of a statistician or psychometrician.

Another problem is that scaling tends to ignore fractional or minimal differences in examinee grades, so that, for example, 10 or 20 or even 30 examinees whose final raw or weighted grades may differ by only a few points, could still receive the same scaled score. Using scaled scores in reporting the results of the Philippine bar examinations would virtually do away with the practices of determining the bar "topnotchers" (and replace it with Pass/Fail marks as used in various states in the United States).

d) Percentile Score

Percentile ranking indicates how an examinee performed in relation to all others taking the test over a given administration of the bar examination. A percentile ranking of 60 per cent, for example, means that the examinees scored higher than 50 percent of all other examinees (and lower than 40 percent of all other examinees). The average of the examinee pool would be 50 percent.

Percentile rankings are typically not reported alone but in combination with an examinee's raw, weighted, and/or scaled scores. The following hypothetical score-conversion table, based on the illustrations above, shows by comparison the various possible ways of scoring the bar examinations. As the table indicates, a bar examinee need not respond correctly to every

32. *See* Report and Recommendations of the New York State Board of Law Examiners to the Court of Appeals Regarding the Passing Standard on the State Bar Examinations 5-6 (2002).

33. *Id.* at 5.

question to attain the highest or "perfect" scaled core of 950 or the highest percentile score of 99.9 in contrast to a raw or weighted score.

Raw Score (over 280)	*Weighted Score* (over 100.1 00)	*Scaled Score* (highest = 950)	*Percentile Rank* (highest = 99.9)
276-280	98.57-100.00	950	99.99
275	98.21	940	99.99
140-145	39.43 -45.78	650	60.00
16	8.00	150	10.50
1	2.6	110	0.59

6. Segregating Final Grades

After the examinees' combined scores (whether raw, weighted, called, percentile, etc.) for the multiple-choice and essay potions are computed, a three-fold classification is established similar to the hypothetical illustration below.[34]

Decision	*Over-all Weighted Grade*
Pass	70.00 and above
Conditional (re-read')	65.00 – 69.99
Fail	64.99 and above

The classification allows for a built-in appeals process for examinees whose scores fall slightly bellows the predetermined "cut-off" or passing standard. Examinees whose final scores are at least 70.00 in the illustration are considered to have successfully passed the examinations, while those whose scores fall below 65.00 are deemed to have failed.

34. This illustration is a modified version of the procedure employed by the New Jersey Board of Bar Examiners. *See* State of New Jersey Rules On Admission to the Bar 7-8 (2002).

The essays of examinees falling below the so-called "Conditional (Re-read)" category (or "twilight zone") are re-read and re-graded by a second reader in each panel who is unaware of the first grade given to the examinee's essay. The first and second grades are then averaged to produce the final grade for a particular essay and then recomputed with the other essay grades to produce the new score for the essay section.[35]

If the essay grade given by the second reader differs from the first reader's by more than 1 or 2 points,[36] the essay is forwarded to the bar examiner, as Panel Chair, for a third and final reading. The "resolution grade" given by the bar examiner is the final grade for the essay and is recomputed with the other essays. The bar examiner cannot give a grade which is either above of the higher of the two grades or below the lower of the two grades. For example, if the reader assigned a score of 7/10 to the Political Law and International Law essay of an examinee, and the second reader gave the same essay a grade of 4/10, the "resolution" grade should fall between 4 and 7 points inclusive.

The Pass/Fail determination for the recomputed final grades of the "Conditional" examinee is thus amended to take into consideration the results of this appeals process. The new passing standard (which applies only to the "Conditional" examinees) is determined by calculating the average of the lower and upper ranges of the "Conditional" examinees) is determined by calculating the average of the lower and upper ranges of the "Conditional" scores. Using the overall (weighted) scores in the preceding illustration, the revised Pass/Fail grades are as follows:

Decision	*Recomputed final grade*
Pass:	67.51 and above
Fail:	67.50 and below

There is no further appeals process beyond this stage, and all grades are deemed final.

35. The range of scores which constitute the "Conditional (Re-read)" category can be either statistically calculated (*e.g.*, using the standard error of measurement) or arbitrarily determined (*e.g.*, states like Ohio allow for essay regarding only if the final score is 1 point below the passing standard.).

36. The permitted difference in the first and second grades is usually 1 point, since essay questions carry a perfect score of 6 points in most state bar examinations. However, if the perfect score is about 10 points or more, a difference of 2 points (to account for a wider spread of possible grades) should be acceptable.

C. Releasing the Bar Examination Results

The Board en banc should approve the results of the bar examinations, as submitted by the various readership panels, and then report them to the Court. In various states or jurisdictions of the United States, only Pass/Fail marks are reported in the notification letters to the bar examinees. In our case, the final grades of those who initially passed and failed, and the recomputed final grades of the "Conditional" examinees, may be released. This concludes the calibration process.

V. SUMMARY AND CONCLUSIONS

The integrity of any professional examination is enhanced by grading procedures and practices which are consistent, reliable, and equitable. This paper proposes the calibration of the essay portion of the bar examinations to permit test standards to remain as constant as possible from one examination to the next, so that an examinee is neither rewarded nor penalized for having taken one examination rather than another. This is because the questions asked, and the grades given out, in one examination may prove to be, on the average, tougher than those in some other administration of the bar examinations.

To adjust for differences in the level of difficulty and grader leniency, multiple levels of calibrating test answers are performed by a readership panel (in contrast to the current practice of having a single examiner per subject). Polling, sampling, benchmaking, scaling, and an internal appeals or resolution process constitute these multiple layers of calibration. The expected outcome is that, over time, the passing standards for bar admission will be consistent, reasonable, more reliable, and representative or demonstrated performance without sacrificing the acceptability of these standards to the bar examining authority.

The proposals herein made are realistic. Given a firm resolve to reform the system of bar examinations, they are not beyond realization. For so long, we have been discussing about the problems of the present system. It is time we confront and solve them.

Morality: Towards A Rational Basis for Law

Should Moral Principles be a Consideration in Law or Court Decisions?

*Jose L. Sabio, Jr.**

I. INTRODUCTION

The recent United States Supreme Court decision in *Lawrence v. Texas*[1] purports to draw legal implications of equal protection of the law down to its ultimate consequences in a highly controversial matter — the private sexual behavior of homosexuals. While it openly promoted the homosexual agenda, it also let out a resounding message — moral principles are no longer valid considerations in legal matters. The Court, in an effort to decriminalize sodomy, declared that moral standards should not be considered in adjudicating controversies when the public arena is not involved. In its own words, the Court decreed that its obligation was to "define the liberty of all, not to mandate its own moral code."[2] The irony behind this stance is that while the

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1 000 U.S. 02-102 (2003), 41 S. W. 3d 349, certiorari to the Court of Appeals of Texas, Fourteenth District, No. 02-102. Argued March 26, 2003 – Decided June 26, 2003.

2 *Id.*

Court pretended not to moralize in its decision, it did make a moral stand in an important issue because the very nature of law called for such. It shall be explained shortly why this is so.

Defence of the rightful liberty of individuals and equal protection of the laws was the main argument of the Court when it decided to overturn the decision of *Bowers* v. *Hardwick*,[3] which had decided that homosexuals did not have the right to engage in sodomy. It can be drawn from *Lawrence* that liberty is equated with doing whatever a person chooses to do, even if this act is deemed immoral. In other words, society has no right to intrude upon the private behavior of its citizens when such behavior is consensual and does not harm parties other that those directly involved. Of course, such a behavior could go against moral sensibilities of certain sectors of society, but law should not be based on moral considerations, rather, it should be based on rational ones. This event raised a general alarm all over the United States, resulting in a current move to push for a constitutional amendment to strengthen the institution of marriage and define it as a union between heterosexuals.[4] As far as marriage and family-related legislation is concerned, the United States seems to contemplate a fate similar to Canada.

While this current situation may seem implausible in the Philippines at present, such a status gives us a ground for considering the seeming disregard for morality in legislation and jurisprudence. The current situation sadly points to the weak hold that Christian moral principles seem to have over Western society in general. While the public perception of most Western countries is hostile to religious-grounded reasons, a close examination of the nature of law may show that moral principles do have a bearing over questions of significance in society, particularly those pertaining to its laws. There is an urgent necessity, therefore, to present jurisprudential and social reasons why morality should be considered in law making and judicial pronouncements. It bears stressing that moral principles are intrinsic to the bonds which tie society together and, therefore, cannot be disregarded without inflicting considerable harm to society based on the following reasons: a) Moral

3 478 U.S. 186 (1986).

4 The Alliance For Marriage (AFM) proposes the following amendments to the United States Constitution: "Marriage in the United States shall consist only of the union of a man and a woman;" and "[n]either this Constitution or the constitution of any state, nor state or federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups." Alliance For Marriage, Multicultural Coalition Reintroduces Federal Marriage Amendment in Congress *available at* http://www.allianceformarriage.org/reports/fma/amendment.htm (last accessed on Feb. 21, 2003).

principles are necessary presuppositions of legal reasoning and legal systems, without which these legal systems will make no sense at all; and b) Law performs a function of morally forming society's citizens, and every time lawmakers promulgate and enforce a law, persons are effectively drawn towards or deflected from morally significant actions. In view of this second reason, lawmakers and judges thus have the duty and obligation to enact, enforce, and apply, at least morally neutral, if not morally good, laws.

II. Moral Bonds Hold Society Together

A. Main Considerations

The main considerations for legal enactments may be protection of rights, imposition of order, efficiency, or other pragmatic concerns that are based on general public feeling or some common goal. In Lawrence, there is much emphasis on the notion that in a pluralistic society, it is of utmost importance that the civil liberties of persons be protected by the due process clause of law. This is not surprising since the legal panorama in many Western countries has been positivistic, which means that laws are taken simply as enactments of lawful authority with or without considerations for morality.

Furthermore, an important characteristic in modern legal reasoning is that the question of morality has been taken out of the public sphere and shelved under some obscure drawer, thus some stigma is attached to bringing discussions of morality to the public sphere. In other words, morality may not be legislated. In spite of this reluctance, or even sometimes abhorrence, to bring considerations of morality to the legal sphere, laws are pregnant with moral notions which cannot be easily disregarded. In fact, a close examination of what the law is really all about will show that law may not be divorced from moral principles without rendering basic laws insensible or unjust or even absurd. Take the case of any country's fundamental law—the constitution, whether written or unwritten. Any constitution is a set of laws that a country establishes and lays down as a basis for building a society based on a common ground with a view to a common aim or good. Our own Constitution incorporated the following words in the Preamble:

> We, the sovereign Filipino people, imploring the aid of Almighty God; in order to build a just and humane society, and establish a Government that shall embody our ideals and aspirations, promote the common good; conserve and develop our patrimony, and secure to ourselves and our posterity, the blessings of independence and democracy under the rule of law and a regime of truth, justice, freedom, love, equality, and peace, do ordain and promulgate this Constitution.[5]

As stated clearly in our own Philippine constitution, the aim of this body of laws is to build a just society based on the rule of law in order to promote the common good. These very words imply that every society which aims to achieve this does so based on some idea of what good is. It also bases its laws on some foundation of justice, truth, and the like. Now good, truth, rights, and justice are decidedly moral notions which are linked to other moral principles as well. The American Declaration of Independence and Constitution are fraught as well with parallel notions evoking moral principles. Concepts such as liberty and freedom are intimately linked with ideas and moral principles such as the dignity of human persons. These notions bring along with them moral presuppositions. It is apt to cite the following words written by Lord Devlin in his essay *Morals and the Criminal Law:*

> Society means a community of ideas; without shared ideas on politics morals and ethics, no society can exist. Each one of us has ideas about what is good and what is evil; they cannot be kept private from the society in which we live. If men and women try to create a society in which there is no fundamental agreement about good and evil they will fail; if, having based it on common agreement, the agreement goes, the society will disintegrate.
>
> For society is not something that is kept together physically; it is held by the invisible bonds of common thought. If the bonds were too far relaxed, the members would drift apart. A common morality is part of the bondage. The bondage is part of the price of society; and mankind, which needs society, must pay its price.[6]

Ultimately, the aim of the promulgation of a body of laws, like the constitution, is to establish a society based on a common ground which in turn is based on some moral principles. These moral principles are not created, rather are necessarily presupposed by law. Justice, for example, is presupposed by law in the sense that it is what the imposition of law intends to protect so it may not be taken away, or reinstated after it has been taken away. Law does not make sense without the presupposition of justice. Justice does not make sense unless you have the presupposed notions of human dignity, rights, truth, freedom and so on.

Aristotle not only classified justice as a personal virtue which leads a person to render constantly what is due, but he also characterized it as a

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5. PHIL. CONST. PMBL.

6. LORD DEVLIN, MORALS AND THE CRIMINAL LAW, IN PHILOSOPHY OF LAW 223-29 (Joel Feinberg & Hyman Gross eds. 5th ed. 1995) (quoted in Ronald M. Dworkin, The Philosophy of a Law (1977)).

system which is an integral foundation of society. For justice to be in society, it necessarily has to be fostered in every citizen who forms part of that society. Applied to modern situations, justice leads the employer to give the due salary of his workers, and a government to render service to its people by establishing a legal system which protects their rights and liberties. To the extent that this habitual rendering of what is due is observed, then there is a just ordering in any given society. The aim of the society as a whole is for its members to attain happiness through a life of virtue. For this reason, laws are enacted to ensure that a system which promotes this behavior is in place. Laws are established to enforce justice.

B. Justice

Is justice then dependent on how society articulates it and lives it? Montesquieu makes this observation:

> Particular intelligent beings may have laws of their own making, but they have some likewise which they never made. Before there were intelligent beings, they were possible; they had therefore possible relations, and consequently possible laws. Before laws were made, there were relations of possible justice. To say that there is nothing just or unjust but what is commanded or forbidden by positive laws, is the same as saying that before the describing of a circle all the radii were not equal.
>
> We must therefore acknowledge relations of justice antecedent to the positive law by which they are established.[7]

Justice then is something which is first discovered as a certain ordering of reality before it is applied in particularities. His observation points to the fact that justice must have some objective basis which transcends its positivization through civil laws. This points to the existence of the natural law, understood as an ordering of reality based on some pre-made plan by the Creator. This natural law encompasses not only the physical laws of nature but includes the moral laws by which human persons ought to live in society. Aquinas says that this law is written in the heart of every human person wherefore everyone knows that he must do good and avoid evil.[8] This is the most basic prescription

7. Charles de Secondat, Baron de Montesquieu, *The Spirit of Laws,* (Thomas Nugent trans.) *available at* http://www.constitution.org/cm/sol.htm (last accessed on Feb. 21, 2004).

8. Aquinas further explains that since not everyone has the inclination or the capacity to discover this law individually (mainly due to the darkening of reason caused by original sin), God revealed this law in the promulgation of the Ten Commandments. According to this view, the Ten Commandments are not only negative prohibitions, but also prescriptions for certain behavior, *e.g.*, *Thou shall not steal* not only a prohibition against unlawful usurpation of another's property, but is also a prescription to observe justice in property relations; *Thou shall not kill* is not only a prohibition against murderous acts, but is also a prescription to preserve life.

of the natural law. This natural law is founded on certain inclinations of the human person which are a demand of his nature. For example, it is a natural inclination of persons to communicate their thoughts to each other. Reason demands, however, that persons should always speak the truth because otherwise, communication will not only be rendered meaningless but useless as well. For this reason, telling the truth is part of natural law. Our natural inclinations then become part of our obligations because reason commands it so.

However, even if natural laws are inscribed in the nature of the human person, human positive law are still quite necessary to determine the specifications which the natural law has to assume under the varying conditions of time and age. In other words, while the natural law remains immutable and universal, its application to specific societies of different times may be different. Hence, there is a need to enforce positive laws. To the extent that these laws follow the natural law, then these laws are said to be just and will, therefore, have the force of law. For example, a positive law which disregards life will not be just according to natural law which acknowledges the sacredness of life in all its stages.[9]

C. Truth

Another notion reverberating with moral undertones is truth. This requires of society the establishment of certain objectivity. Objectivity, in turn, points to an element that is not invented, rather discovered. In this sense, truth is not something made by man but is discovered by him through the use of reason. This shows that reality has its own ordering that needs to be discovered. This is why science can in fact discover laws in nature which are constant and uniform given certain conditions. The same can be said in the sphere of human laws and not just physical laws. When applied to human behavior, therefore, truth demands that our action should follow the rational demands of our nature. Truth demands that the objective moral ordering of our nature is followed. Truth demands the absence of arbitrariness and acknowledges the demands of moral absolutes.

D. Liberty

Liberty, as understood in democracies, is not license. It is liberty regulated by law. Malcolm, borrowing from Mabini, referred to liberty as "freedom to do

9. Hence, laws which promote abortion or euthanasia may be enforced in some societies as positive laws but they are not just laws and, therefore, ought not to be obeyed.

right and never wrong...ever guided by reason and the upright and honourable conscience of the individual."[10] Neither does the person have the liberty to abuse himself. The reasonable thing to do with liberty is to exercise it with a view to promoting some good, whether it is on the personal or communal level. The right to be free may not be equated to mean the right to do evil or do actions which may be harmful to one's self or to others.

Furthermore, the free exercise of rights is reasonably geared towards human perfection and the perfection of society. Wherefore, to exercise one's freedom to do what is evil or harmful not only is insensible but is also unreasonable. Linked to this is the notion that the exercise of freedom is not absolute and individualistic. Every human person who wishes to exercise his or her rights within society is also expected to contribute to the common good. This is what the principle of solidarity is all about. All of one's actions have a bearing on the welfare of others, whether these actions are exercised in the private or public sphere. In the sphere of moral actions, then, our personal choices have a bearing on the general moral tone of society in general.

Justice, truth and liberty then, understood as moral notions, are seen as basic presuppositions of civil laws which ultimately should be founded on natural laws, and are part of the common bond that society wants to not only presuppose, but also establish. If such notions are ignored or disregard, only but weak links will be forged within society, thus making it unstable. If moral principles do not form the backbone of society, soon enough, these moral principles will easily be replaced by political ideology or some other agenda. To illustrate how the lack of basic moral considerations can reach the absurd in legal proceedings, applications in cases in the United States where a proclivity for resorting to legal solutions has sometimes reached the extremes are ready examples.[11]

10. Rubi v. Provincial Board of Mindoro, 39 Phil. 660 (1919).

11. If you have come across absurd accounts in the Stella Awards (http://www.stellaawards.com), then one would realize to what extent the law may be used not to redress justifiable grievances but for mercenary schemes. One account tells of how a certain Mr. Merv Grazinski of Oklahoma City, Oklahoma, won a suit against the company on the basis of what one may call moronic misinformation. He purportedly purchased a brand new Winnebago Motor Home. On his trip home from a football game, having driven onto the freeway, he set the cruise control at 70 mph and calmly left the driver's seat to go into the back and make himself a cup of coffee. Not surprisingly the RV left the freeway, crashed and overturned. Mr. Grazinski sued Winnebago for not advising him in the owner's manual that he could not actually do this. The jury awarded him $1,750,000 plus a new Winnebago Motor Home. The company actually changed their manuals on the basis of this suit to prevent others, like Mr. Grazinski, from getting away with the same or similar lawsuits.

As regards equal protection of the law, equal protection does not signify a kind of classless equality. Equal protection "is not a disembodied equality. It does not deny to the State the power to recognize and act upon factual differences between individuals and classes. It recognizes that inherent in the right to legislate is the right to classify."[12] Thus, since marriage is a union between a man and a woman, it would be repugnant to reason that a man should insist on being allowed to marry another man. In this regard, it is worth noting that in the Philippines, pursuant to the provisions of the 1987 Constitution, a law cannot be passed, as the other Scandinavian countries have done, allowing a marriage between individuals of the same sex.

The Constitution provides: "The State recognizes the sanctity of family life and shall protect and strengthen the family as a basic autonomous social institution."[13] The family, as contemplated by such provision, is understood as a stable heterosexual relationship and never as a union between the same sexes. Lawrence has certainly closed its eyes to the fact that equal protection does admit of a valid classification not only provided by law, but by nature itself. To discard the natural and basic distinction between man and woman is to deny reason itself

III. The Relevance of Moral Law to Man-Made Laws

What is a law? St. Thomas Aquinas defines law as a decree of reason made by him who has care of the community. In this definition are encapsulated the essential traits of law. However, this definition alone does not give us the function of law. Shortly, it will be shown how the intrinsic link between law and morality has been elucidated by Aristotle's *Nichomeachean Ethics*.

Law's primary function is to establish order in society and serve it as an instrument. Law also has a normative function in creating and enforcing obligations and rights or it may prohibit certain actions. Due to this function, law creates a system where it becomes more favorable to do what is just. If law does not create this kind of climate, then the law ceases to be an effective tool of society for forming its citizenry. When a just law exists, justice is favored in society. This is the reason why the law has to be just, and not only effective at protecting or sanctioning individual rights and liberties.

12. Joaquin G. Bernas, S.J., The 1987 Constitution of the Republic of the Philippines: A Commentary 137 (2003).

13. Phil. Const. art II, § 17.

Because of the consequent climate created by law, law recognizably performs a secondary but equally important function—the moral formation of society's citizens. This has long been recognized by Aristotle, as seen in his *Nichomachean Ethics*. The main argument of Aristotle was that laws are formulated in such a way as to habituate the citizens to virtue. After extensively discussing the moral virtues in various chapters of his *Ethics*. He argues in the last chapter the dependence of morality on law. He says that in order to instill and habituate the citizens of any state towards moral virtue, the ruler has to fashion laws which direct the actions of the general public.

Law has the function of either habituating the actions of citizens towards moral virtue, or it inhibits other actions which lead toward vice. Law has the important function then of not only establishing law and order, but also has the function of training the citizens toward morally good acts. Often enough, the law specifies how justice may be applied in situations or how it may be specified in various circumstances. This idea runs contrary to many modern theories about law, and in fact runs contrary to the reasons why certain laws are promulgated in modern times.

Whether the law pertains directly to moral matters or not (e.g., whether they pertain directly to matters of order or administration like traffic rules; or whether they pertain to matters with direct moral implication like decriminalizing homosexuality or prostitution), law always fulfills the secondary function of forming citizens in moral character. This is so because law directly controls behavior and this certainly has a bearing on character. It has an important function in the habituation of its citizens. For example, at the root of all the seemingly prohibitive rules being meted out by the MMDA is an attempt at conditioning people to be more orderly in their comings and goings to promote better traffic flow. At present for example, traffic laws are implemented not only to instill order but indirectly, these laws are supposed to instill a sense of order in citizens. A noted political scientist observes:

> Although intellectuals of liberal democratic sympathies may not believe that morality depends on law, it is almost impossible for any regime that takes itself, and is to be taken, seriously not to shape its citizens with respect to morality. To deny that legislation of morality can or should take place does not eliminate such legislation; it merely conceals it, perhaps distorts it, and otherwise confuses and misleads rulers and ruled alike.[14]

This leads us to conclude that laws have a great part to play in the forging of a moral climate within a given society. This is not to deny that there are

14. George Anastaplo, *Aristotle on Law and Morality*, *in* 3 WINDSOR [ONTARIO] YEARBOOK OF ACCESS TO JUSTICE 458–64 (1983), *available at* http://www.cygneis.com/ethics/gamoralist.htm (last accessed on Feb. 21, 2004).

other factors which shape morality, such as religion, familial instruction, and custom. But note that even these factors depend on the law to some extent. Religious freedom is protected by the law. Mores and customs are safeguarded by law as well. The family, as an institution of society, is also shaped by the law. Society knows that the institution of the family has a lot of impact on the common good and its promotion or breakdown is within the interest of the general public. Laws which affect the family will affect the progress or demise of society. To the extent that society's laws promote the role of the family, then that society is protecting itself. But above this primary concern of promoting society's interest that the family fulfills its institutional role, society's laws which touch on the family do a lot to spell the moral tone that society may imbibe. For example, to the extent that a society may indirectly sanction promiscuous behavior by providing lax divorce rules, it sets the moral tone for that society through its marriage legislation.

Aside from setting the moral tone of a society, law also charts the sociological path a society is likely to take, whether for good or bad. Take the case of divorce. There is a wealth of sociological and psychological studies showing the adverse impact of divorce in America.[15] One study after another have shown the far-ranging effects of divorce such that many American states now are trying to promote through public policy and legislation the strengthening of families and the imposition of stricter divorce laws.

If the law then has this powerful capacity of setting the moral tone of a society, then there is an obligation on the part of legislators to keep this in mind whenever laws are formulated. In the case of the recent U.S. Supreme Court decision on the decriminalization of sodomy, we can only imagine and project the impact that such a ruling will take. Contrary to its claim that it is not stating the Court's moral code but is simply protecting civil liberties, it has indeed stated its moral position. The decision was, in effect, a stamp of approval on the homosexual lifestyle. Yet, several psychological and sociological studies have come up underlining the risks of a homosexual lifestyle.[16] Does this mean that the U.S. Supreme Court is protecting civil liberties at the cost

15. JUDITH WALLERSTEIN, THE UNEXPECTED LEGACY OF DIVORCE: THE 25-YEAR LANDMARK STUDY (2000), presents significant findings on the long-term effects of divorce on children. One marked characteristic of children of divorce is the tendency to cohabit before getting committed.

16. The National Association for Research and Therapy of Homosexuality (NARTH) presents a study suggesting higher rates of self-harm and suicidal behavior for same-sex attracted individuals. Other studies as well indicate that same sex unions likely lead to substance abuse, violent behavior, *etc.* NARTH, *New Zealand Study Suggests Higher Rates Of Self-Harm And Suicidal Behavior For Same-Sex Attracted Individuals*, *available at* http://www.narth.com/docs/newzealand.html (last accessed on Feb. 21, 2003).

of some societal risk in the future? Only history can judge the impact that this decision (and other such similar decisions) will have on societies where they have been implemented.

IV. Conclusion

Our exploration of the implications of the U.S. Supreme Court's decision in Lawrence v. Texas may have generated more questions than answers. While there is no doubt that each citizen has to be accorded his fundamental rights, we do know that not all private actions may be licit or legal. Where is the line then drawn between protecting the basic rights of individuals and ensuring that justice really reigns in the community? If certain intimate and private choices may be protected from state interference, then to what extent should the law sanction these choices especially when they have societal and moral implications? Related questions are: On what ground then should a law be enforced? On the pleasure of the majority? On pragmatic and utilitarian grounds? On a political agenda?

In spite of all these questions and others which may be asked, we have tried to see some rational ground for the inclusion of moral principles in the formulation of law. The reasoning has been geared to showing jurisprudential and social reasons which point towards the connections between moral principles and legal systems and situations. Thus, moral principles are intrinsic to the bonds which tie society together and, therefore, cannot be disregarded without inflicting considerable harm to the whole of society based on the following reasons: a) Moral principles are necessary presuppositions of legal reasoning and legal systems, without which these legal systems will make no sense at all; and b) Law performs a function of morally forming society's citizens, and therefore every time lawmakers promulgate and enforce a law, persons are effectively habituated towards or deflected away from morally

Other studies also show that children raised by non-heterosexual parents are at risk. They are more apt to experience gender and sexual confusion; they are more apt to become promiscuous; they are at greater risk of losing a parent to AIDS, substance abuse or suicide. They suffer more depression and other emotional difficulties. They are also more likely to engage in same-sex behavior. NARTH, *Pediatrics Group Endorses Homosexual Adoption ...But New Policy Places Children at Risk*, *available at* http://www.narth.com/docs/endorses.html (last accessed on Feb. 21, 2003).

Furthermore, statistics tell us that gay sex is often tied to substance abuse, promiscuity and unsafe sex practices. NARTH, *Why Reveal the Dark Side of the Gay Movement?*, *available at* http://www.narth.com/docs/whyreveal.html (last accessed on Feb. 21, 2003).

significant actions because of the law. This second reason then imposes a certain obligation on lawmakers and jurists when they enforce a law.

A brief examination of the concepts of law and its function and impact in society has shown us that law does have something to do with morality. In turn, the moral tone of any society very much depends on the laws which are presently promulgated and/or applied. We see here a reciprocal relation between law and morality. Society's laws are founded on something beyond the law itself. Often enough, modern judicial systems have invoked the phrase "rational basis of law" to found legal decisions. Yet ultimately, unless societal laws or judicial decisions for that matter are founded on some basis other than the will of the lawgiver or interpreter, they will simply be subjected to either propaganda or the ideology of the ruling faction.

A law or a court decision, as we have tried to show, has an indirect function in the moral formation of its citizens and, therefore, a disregard for moral considerations will lead to the loosening of important societal bonds and ultimately will lead to the ruin of society. Finally, any lawgiver or jurist who intends to fulfill his function in a just manner has to be cognizant of the impact of the law or a judicial decision on the moral tone of society. To disregard this role would be to disregard the very good of society.