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## ESSAY

### LAW SCHOOLS CAN SOLVE THE "BAR PASS PROBLEM"— "DO THE WORK!"

CHRISTIAN C. DAY\*\*

The bar pass rate for law graduates peaked in 1994.<sup>1</sup> Since the mid-1990s, this rate has declined precipitously.<sup>2</sup> In 1999 and 2000, first-time test takers passed at a rate of only seventy-five percent; in 2002, first-time test takers who graduated from ABA-approved schools had a seventy-four percent pass rate.<sup>3</sup> The decline in Law School Admissions Test (LSAT) scores foreshadowed these failures. Many students with LSAT scores below 157 are at considerable risk of failing the bar exam, as this essay demonstrates.<sup>4</sup> The failure to pass the bar exam has devastating consequences for the applicant and may have serious consequences for law schools as reputations decline.

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\* "Do the work!" comes from Professor Kathleen Dole, my wise colleague, who instills that wisdom in her students. This injunction represents the tenacity and the quality of work and rigor that deans, faculty and students must bring to law school studies. If they do and follow solutions proposed in this article, bar examination success will follow.

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Many of the ideas and information set forth in this essay were the result of a two day conference I attended, "Academic Assistance and the Bar Examination," Midwest Region Academic Support Workshop, sponsored in conjunction with the National Conference of Bar Examiners, Capital University Law School, Columbus, Ohio, June 8-9, 2001. I am informed and indebted by the work of the College's Ad Hoc Committee on bar examination concerns. My thinking also has been shaped by discussions with Professor Kathleen Dole (a former New York State Bar Examination grader and legal assistant to the New York State Board of Law Examiners) and Associate Dean Margery Connor. Research Assistants, Phyllis V. Barry, 2003 and James P. Livesey, 2002, have ably assisted me. I must thank my wonderful wife and faithful editor, Ann M. Day, B.S., Syracuse University, 1978; M.B.A., Syracuse University, 1982; M.S. (Science Teaching), Syracuse University, 1999. The insights are often others; the errors exclusively mine. Finally, I am grateful to Syracuse University for providing me with leave and giving me time to read, reflect, and write.

1. See *infra* Chart 1 and note 15.
2. See *infra* Chart 1 and note 15.
3. See *infra* Chart 1 and note 15.
4. See *infra* Section I.B.

Law schools have a moral and professional obligation, not only to graduate their increasingly heterogeneous student body, but also to enable graduates to practice by preparing them to pass the bar. This essay explains why strategies to improve the bar pass rate by increasing selectivity, either through admissions or attrition, may not succeed. It argues that law schools must work with the students they admit. The essay concludes by offering a number of common sense tactics and strategies to raise exam pass rates without turning law schools into “bar schools.”

*“The only thing necessary for the triumph of evil is for good men to do nothing.”*

*Edmund Burke*<sup>5</sup>

## I. INTRODUCTION

Law students attend law school to become lawyers. That is their primary goal and objective. A number of graduates do pursue non-traditional roles. Some aspire to be law teachers, others to enter business. But the vast majority need both the diploma and admission to the bar in order to practice the profession they have chosen. Most law graduates do not enter non-traditional positions without first practicing law. Further, many employers regard bar admission as part of the criteria for the non-traditional position—they use the bar admission as a vetting. Thus, the most important obligation of law schools is to prepare their students to become capable, practicing lawyers. The Standards for Approval of Law Schools of the American Bar Association assume that law schools are the gateway to the legal profession.<sup>6</sup> The

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5. *Attributed to Edmund Burke (1729-1797)*. JOHN BARTLETT, FAMILIAR QUOTATIONS 374 (15th ed. 1980). Certainly graduating a number of students who will routinely fail the bar exam is an evil to the students. It is a greater evil to ignore the problem when obvious and useful solutions are available.

6. Accreditation standards require a rigorous education that will prepare law students for the bar and practice. Some of the key standards are set forth below.

### Standard 201. Resources for Program.

- (a) The present and anticipated financial resources of a law school shall be adequate to sustain a sound program of legal education and accomplish its mission.
- (b) A law school should be so organized and administered that its resources are used to provide a sound program of legal education and to accomplish its mission.

### Standard 301. Objectives.

- (a) A law school shall maintain an educational program that prepares its graduates for admission to the bar and to participate effectively and responsibly in the legal profession.
- (b) A law school shall maintain an educational program that prepares its graduates to deal with current and anticipated legal problems.

### Interpretation 301-1:

*Among the factors to be considered in assessing the extent to which a law school complies with this Standard are the quality of the school's students, and the*

Preamble to the Standards contemplates that law graduates will practice law and be ethical representatives of their clients, officers of the court and public citizens.<sup>7</sup> To do that, law students must pass the bar or they cannot practice law.<sup>8</sup>

Legal education is faced with a serious problem: declining pass rates on bar examinations. This essay is written by a law school teacher with more than two decades of experience who does not consider himself to be an expert on the bar problem.<sup>9</sup> Indeed, the author had hostility toward the exam for a number of years. On that accord, the author was in good company with many academics and practitioners who, having passed the exam, did not find

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*bar passage and career placement rates of its graduates. (August 1997).*

**Standard 211. Equal Opportunity Effort.**

Consistent with sound legal education policy and the Standards, a law school shall demonstrate, or have carried out and maintained, by concrete action, a commitment to providing full opportunities for the study of law and entry into the profession by qualified members of groups, notably racial and ethnic minorities, which have been victims of discrimination in various forms. This commitment typically includes a special concern for determining the potential of these applicants through the admission process, special recruitment efforts, and a program that assists in meeting the unusual financial needs of many of these students. . . .

*Interpretation 211-1:*

*This standard does not specify the forms of concrete actions a school must take in order to satisfy its equal employment [sic] obligation. . . . [Actions schools can undertake include]: . . .*

*g. Encouraging and participating in the development and expansion of programs to assist minority law graduates to pass the bar.*

**Standard 501. Admissions.**

A law school's admission policies shall be consistent with the objectives of its educational program and the resources available for implementing those objectives.

A law school shall not admit applicants who do not appear capable of satisfactorily completing its educational program and being admitted to the bar.

*Interpretation 501-2:*

*A law school's admission policies shall be consistent with Standards 201, 211 and 301. (August 1996; July 2000).*

AM. BAR ASS'N, STANDARDS FOR APPROVAL OF LAW SCHOOLS OF THE AMERICAN BAR ASSOCIATION, available at <http://www.abanet.org/legaled/standards/standards.html> [hereinafter STANDARDS] (last visited Feb. 20, 2004).

7. *Id.*, pmb1. at 24.

8. Some academics have questioned the utility of the exam and have proposed alternatives, such as diploma privileges, practical skills exams and public service. *Society of American Law Teachers Statement on the Bar Exam, July 2002*, 52 J. LEGAL EDUC. 446, 451-52 (2002). Notwithstanding SALT's critique, concern and proposed reforms, the bar exam will undoubtedly be with us for the foreseeable future, so we must address the bar performance problem.

9. Faculty admitted to practice law before the mid-1970s "missed" the modern multi-state type exams described in Section III. Further, even more youthful faculty undoubtedly did not experience the difficulties that many of our students do with the exam. Hence, much of the information presented might prove enlightening to faculty in general.

the bar review to be intellectually challenging or did not feel they “needed” the bar exam. This attitude represents that of many faculty members. The author’s current attitude is radically different; that is, bar examiners do effective and critical jobs of protecting the public from graduates who have not mastered the basics necessary to practice law. The purpose of this essay is to convince academic professionals of the value and importance of the exam and give ideas that will help students pass the exam the first time.

Like many law faculty who are not administrators or involved in academic support programs, the writer had not given much thought to the bar and the success rate until recently. This essay calls law schools and their faculty to action to recognize and address the problem.<sup>10</sup> It is modest in scope because it does not attempt to radically reform legal education.<sup>11</sup> The suggestions proffered will work at most, if not all, law schools that need to address a bar exam failure problem. In no way will these ideas and strategies turn a particular law school into a “bar school,” though why academics should disparage some schools as “bar schools” when they have high bar pass rates is hard to fathom. Without admission to the bar, law school graduates cannot enter the profession they have chosen to practice. High quality legal education and a good bar pass rate are attainable goals throughout the law school universe regardless of the so-called standing (and raw credentials) of the law school *if the entire enterprise takes legal education and the bar examination seriously*.<sup>12</sup>

Modest though these suggestions be, this essay has the grand objective of raising the bar pass rate and preparing law students to be better members of the learned profession. The balance of this section outlines the problem in greater detail.

### A. *The Gravity of the Problem*

We are judged by our works.<sup>13</sup> Legal education has a serious bar pass rate problem. Law students and law school reputations are paying a dear price for the decline in bar pass rate. In 1994, the bar examination pass rate

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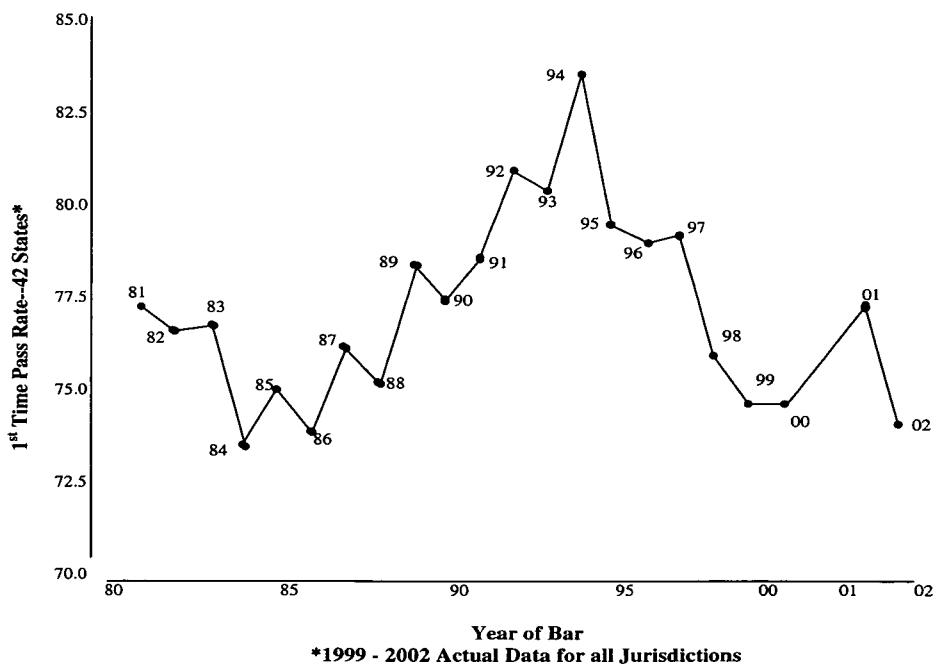
10. The American Association of Law Schools (AALS) has recently surveyed schools to determine what programs exist to solve the problem. Committee on Bar Admissions and Lawyer Performance & Richard A. White, AALS Research Associate, *AALS Survey of Law Schools on Programs and Courses Designed to Enhance Bar Examination Performance*, 52 J. LEGAL EDUC. 453 (2002).

11. For an article proposing fairly radical reform of law schools that merits thoughtful review and consideration, see Alan Watson, *Legal Education Reform: Modest Suggestions*, 51 J. LEGAL EDUC. 91 (2001). Professor Watson’s suggestions include abolishing casebooks and dramatically changing first year curricula. *Id.* at 93-94. If Professor Watson’s innovations were adopted, legal education would likely be improved with the concomitant improvement in bar examination performance and improved practice and professionalism upon admission.

12. The author is calling for renewed effort from all quarters: faculty, students, and law school administration. Without all rowing together, many of these strategies and tactics will founder.

for first-time takers was at an all-time high of more than 82.5%. It has declined to below 75% in 2000 and will likely continue to erode.<sup>14</sup> This alarming decline is demonstrated by the data presented in Chart 1.<sup>15</sup>

**First Time Bar Pass Rates of 42 States  
1981-2002**



14. When this essay was being written, the 2003 results were not yet available. Some preliminary results suggest that increased emphasis on the importance of the bar and support for ideas like those contained in this article may be working. For bar exam rates in New York for the past several years, see *When Will the July 2002 Results Be Released?*, at <http://www.nylawyer.com/exam/nextresults.htm> (last visited Feb. 29, 2004). For recent Texas pass rates, see Jeanne Graham, *Overall Pass Rate Declines Slightly for Bar Exam*, TEX. LAW., Nov. 17, 2003 at 9 (noting a 76% pass rate for all test-takers in July 2003 and outlining strategies of Texas law schools). Notwithstanding delightful progress and good students, the decline in credentials of students attending law schools mandates that law schools should employ all reasonable measures to help their students pass the bar.

15. Chart 1 is based upon a chart and data prepared by Associate Professor Richard E. Litvin, Quinnipiac College of Law. Professor Litvin used the Eureka statistical package to calculate his results. (Power Point slides on file with author). The author modified the Chart, taking into account the actual pass rate for first-time takers in 2000-2002 in all jurisdictions. *First-Time Exam Takers and Repeaters in 2000*, B. EXAMINER, May 2001, at 8. Subsequent statistics are available from the National Conference of Bar Examiners web site, <http://www.ncbex.org/stats.htm> (last visited Mar. 16, 2004).

Each drop of one percent in first time bar pass rates represents about 400 law school graduates who failed the bar.<sup>16</sup> A ten percent decline represents the failure of about 4,000 students. If an awful trend like this persists, more than 10,000 law students will fail the bar each year unless law schools, law faculty, and law students adjust their way of doing business. Failure on the bar can have harsh and catastrophic results for law graduates. They may lose their jobs, be unable to find employment, and be saddled with debt from law school and undergraduate education that they cannot repay. Further, bar examination failure falls disproportionately on minority and non-traditional students—undermining the attempts of law schools to create a vibrant and just society.<sup>17</sup> Chart 2 shows the dramatic increase in minority law students, up from nine percent in 1984 to nineteen percent in 1999.<sup>18</sup> This is clearly good news. What is not so good news is that the normalizing passing score on the Multistate Bar Examination has increased from 125 in 1984 to 135 in 1999.<sup>19</sup> The effect of increasing the scaled score from 125 to 135 may result in qualified minority applicants being turned away. This is obviously a bad result.<sup>20</sup>

### B. The Link Between LSAT Scores and Bar Results

Bar pass rates have declined dramatically since 1994. The decline can be correlated to the LSAT scores three to four years previous to the bar exam. Chart 3 demonstrates the mean LSAT scores for first year students at ABA schools. The scores peaked in 1991 at 158.5 (representing about the 75<sup>th</sup> percentile).<sup>21</sup>

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16. Law schools graduate annually approximately 40,000 students. They conferred 38,150 J.D./LL.B. degrees in 2000. OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS app. at 804 (2002 ed.). Hence, one percent of 40,000 is 400.

17. Since the 1980s, there has been a dramatic increase in law degrees awarded to minority students. Deborah Jones Merritt, Ohio State University College of Law, What Does Social Science Tell Us About the Bar Exam?, Address at the Academic Assistance and the Bar Examination Conference, Midwest Region Academic Support Workshop (June 8, 2001). See also Deborah Jones Merritt, et al., *Raising the Bar: A Social Sciences Critique of Recent Increases to Passing Scores on the Bar Exam*, 61 U. CIN. L. REV. 929 (2001).

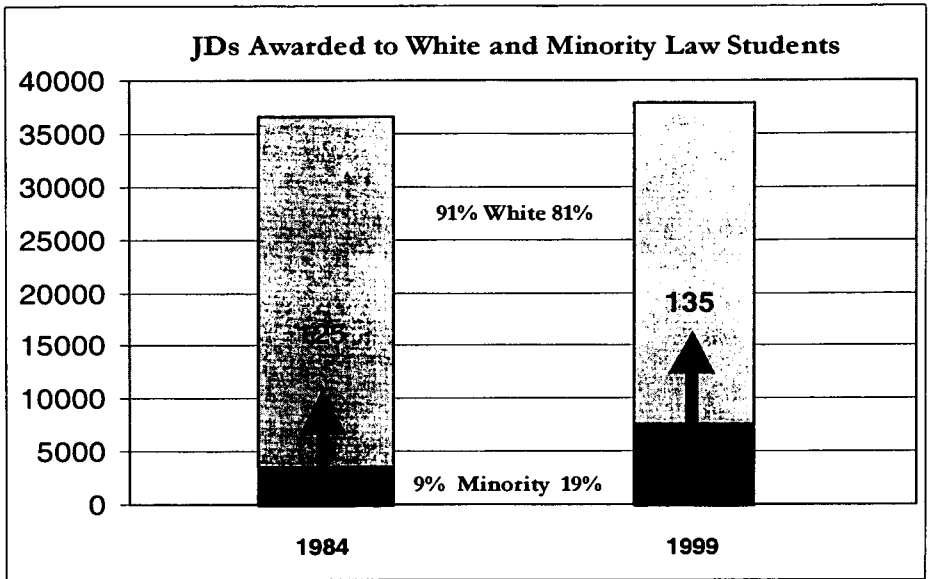
18. Chart prepared by Prof. Deborah Jones Merritt, Ohio State University College of Law, as part of Presentation, *supra* note 17.

19. Presentation of Prof. Merritt, *supra* note 17. Bar examination scores are not subject to grade inflation, but are equated year to year. Thus, a passing score of 125 in 1984 equates to a 125 score in 1999 or 2004. *Id.* Essay scores are also scaled to match Multistate Bar examination scores. *Id.* Raising the passing score does not compensate for grade inflation and undoubtedly makes it more difficult for minority test takers to achieve the “passing” scaled score.

20. As increasing the number of minority lawyers is an important goal, it seems appropriate to lobby against an increase of the passing scaled score, unless it can be tied to competence. In the meantime, it makes sense to lobby for change as well as prepare students to meet the heightened standard.

21. Charts 1, 3 and 5 and data prepared by Associate Professor Richard D. Litvin, Quincy College of Law and used with his permission. Power Point slides on file with author.<sup>6</sup>

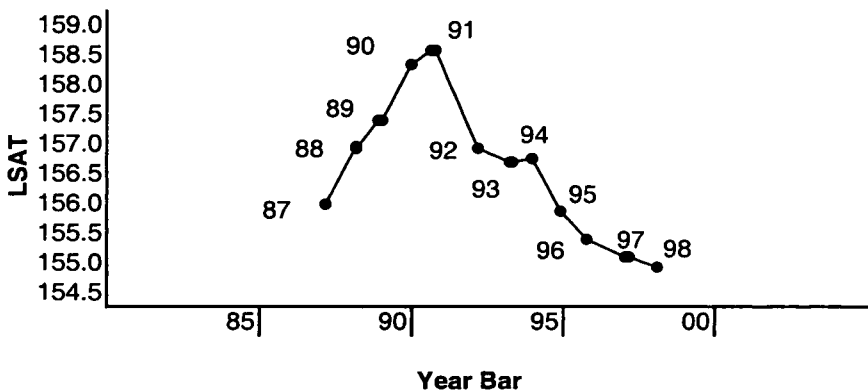
Chart 2



Increase of Passing Scaled Score from 1984 to 1999

Chart 3

LSAT 1987 TO 1998 MEAN FOR ALL 1st Year Students At ABA Accredited Schools





The drop is very significant, but this point may be lost on many faculty who sense that their students are still "pretty good" without understanding the importance of the scaled LSAT score or the percentile into which their students fit. LSAT scores probably mean very little to most law school faculty. Here is what faculty should know to make sense of this decline.<sup>22</sup> The peak mean in 1991 of 158.5 (75<sup>th</sup> percentile) meant that one-half of the students who enrolled in law school scored above the 75<sup>th</sup> percentile of all test takers. The 155 mean of today indicates the top half of law students has declined to the 64<sup>th</sup> percentile. Thus, average students in schools are considerably weaker than students were earlier in the last decade. One hundred and five schools had mean LSATs of 155 or less (ranging from 140-155).<sup>23</sup> Students with an LSAT of 155 have a predictive pass rate of about 72.5%.<sup>24</sup> Certainly those students who fall below the mean are considerably weaker than their 1991 cohorts.<sup>25</sup>

This decline is substantial and must be taken seriously because it poses a threat to diversity in the profession and in law schools. There is an ex-

22. The chart set forth below gives the percentile for LSAT scores.

Chart 4

LSAT Score	Percent Below	LSAT Score	Percent Below
180	99.9	160	81.8
179	99.9	159	78.3
178	99.9	158	74.5
177	99.8	157	70.9
176	99.7	156	67.9
175	99.6	155	64.2
174	99.5	154	59.5
173	99.2	153	55.6
172	98.9	152	51.9
171	98.6	151	47.0
170	97.9	150	44.1
169	97.3	149	39.4
168	96.6	148	36.0
167	95.5	147	32.2
166	94.3	146	29.0
165	92.4	145	25.7
164	91.4	144	22.8
163	89.0	143	20.1
162	86.7	142	17.5
161	83.6	141	15.4

**LSAT SCORES AND PERCENTILES**

PRINCETON REVIEW, COMPLETE BOOK OF LAW SCHOOLS 27 (2001 ed.).

23. The author tabulated mean LSAT scores for all ABA-accredited law schools using data from the 2001 edition of the Princeton Review. *See id.* at 341.

24. *See infra* Chart 5.

tremely high correlation between LSAT score and bar exam result—0.91 to 0.94!<sup>26</sup> A perfect correlation is 1.0.<sup>27</sup> To illustrate how powerful this information is, consider the predictive value of the LSAT and GPA on class rank (and bar performance) at Typical Law School. The greatest risk of failure on the bar exam is for those students in the lower half, particularly, the bottom quartile. Now, if law schools can just select and enroll candidates having GPAs and LSATs that predict they will land in the first quarter, they would be in Nirvana or, at least, Lake Wobegon! Alas, we live in reality, so presume that the Law School Admissions Council (LSAC) has advised Typical's Admissions Office that the predictive value of its GPA and LSAT data for its students is 0.40 for each factor. Taken alone, the value for each factor is quite respectable. Yet, the predictive value is actually 0.16.<sup>28</sup> This is good and valuable information, to be sure,<sup>29</sup> but it is not a great predictor for law school or bar exam success.

The relationship between LSAT scores and bar exam success is an entirely different matter. *And this is critical: the correlation is almost perfect.* If you do not have confidence in this assertion, you can "eyeball" the relationship. Scan the *U.S. News & World Report* LSAT and bar pass rate data for American law schools.<sup>30</sup> The reader can confirm the strong relationship between the LSAT factor and bar results. Thus, as LSAT scores and credentials decline at many schools, more and more law school students are at substantial risk of failing the bar examination the first time they take it. Chart 5 demonstrates this relationship.<sup>31</sup>

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26. See *infra* Chart 5.

27. "Calculating the Pearson correlation coefficient always gives a value between -1 and +1, inclusively. The closer the correlation coefficient is to one of these extremes, the more consistent is the relationship between the variables involved. A correlation coefficient equal to -1 or +1 reflects *perfect* consistency in the changes of values of the two variables. If the value of variable always shows the same *proportionate* increase when the other increases we say that there is a *perfect positive relationship*. . . . If there is no consistency in the relationship between the variables there is no mathematical association between them and the correlation is, appropriately, zero." DAVID W. BARNES & JOHN M. CONLEY, *STATISTICAL EVIDENCE IN LITIGATION: METHODOLOGY, PROCEDURE & PRACTICE* 338 (1986).

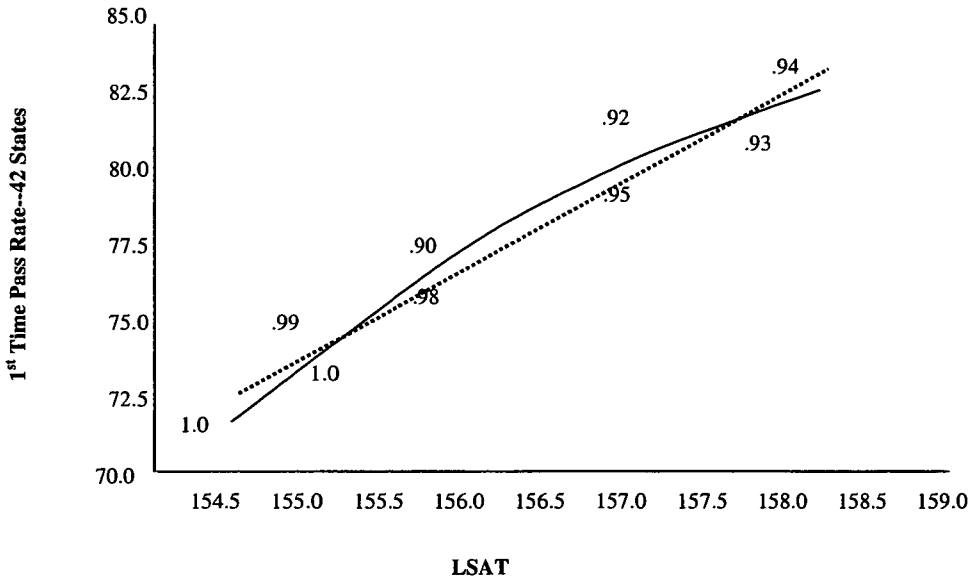
28. This correlation value is obtained by multiplying the GPA factor (0.40) by the LSAT factor (0.40).

29. Any correlation above 0.05 is considered significant. BARNES & CONLEY, *supra* note 27, at 338. Thus, as the correlation approaches 1.0, the confidence in the correlation rises.

30. *Best Graduate Schools 2004*, U.S. NEWS & WORLD REP., Apr. 14, 2003, at 58.

31. Data prepared by Associate Professor Richard Litvin, Quinnipiac College of Law and used with permission (data and slides on file with author). For the pattern of decline in first time bar pass rates in forty-two states, see *supra* Chart 1.

**Chart 5**  
**The Strength of Relationship?**  
 $R^2 = .91$  for straight regression and  $.94$  for curvilinear.



Predictability is not destiny. If law schools and students take the bar examination seriously and use the suggested tactics and strategies, the LSAT prediction of bar exam success can be defeated. Three to four years intervene between the LSAT and bar exams—tigers can change their stripes if they realize that they must now approach learning more aggressively than before. Students must regularly attend class and actively participate, answer the exam questions asked with cogent analysis, opt out of "Pass/Fail" courses, take the "bar courses," and prepare for the bar exam as if it were a full time job. Even students with solid credentials, those whose LSAT scores are 157 and above, can profit from the suggestions in this article. Many of the suggestions and tactics will lead to a better mastery of the law and better bar performance, resulting in individual accomplishment and strengthened school reputation.

Law school bar pass problems are systemic. They are also rectifiable. If law schools have the will to recognize the problem and overcome it, students will be prepared to pass the bar and to practice. Law schools will have fulfilled their moral obligations to their students and society. If schools do not address this most important concern, they will have failed their students and harmed their reputation as law teachers.

### C. Article Overview

Section II addresses the need for the bar examination. Section III describes the modern bar exam. Section IV looks at the bar pass rate problem in terms of law school economics and concludes cutting enrollments, either by failing out more students or reducing admissions, is not a viable approach for many schools; most schools will be left to rectify the problem with the quality of students they currently enroll. Section V provides a number of tactics, suggestions and strategies that can be employed to raise the pass rate. The essay concludes that these approaches are well within the ken of law schools and will improve bar performance.

## II. WHY THE BAR EXAMINATION IS NEEDED

Many law faculty, students and practitioners question the relevance of the bar exam.<sup>32</sup> The bar exam seems to have little to do with legal reasoning or the academic, intellectual side of law studied in school. It requires "specific answers to specific questions in a format completely different from the typical law school exam."<sup>33</sup> No one the author has ever met admitted that the

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32. Indeed, there is much hostility towards the bar exam. Paul Reidinger, *Bar Exam Blues*, 73 A.B.A. J. 34 (1987). A three-to-one margin believes exams do not measure the ability to practice law. *Id.* Yet, eighty-eight percent of lawyers think bar exams should continue. *Id.* Thirty-four percent of young lawyers believe the tests measure competence. Half the lawyers older than fifty-five believe competence is measured by the exam. *Id.*

33. Margaret Graham Tebo, *Getting to Know the Bar Exam*, STUDENT LAW., Feb. 2000, 1

study and preparation for the exam, the exam itself, or the anxiety thereafter was a pleasurable activity. Yet, the legal field needs the bar exam to ensure a minimal level of competence.<sup>34</sup>

The American Bar Association and the National Conference of Bar Examiners put it thus:

*Purpose of Examination.* The bar examination should test the ability of an applicant to identify legal issues in a statement of facts, such as may be encountered in the practice of law, to engage in a reasoned analysis of the issues and to arrive at a logical solution by the application of fundamental legal principles, in a manner which demonstrates a thorough understanding of these principles. The examination should not be designed primarily to test information, memory or experience. Its purpose is to protect the public, not to limit the number of lawyers admitted to practice.<sup>35</sup>

In essence, the bar examination attempts to ensure minimum competence—the ability to practice law unsupervised.<sup>36</sup>

#### *A. Law Schools Do Not Cull Out Poor Performers*

Are not all graduates of accredited law schools *prima facie* able to meet that professional standard and thus obviate the need for the exam? Unfortunately, no. Law school educators have not been guardians of the public interest. Indeed, most do not see their charge as that—they leave it up to the bar examiners. Law school faculty know that it is almost impossible to flunk out of most law schools. To be fair, there is some “weeding out.” Some students drop out in the first semester or after the first exams. Some students do manage to fall below the minimum after the first year and are either placed on probation, forced to repeat courses or are dropped from law school. But the attrition rate is negligible for most schools.<sup>37</sup> Modern legal education is

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at 24.

34. Virtually all American jurisdictions rely upon a written examination. Wisconsin has diploma privilege for its two law schools, the University of Wisconsin Law School and Marquette University Law School. The diploma privilege allows admission to practice law upon graduation from law school, without taking a bar examination. WISC. SCR 40.03 (2002).

35. NAT'L CONFERENCE OF BAR EXAM'RS & AM. BAR ASS'N SECTION OF LEGAL EDUC. & ADMISSION TO THE BAR, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 2002, at ix (Erica Moeser & Margaret Fuller Corneille eds., 2002) [hereinafter ADMISSION REQUIREMENTS 2002].

36. Diane F. Bosse, Esq., Chair, New York Board of Law Examiners, Remarks at the Academic Assistance and the Bar Examination Conference, Midwest Region Academic Support Workshop (June 8, 2001).

37. Those at the conference attended by the author estimated attrition to be in the one to three percent range. Another source computed the average attrition rate for all ABA-approved law schools to be four percent academic and nine percent other. Deloggio Achievement Program, at <http://www.deloggio.com/homepage/faq/choosing/attritn.html> (last visited Jan. 30, 2004). That average was obtained using attrition rates for individual ABA-approved law schools for three years. Attrition rates for individual ABA-approved law schools can be found

really an open admissions program that is ranked and sorted by credentials and quality of applicants. Virtually everyone who seriously wants to go to law school can and will be admitted at some school. Once there, it is pretty difficult to fail.

### *B. The Grade Inflation Part of the Puzzle*

How is it that almost all American law students graduate from law school, yet about a quarter of them fail the bar the first time out? Grade inflation and faculty unwillingness to make hard decisions regarding students undoubtedly contribute to the result. Grade inflation appears to have started as a consequence of the Vietnam War.<sup>38</sup> Since that conflict, undergraduate and graduate/professional school grades have increased dramatically. The College Board reported that the percentage of students with the grade of A increased from 28% to 32% between 1987 and 1994.<sup>39</sup> Yet SAT scores fell between six and fifteen points.<sup>40</sup> Reading achievement has declined notably for both elementary school children and high school students.<sup>41</sup> In 1941, the modern form of the SAT was used with an average score of 500.<sup>42</sup> In five decades, the scores had dropped to 424 in verbal and 478 in math.<sup>43</sup> This is an astonishing decline of almost 100 points, which gave rise to the "recentering" of scores beginning in April 1995.<sup>44</sup> The recentering confirms that the raw ability or demonstrated accomplishment of the pool has declined significantly since 1941.<sup>45</sup> Yet, grades have risen significantly at undergraduate in-

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ABA APPROVED LAW SCHOOLS (2003). Certainly this present attrition rate is quite different from the rate thirty or forty years ago. The author was warned in the 1960s at both his undergraduate institution and law school: "Look to the left of you, look to the right of you. One of you will be missing at the end of the year unless you buckle down and study. Higher education is a very competitive enterprise." While these warnings may have been apocryphal, a number of the author's classmates did flunk out of Cornell and a number left N.Y.U. before graduation.

38. It is believed that professors began lowering their standards to avoid failing male students who would be eligible for the draft without their educational deferment. See Alice Dembner, *Colleges Tighten Honors Standards over Grade Inflation*, HOUS. CHRON., Feb. 16, 1997, at A1.

39. CHARLES J. SYKES, *DUMBING DOWN OUR KIDS: WHY AMERICA'S CHILDREN FEEL GOOD ABOUT THEMSELVES BUT CAN'T READ, WRITE OR ADD* 30 (1995).

40. *Id.* at 30-31.

41. *Id.* at 129 (outlining the simplification of reading textbooks).

42. *Id.* at 148.

43. *Id.*

44. DAVID OWEN & MARILYN DOERR, *NONE OF THE ABOVE: THE TRUTH BEHIND THE SATS, REVISED & UPDATED* 67 (1999); see also *After Changes in Test Format, S.A.T. Scores Show an Increase*, N.Y. TIMES, Aug. 23, 1995, at A18.

45. The pool is much more heterogeneous than it once was. Minorities and economically disadvantaged students who are now college-bound represent a different pool than the relatively homogeneous pool of middle class white males that constituted the first SAT takers. See OWEN & DOERR, *supra* note 44, at 67. Our students may not be less bright than their predecessors, but their academic achievements as marked by standardized tests clearly seem to have declined.

stitutions and in law schools.

Law school grade inflation is another component of the problem. Again, part of this may be attributable to societal influences that pushed for grade inflation during the Vietnam War.<sup>46</sup> However, law school grade inflation likely has a number of roots: the “pass/fail” option, the lack of many required courses beyond the first year, open book exams and take-home exams to name a few.

Inflated grades do not give an accurate measurement of achievement.<sup>47</sup> Consider for example, Representative Law School that enacted its grading standards in the 1970s. This school established a “traditional” grading scale: 4.0 is an A, 2.0 is a C, 1.0 is a D. Students need a 2.0 or better to graduate.<sup>48</sup> The transcripts explain that the grade of A represents work of the highest quality; B, very good work; C, good or average work; D, passing, but unacceptable for graduation. Before grade inflation, grades probably centered in the C-to-B range. Students with grades near a C had fair warning that they were in trouble. As grades have risen, the warning has disappeared. Representative Law School’s grades have centered near a B and few grades are now given in the C and D range; marginal students will not have received a fair warning. They will believe on the basis of their law school grades that they have done above average/very good work and are not in danger of failing the bar. Further, the study habits, work ethic, and quality of mind that enabled them to “earn” inflated grades may not be sufficient for the marathon that is the bar exam. In essence, these students have been ill-prepared for the bar exam and subsequent practice. These students simply may not have been tested enough. They may not have developed sufficient writing skills nor demonstrated the minimal analytical and time management skills that are tested on the bar. They may not have been exposed to exams similar to the bar exams nor held to the standards of the examiners.

Bar examiners stand between the law schools and the public. Examiners attempt to protect the unwitting public from incompetent lawyers. They attempt to assess law school graduates with objectivity that is difficult to achieve in law school grading.<sup>49</sup> The bar examiners do not know the law school students; they have no reason to like (or dislike) the students.<sup>50</sup> There

46. Indeed, many of today’s professors were students at that time or benefited by the relaxed grades that followed.

47. Richard Kamber & Mary Briggs, *Grade Conflation: A Question of Credibility*, CHRON. HIGHER EDUC., Apr. 12, 2002, at B14. Professors Kamber and Briggs offer a devastating indictment of the harm that grade inflation inflicts.

48. The standards could be numerical on a 100-point scale or some other standard. The bottom line is that the equivalent of a C average or better is needed to graduate.

49. The objectivity comes from the objective exams (the MBE and MPRE), scaling the scores so that the results are uniform *inter se* and from year to year, multiple gradings and uniform grading standards. Most of this objectivity is not present in law school grading.

50. The author considers himself a pretty hard grader and has a reputation as such. Yet, for example, he undoubtedly factors in his assessment that his most recent Business Associations class was a “good class” when he grades. That bias may boost the author’s marginal students. The law examiners who do not know the author’s students from those who took Busi-

is no institutional bias in favor of them. The bar examiners' only duty is to protect the public.

### III. THE STRUCTURE AND PURPOSE OF THE BAR EXAMINATION

The purpose of the bar exam is to screen out applicants who are not fit to practice law.<sup>51</sup> It is a high stakes test that is cumulative; it tests applicants on a number of subjects that they may encounter in practice. The exam is considerably different from the type of exams that law students have been exposed to in either law school or in their undergraduate training.<sup>52</sup> It is fair to say that unless they are also medical doctors who have taken their National Boards or licensed professionals such as accountants, engineers or pharmacists, nothing they have encountered previously is similar to the bar exam. This section provides a brief overview of the contemporary bar exam to acquaint law teachers and administrators with today's format of the exam and the things tested.

The exam has changed considerably from the traditional two-day essay exam on state law and some federal subjects that was the norm before the 1970s. The essay portion has always been a major part of the exam because it assesses analytical ability, ability to understand and to marshal facts, logic and the application of principles of law.<sup>53</sup> With the huge increase in applicants in the 1970s, states needed a more efficient method of assessing applicants and they turned to the multiple-choice test to supplement the essay.<sup>54</sup> The Multistate Bar Examination (MBE) was introduced in 1972<sup>55</sup> and is now used in all United States jurisdictions (including the District of Columbia and our territories) except for Washington State, Louisiana and Puerto Rico.<sup>56</sup> Since the 1970s, the National Conference of Bar Examiners (NCBE) has developed a number of standardized tests: the Multistate Essay Examination (MEE); the Multistate Performance Test (MPT); and the Multistate Pro-

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ness Associations at other schools have no such compunctions. They appropriately check all personal biases and act to protect the public.

51. "Tests used in credentialing are designed to determine whether the essential knowledge and skills of a specific domain have been mastered by the candidate. The focus of performance standards is on levels of knowledge and performance necessary for safe and appropriate practice." AM. EDUC. RESEARCH ASS'N, ET AL., STANDARDS FOR EDUCATIONAL & PSYCHOLOGICAL TESTING 156 (3d ed. 1999).

52. Law school exams are generally cumulative. They are often given only at the end of the semester, so in some measure, the three to five hour exam approximates loosely the high-stakes nature of the bar exam. A major difference is that law school exams test on one subject while the bar exam tests on a number of subjects. In the essay questions or in the Multistate Performance Test, quite a few subjects (and in the MPT, skills) are integrated in the exam.

53. Marcia Kuechenmeister, *Admission to the Bar: We've Come a Long Way Baby*, B. EXAMINER, Feb. 1999, at 25. This is an excellent article giving a very good look at what the various bar exams strive to assess.

54. *Id.*

55. *Id.* at 26.



fessional Responsibility Examination (MPRE).<sup>57</sup> States typically supplement their traditional essay exams with some combination of these national exams.

While it is true professional competence would be assessed best if bar examiners could objectively observe applicants performing a number of tasks, authentic assessment is not feasible.<sup>58</sup> The combination of the essays and the multistate examinations has proven to be a reliable yet manageable method of determining minimal competence.<sup>59</sup>

### A. *The Multistate Bar Examination (MBE)*

In the late 1960s, bar examiners became concerned about the ability to fairly grade the ever-increasing number of applicants if they continued to rely exclusively on the traditional essay exam.<sup>60</sup> Additional resources were required for the significant increase in grading, time lags in evaluation were developing, and there was concern about the possible discrepancy in evaluations by graders.<sup>61</sup> States were surveyed and the NCBE decided to test in core subjects that were required in all jurisdictions—Contracts, Evidence, Criminal Law, Real Property and Torts.<sup>62</sup> In 1973, Constitutional Law was added.<sup>63</sup> The content and validity of the MBE was evaluated twice, in 1980 and 1992, by a panel of law professors and lawyers.<sup>64</sup> These independent panels determined the MBE was covering topics material to the practice of law and requiring the requisite degree of knowledge and reasoning.<sup>65</sup> Throughout the 1990s, other panels have evaluated the exam and tweaked the structure.<sup>66</sup> The present MBE is a 200 multiple-choice exam that has nearly equal distribution among its six content areas. Thirty-three questions each are allotted for Constitutional Law, Criminal Law, Evidence and Real Property.<sup>67</sup> Thirty-four questions are used for each of Contracts and Torts.<sup>68</sup> The MBE tests for knowledge, factual analysis, legal analysis and legal reasoning.<sup>69</sup>

One of the criticisms of the MBE is that the multiple-choice nature of the exam forces applicants to speed through the exam and answer questions

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57. See Tebo, *supra* note 33, at 26 (describing the exams).

58. Kuechenmeister, *supra* note 53, at 26.

59. The grading, scaling and correlation of the results is discussed in this section, *infra*.

60. Kuechenmeister, *supra* note 53, at 28.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

quickly, without reflection.<sup>70</sup> This type of exam seems to be subject to "guesswork." The rapid-fire questioning is not typical of practice—except for the occasional "ambush" phone call or e-mail requiring an immediate response. Yet, as will be seen in the section discussing the validity of the assessment, there is a high correlation between MBE results and other tests.

One of the advantages of the MBE is that its multiple-issue testing provides a better read on the applicant's knowledge than the typical essay, standing alone. For example, there are over thirty contract questions. An applicant can miss some of them and still pass the exam. Contrast this approach with the typical essay exam. If the essay question concerns questions of mistake, competency and consideration and the applicant has not mastered these topics, the applicant will fail that essay. The multiple testings and observations thus offer a fairer and more accurate evaluation.

### *B. The Multistate Essay Examination (MEE)*

The MEE was introduced in 1988 to standardize the testing through vetted essay questions.<sup>71</sup> The current MEE is a three-hour, six question exam that tests on some of the following subject areas: Business Organizations; Commercial Transactions; Family; Wills, Trusts & Estates; Conflicts of Law; and Federal Civil Procedure.<sup>72</sup> In addition to testing knowledge of subjects not tested on the MBE, the MEE tests factual analysis, legal analysis and reasoning and communication skills.<sup>73</sup>

### *C. The Multistate Performance Test (MPT)*

The MPT was introduced in 1997 to test fundamental lawyering skills.<sup>74</sup> Applicants are given a case file and a specific assignment from a "supervising attorney."<sup>75</sup> The case file includes source documents such as interview transcripts, contracts, correspondence and reports.<sup>76</sup> The test also contains reference materials—statutes, cases, regulations, and rules.<sup>77</sup> Some material included may be extraneous.<sup>78</sup> Applicants are expected to discern what is important and solve the problem. The MPT requires sorting relevant information, analyzing authorities, applying the appropriate case law, identifying

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70. Applicants have less than two minutes to answer each question. It would seem that it would be difficult for many to finish. The NCBE surveys show that the average test taker finishes without difficulty (conference notes on file with author).

71. Kuechenmeister, *supra* note 53, at 29.

72. *Id.*

73. *Id.* at 30.

74. *Id.* at 31.

75. *Id.*

76. *Id.*

77. *Id.*

and resolving any ethical issues, communicating effectively and completing the task in a lawyerlike manner.<sup>79</sup> Virtually everything taught in law school is encapsulated in the MPT. Law schools teach legal analysis and writing, core substantive law (“Black Letter” law), legal research, objective thinking, advocacy, and problem solving. The MPT tries to evaluate those skills and knowledge with authentic assessments requiring applicants to demonstrate the mastery of professional skills, ethics, and knowledge.

#### *D. Reliability and Consistency*

Studies of the MBE have shown a high degree of reliability or consistency of measurement. The MBE’s reliability is 0.87 to 0.90.<sup>80</sup> Most essay tests have a lower reliability—0.40s to mid 0.50s.<sup>81</sup> MBE scores are comparable across many administrations. Thus, the scaled score from 1978 and the scaled score from 2001 are the same.<sup>82</sup> This is important if the qualities tested for in the late 1970s are the ones held out for today. Scaling, in effect, treats all applicants equally by establishing a standard and maintaining it over time. It is a fair adjustment that resolves inequities attributed to tests of somewhat different difficulty and holds all candidates to the same standard. Thus, the public may be certain the lawyer who passed the bar in 2001 is just as good as the lawyers a generation ago.

The preparation of the various questions is thorough and exhaustive. Most questions and problems go through several years of evaluation and pre-testing.<sup>83</sup> The confidence level for these evaluations must be considerably higher than for the average law school exam.<sup>84</sup> Over time, the question bank of strong, good questions grow and the weaker, poorer questions are eliminated.

79. *Id.*

80. Mary Sandifer, NCBE Deputy Director of Testing, Statistics and Bar Examinations, Address at the Midwest Region Academic Support Workshop (June 8, 2001).

81. *Id.* The scaling of essay scores to the MBE will correct for difficulty of essay questions and leniency of graders. *Id.* For example, assume that the 2000 MBE was a “harder” exam and its scaled scores were lower. The state examiners should scale the raw scores earned on the essay portion to raise the scores of that group of applicants.

82. With standardized tests like the LSAT and the MBE, the applicant has two scores: the raw score and the scaled score. Here is how that works: Assume Herb Graduate had a raw score of 130 on a test he took in 1999. The 1999 test was a hard test when it was scaled. Mr. Graduate’s scaled score is 150 (sufficient to pass). Amy Lawyer took the 2000 exam. Her test was determined to be easier after it was scaled. Her raw score was 160. The scaled score was 151. She, too, passed.

83. This is true of all the tests offered by the NCBE.

84. The author is not being critical of faculty exam drafters. Yet, faculty do not have a need to be as thorough in the construction of exams. For example, if a professor makes an “error” in construction that causes students to miss the point or rightly answer an unintended question, that professor can correct for this by changing the key, adjusting the curve or by not holding students responsible for the answer for which they initially thought the professor was testing. The state bar examiners and the NCBE have no such luxury. Their tests perform

In conclusion, the modern bar exam provides a fair assessment of candidates' skills and knowledge. The MBE is a thorough sampling of core content. The 200 questions obtain much information about a candidate's ability to analyze the law and reason. Stability and consistency built into the exam permit accurate results. The MEE assays additional areas of law and provides a sample of the applicant's writing ability. The MPT simulates actual practice and gives the applicant a chance to demonstrate mastery of professional skills. Last, but not least, the scores of the exams are combined in almost all of the jurisdictions.<sup>85</sup> The combination of scores from the various components of the examination makes it possible for someone who does poorly on one type of test (like the MBE) or in some of the subject areas to pass the exam.<sup>86</sup>

#### IV. A WORD ON LAW SCHOOL ECONOMICS<sup>87</sup>

One solution to the bar pass problem is to limit enrollment to those with high LSAT scores. There is an extremely high correlation between LSAT scores and bar performance.<sup>88</sup> Indeed, the correlation is 0.94, almost perfect.<sup>89</sup> In essence, the higher the LSAT score, the better the graduate will perform on the bar exam. This is no news flash. The "best" law schools often have the highest LSAT scores from students who excelled at competitive undergraduate schools. Thus, if law schools with a "bar pass problem" can manage to capture and retain some of those more highly credentialed students, the bar pass problem can be rectified or ameliorated. However, the economics of law schools ultimately will determine that most law schools cannot afford to adopt two sure approaches that would raise bar pass rates: admit fewer students or flunk out poor performing students.

Assuming that a school could afford to limit enrollment, even this option is not foolproof. The law school can strive to become more selective and admit fewer applicants. It can seek to recruit students with higher LSAT scores and more selective undergraduate backgrounds. The law school can

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85. See "Chart VII: Grading and Scoring," *ADMISSION REQUIREMENTS 2002*, *supra* note 35, at 22.

86. For example, assume Jack Russell does poorly on multiple-choice tests, but he has excellent practical skills and is a solid writer. His scores on the essay questions and the MPT will undoubtedly allow him to pass. Sally Ambition's inability to master contracts will not doom her chances of passing, if she writes well and has mastered many of the subject areas. Even a MPT question emphasizing contracts probably will not doom her if she handles the non-contract portions of the MPT exercise effectively and is fundamentally sound in most of the other areas tested.

87. Some of the ideas in this section were informed by Associate Dean Frederic White, Cleveland-Marshall College of Law at Cleveland State University, Address at the Academic Assistance & the Bar Examination Conference, Midwest Region Support Workshop (June 9, 2001).

88. See *supra* Section I and Chart 5.

89. 1.0 is a perfect correlation, so 0.94 is very reliable. See BARNES & CONLEY, *supra* note 27, at 338.

recruit more aggressively and it can offer more scholarship money. If it succeeds in this strategy, it will have more students with higher LSATs and it will be perceived as more selective.<sup>90</sup> However, there is no guarantee that concerted efforts to shrink enrollment and increase selectivity will achieve the goal. Law school applicant pools have their own bell curves. Thus, for a while, the mean and median statistics of student body will not change rapidly as many of the “replacements” will come from the same pool.

An aggressive admissions policy that targets higher-credentialed students who would normally go to Halcyon Law School (those with 165 LSATs or higher) will not entice candidates to apply to or enroll in Pretty Good Law School (mean LSAT 153 before the Big Push). Applicants and students offered admission do read *The Princeton Review* and *U.S. News & World Report*.<sup>91</sup> They are concerned about the credentials of their peers, school reputation, bar pass rate, and placement success. Even considerable financial aid might not prove sufficient to lure more highly credentialed students if the school’s bar exam pass rate is low. Eventually, if the bar pass rate rises, the school should then become more selective. Higher selectivity then improves reputation, subsequent bar pass rate, and placement. Unfortunately, this process takes time, so many schools have to craft success from their current students and resources, or suffer the downward spiral of poor bar exam results and falling reputation.

This strategy of improving bar pass rate first has profound financial implications for the law school. Assume that Good Private Law School seeks to cut its enrollment from 600 students to 540 because it believes being more selective will attract “better” students who will succeed on the bar. To meet its objective, it will have to address the immediate financial realities of such a strategy.

Assume that the tuition at this school is \$20,000 per year. In the first year of the plan, the drop from 200 students in the first year class to 180 will cost the school \$400,000 in revenues.<sup>92</sup> This \$400,000 evaporation may undercut scholarship funds if the school typically earmarks some scholarship monies from tuition.<sup>93</sup> It also affects the subvention that must be given to the university, unless the school is independent. The loss of income can also affect faculty size. Four hundred thousand dollars per year could represent three full professors’ salaries and benefits, plus some adjunct positions. If the selectivity plan is fully implemented, its costs could be considerably more than \$1.2 million per year in revenue lost from the decreased enrollment.<sup>94</sup> The income deficit would likely be compensated by reducing faculty

90. Presentation of Associate Dean White, *supra* note 87.

91. PRINCETON REVIEW, *supra* note 22; U.S. NEWS & WORLD REP., *supra* note 30.

92. Twenty students multiplied by \$20,000 of income per student yields \$400,000.

93. Scholarship money may also be derived from annual donations, endowment income, and university subsidies designed to enhance the quality of the law school.

94. Four hundred thousand dollars would be lost per class year until the optimum enrollment is achieved. The hypothetical \$1.2 million deficit could be financed from an endo-

size, curbing existing programs, and foregoing creation of new, innovative programs. Alternatively, the dean and development office can meet the challenge by increasing annual giving or funding an endowment of about \$25 million to make the program self-supporting. Lastly, the school could raise tuition, driving away some students and further encumbering economically disadvantaged students and underrepresented minority students.

Similar economic forces are at work with public law schools. Fine Public Law School might undertake a similar plan to cut its enrollment from 600 to 540 over several years. Assume its tuition is \$10,000 (half that of Good Private Law School). The first year loss of \$200,000 represents almost two full professors' salaries. While the nominal loss after three years is merely \$600,000, replacement funds must be obtained from aggressive fundraising and greater state subsidies. Many states have been reducing their support of law schools, so this strategy may be very costly to implement.

A strategy of admitting students and flunking them out to maintain selectivity and increase the bar pass rate has complex moral and economic dimensions associated with it.<sup>95</sup> It is unlikely that many schools will be able to sustain the income needed for such an approach. Flunking out a sizeable percentage of the student body increases stress on students and faculty alike. The school may still be left with a number of poorly prepared students who fail the bar. The ultimate solution lies in working with the students that have been recruited and preparing them to pass the bar. Strategies and tactics that can be employed in that approach are developed in the next section.

#### V. STRATEGIES, TACTICS AND SUGGESTIONS TO IMPROVE THE BAR PASS RATE

There are many strategies that law schools and individual faculty can employ to prepare students for the bar exam. The vast majority of these suggestions are clearly "non-evasive" and will not turn law schools into "bar review schools." A number of the most valuable considerations are presented in this essay.

1. *The dean and the faculty should lead the battle.* The dean and the faculty should set the tone of professionalism. The importance of mastering law and of the bar should be stressed to students from the opening address at school orientation to a third year meeting that reinforces what students must do to succeed on the bar exam.

2. *Recognize and support students who learn differently.* Most law professors are predominately visual learners. They learn by reading and thinking about what they have read. During law school, many law professors then

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ment of about \$20 million (assuming a six percent return). Of course, this substantial income could be used for other purposes such as more faculty, scholarship support, increased staff, etc.

95. Most faculty are probably Kantian and would feel uncomfortable failing students as a means to the end of greater selectivity.

went to class and had their understanding confirmed by hearing the information.<sup>96</sup> Students should be given the opportunity to determine their learning style, through handouts and tests during orientation. A number of students learn aurally. These students should be encouraged to tape the classes, their notes and their study sessions and listen to the tapes to learn the material. Some are kinesthetic learners—they must make a connection tactilely by *writing* it down or other manipulation. Laptops and desktops are not helpful for kinesthetic learners. Law schools should describe the learning types, and encourage students at the beginning of the school year to experiment and find out which type(s) of learners they are and then use most appropriate techniques.<sup>97</sup>

3. *Recognize that the law does not come easily for most. Professors must teach students to see what professors may have seen almost intuitively.* Unlike most law students, including those who went to the schools faculty attended, law came easily to faculty. Faculty may have understood law almost as second nature. That is why it was easy for them to want to be teachers. That is probably why professors love the law. Most law students do not have that innate ability. Faculty must teach them. This can be done without “dumbing down” the work. Teachers must, however, make certain connections. They must become more patient to reach those who do not have our particular skill to see the law and accurately describe it. They must help students to reach proper legal resolutions to complex problems. However, teachers must insist that students keep up their end of the bargain.

4. *Law schools can prepare students for the bar by teaching them the law.* The author is not advocating teaching to the test. A casual review of the subjects that may be tested and typical questions and answers will confirm that the examiners are making reasonable demands upon our graduates.<sup>98</sup> If students cannot pass the test, then they cannot practice law.

If students have learned the law and can analyze it and write about it in a coherent and professional manner, then law schools will see a huge improvement in their students’ bar pass rate. To prepare, faculty must understand the subjects tested and the method. Each year, faculty members should be given the information booklets on the multistate exams as well as the sub-

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96. Some professors, as students, may have been so smart that they stopped going to class and just read outlines or briefed cases. Students on Law Review often succeed using this type of study. Such an approach may work for extremely bright students and law professors, but is a recipe for disaster for most students.

97. The author was aghast about ten years ago when he saw several students prepping for the bar exam using flash cards. The author could not imagine what they were learning or how they were learning. The author found out at the Conference that flash cards are helpful for kinesthetic learners. It never occurred to the author that dictating class notes and briefs is a viable way for a substantial number of students to learn. The author does not learn that way, but many do. Hence, professors must encourage students to learn what type of learners they are and promote their use of their own most effective strategy. This is a departure from much typical law school teaching, which traditionally emphasizes lesson content and leaves students to devise their own strategies.

98. See <https://scholarlycommons.cwlr.edu/vol40/iss2/art4> for typical subject matter tested.

jects the particular state tests.<sup>99</sup> Faculty should familiarize themselves with these materials. They must be ready to counsel students and remind students of the relevance of the course materials.

5. *Law schools should encourage students to take "bar courses" for a grade and be prepared to counsel them if their work is poor in these courses.* The list of bar courses is unexceptional.<sup>100</sup> Boldly put, if students have not taken these courses or have done poorly in them, they will not pass the examination. Students should be told that *mastery* of these courses is a prerequisite for passing the exam. It is wrong to assume that students who graduate from law school yet fail to pass the bar have met their objectives. They came to school to practice law. If they fail the bar exam, they cannot have the career in which they have invested \$100,000 in education.

Mastery of bar courses is so critical, weaker students should be encouraged to take a reduced load to learn the material. It is better that a student spend an extra semester or summer to master the bar material than graduate in six semesters and flunk the bar. The damage caused by not passing the bar is almost insurmountable. Law schools should strive to make flunking the bar an isolated occurrence.

6. *Law professors should concentrate on creating relevant essay exams and not create multiple choice questions to prepare students for the bar.* Faculty expertise is in teaching law and creating and grading essay exams. Law school faculty should concentrate on those tasks. The multiple choice questions and bar essays typically take three years and much revision to prepare. Experts (many of whom are law faculty but who have had training in devising standardized tests) prepare these questions. If professors must expose students to multiple choice questions similar to the bar examination, they should use previously created MBE questions and assist students in deconstructing the answer to discern the correct response. If law schools teach students the law and professionalism, competent bar preparation courses can do the rest. If students have not learned how to analyze the law and respond in a professional manner in three years of law school, the bar preparation course teachers cannot make up the difference. Faculty members should concentrate their efforts where they have expertise—substantive law, reasoning, ethics, professional habits, skills, problem solving and legal writing. Faculty can share exam drafting and grading techniques. What we learn

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99. The Academic Support Office should provide information on bar exams for distribution to faculty. State bar examination websites should be consulted by students and faculty alike. (The NCBE's website is [www.ncbex.org](http://www.ncbex.org).) Study aids for the various multistate exams can be ordered from the National Conference of Bar Examiners, 402 W. Wilson Street, Madison, WI 53703-3614.

100. The New York State Bar requirements are typical and predictable. New York may test students on Business Relationships; Conflicts of Law; New York Constitutional Law; Criminal Procedure; Family Law; Remedies; New York and Federal Jurisdiction and Practice; Professional Responsibility; Trusts, Wills and Estates (including Estate Tax); U.C.C. Articles 2, 3 & 9. See <http://www.nybarexam.org/barexam.htm> (last visited Feb. 7, 2004).



should make us more authentic testers and evaluators.<sup>101</sup>

7. *Law schools should identify and assist students who come to law school with bad study habits learned in high school and college.*<sup>102</sup> Many have been educated by “how to prepare for law school” courses and books that engendered more bad habits. Law schools must insist that students develop good law school skills and avoid bad habits and “skills.” In preparation for this essay, the author reviewed some current books on law school and was dumbfounded by the advice. The Princeton Review advises: “Lawyering is a game.”<sup>103</sup> The authors then suggest using commercial outlines from Day One, avoid briefing cases, and preparing only for the final exam.<sup>104</sup> Students following such advice cannot learn to be good lawyers in law school. Average students will fail the bar because they have not acquired the habits of a good lawyer. The time-pressed, careerist, education-as-a-commodity students are considerably different in kind and quality than the faculty might have been and than what law schools expect. Forewarned is forearmed. Law schools must get these types of students on the right track to becoming competent professional lawyers or all of the profession suffers.

8. *Law schools must produce better legal writers by improving essay exam writing.* Better legal writing translates into better lawyering. It also has a direct correlation to essay examination performance. Many professors make available to students sample exams and questions. But professors often do not explain to students how to achieve the results. Putting samples on class websites or on reserve or handing them to students is insufficient. The learning is passive at best. Professors must teach the student how to deconstruct the questions to determine what is asked and needed and highlight what is good and bad about the sample writing. The quality of the response will be improved significantly, assuming the student has the requisite sub-

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101. For instruction on law school test-taking, see generally RICHARD MICHAEL FISCHL & JEREMY PAUL, *GETTING TO MAYBE: HOW TO EXCEL ON LAW SCHOOL EXAMS* (1999).

102. Many law schools have failed to recognize that today’s students may not have developed the discipline and study habits of earlier generations of students. Grade inflation, not better study habits is responsible for skyrocketing grades. See Dembner, *supra* note 38. Law students arrive at law school poorly prepared for the tasks at hand. The academic side of college is less important to students than it was years ago. Work, family, and peer activities make increasing demands on today’s college and graduate students. A 1993 study found that the average student spent fifteen to eighteen hours per week in class; ten hours studying; twenty hours watching television; twenty hours engaged in leisure; twenty-five to thirty hours at work. The same study found Harvard students studied twenty-nine hours per week; Williams, twenty-six hours per week. Students attending regional colleges of modest academic pretension are estimated to have studied six hours per week. The studies were reported by Theodore J. Marchese, Vice President of the Association for Higher Education, Address at the ABA Facilities Conference (Mar. 9, 2000).

103. PRINCETON REVIEW, *supra* note 22, at 85.

104. *Id.* at 87-89. Much more useful advice for students, advice that will prepare them in good stead for law school and the bar, may be found in RUTA K. STROPUS & CHARLOTTE D. TAYLOR, *BRIDGING THE GAP BETWEEN COLLEGE & LAW SCHOOL: STRATEGIES FOR SUCCESS* (2001). This excellent book should replace the harmful tripe of *The Princeton Review’s* law

stantive knowledge.

Exams can be deconstructed for students by working through the question, exposing the relevant issues, and then demonstrating how the student should apply legal analysis to the problem (and inferentially, the bar exam).<sup>105</sup> If professors can teach students to deconstruct essay questions and hone their writing skills, they immeasurably enhance students' chances of passing the exam. A nice by-product is that the student's ability to understand and answer the legal question that is asked is the same cluster of professional skills clients expect and demand.

Law schools should have faculty participate in seminars with bar examiners or bar exam graders who can explain grading of the bar exam. These experts can provide faculty with sample questions, the answer key and instructions and representative student answers (typed for ease of grading). Ideally, faculty should grade the answers and compare results with bar examiners. With this new perception, faculty can better advise students on their writing. Professors will find that they can help students become better lawyers by requiring solid, professional answers of the quality that bar examiners, practicing lawyers, and the public require. At a minimum, law schools should know the "enemy."<sup>106</sup>

9. *Law schools must give students better feedback regarding their performance.* At a number of schools, the average student earns a B and a number who fail the bar exam are in the low B range. Many B and C students are not informed that they are at risk. Law schools should be more rigorous graders and should advise poorer performing students that they are at risk, and be proactive about directing such students to get help.

10. *Law schools should stress the importance of the bar exam to students.* Each professor can take several minutes at the beginning of each semester to remind students that they are in school to learn the law, learn professional skills, and learn enough to pass the bar exam to practice law. Many students have no idea that the exam is a two or three day marathon. Nothing in law school has prepared them for the stress of that life-changing exam.<sup>107</sup>

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105. Dean Ruta Stropus, DePaul University College of Law, demonstrated exam deconstruction at the Academic Assistance and the Bar Examination Conference, Midwest Region Academic Support Workshop (June 9, 2001). Exam deconstruction is the preferable course for examination preparation and post mortems. Professors often assume that posting sample representative answers or providing answer keys accomplishes the goal of helping students to understand our exams. It often does not, as this type of review, if done at all, is passive learning. Exam deconstruction is active learning that requires students to formulate principles, apply them, and answer the questions in a lawyer-like manner.

106. The 1970 instructions of the Pennsylvania Bar Examiners are worthy of attention. See *infra* Appendix 1. The directions for writing satisfactory essay exams are concise, cogent and most helpful. Professors and administrators should encourage students to use such instructions in answering law school exams and the bar examination.

107. A close lawyer friend made comments about how difficult the bar exam can be: it is not *just* like another law school exam. *Nothing* in law school prepares students for the experience of the exam. She allowed that no law school exam places the student in a two-day mara-

Professors should tell students that the experience is more crucial and more difficult than their worst law school exam nightmare. Professors should also tell them that if they have done their job as professional students, studied the core courses, learned to write well and resolve the questions asked, and take the bar seriously, that they can and should pass.

11. *Law schools should advise students to get their financial and personal lives in order to pass the bar.*<sup>108</sup> A number of students who flunk the bar do so because they worked too much during school or during the bar prep period.<sup>109</sup> Studying in law school and studying for the bar are full time jobs. If working is a must, students should take a reduced course load through the part-time option. When it comes to preparing for the bar exam, students must be able to afford the bar prep course. They must also concentrate their time by not working during the preparation period. This obvious advice will cost about \$5,000, given the cost of the course and the loss of law clerk earnings. Students should plan for this and budget accordingly. At worst, the monies can be borrowed. A \$100,000 out-of-pocket investment for law school<sup>110</sup> is certainly worth an additional \$5,000 in borrowing. If it is not, then, perhaps, the potential lenders are being much more realistic than the candidate about the chance for success.

12. *Law schools should counsel graduates who failed the bar and offer recommendations to improve their chances.* The task here is to get the re-takers to change their approach—it obviously failed and needs re-tooling. Work schedules during the prep period, poor writing, and poor subject mastery can be modified and results improved. The best office for doing this is the Dean of Student Affairs Office. But anyone who has contact with a candidate who failed should be able to offer life-changing advice and gather statistics on the reasons for bar failures.

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other 800 test takers. That the room is hot (or cold). That the room will be airless and maybe noisy. And then the unfortunate test-taker discovers that the first essay question has consumed one hour and thirty-five minutes, leaving him or her with less than an hour and a half to finish the other two questions in that first morning session. There is nothing like this! The wise friend counseled that applicants studying for the bar should treat the exam preparation as a full time job. They should budget their time appropriately, exercise, study, and above all, *take the exam very seriously*. Professors and administrators should convey this advice to students. See also James Burnett, *New York's Bar Exam: The Biggest Baddest Bar*, at <http://www.law.com> (last visited Apr. 2, 2002) (on file with author).

108. Some law schools employ the Internet to reach students. See Salmon P. Chase College of Law, *Tips and Resources for Success on the Bar Examination*, at <http://www.nku.edu/~lawsup/barpage.htm> (last visited Mar. 16, 2004).

109. This is based on anecdotes amongst law professors and information gleaned from the Dean of Students at Syracuse University College of Law based on interviews of graduates. For other anecdotes on the importance of studying full-time for the bar exam, see, for example, Kristin Booth Glen, *When and Where We Enter: Rethinking Admission to the Legal Profession*, 102 COLUM. L. REV. 1696, 1704-05 (2002). LSAC survey results were inconclusive in determining a correlation between working during law school and bar passage rates. LINDA WIGHTMAN, LSAC NATIONAL LONGITUDINAL BAR PASSAGE STUDY 65-66 (1998).

110. This is not factoring in opportunity cost nor discounting to net present value. The \$100,000 is the nominal value for students studying at a private law school.

13. *Law schools should keep detailed statistics to pinpoint students at risk.* This is a decanal duty. The Dean's Office should obtain as much information as possible so that results can be analyzed.<sup>111</sup> Armed with this strategic knowledge, the school can concentrate on the students at risk. Initially law schools might decide to concentrate efforts on the "near misses." It seems intuitive that a candidate missing by fewer points has a better shot at passing the next time than someone who missed by many. School resources are limited and law schools should concentrate their initial efforts where it will do the most good for the most bar exam takers.

14. *Law schools must "bite the bullet" with their retention policies.* It is kinder to dismiss students from law school after one semester or one year than to re-admit students who have no chance of passing the bar. Marginal students will often forum-shop to select professors who are easy graders. These students will graduate, but will not pass the bar. After a law school has analyzed its data, it will probably find that students graduating with grades below a certain GPA will fail the bar. For example, Utopia Law School knows that its bar pass rate is zero for students who have a GPA of below 2.2. It is better to flunk out those marginal performers after one semester<sup>112</sup> or one year than to socially promote them until they graduate. The cost and hardship will be considerably less if triage is employed. Academic support should be focused on students who will graduate and pass the bar. To do otherwise is self-defeating.<sup>113</sup>

15. *Law schools should create and maintain strong academic support offices.* The student population has changed and is significantly less homogenous than it was thirty or forty years ago. Academic support offices can provide students with professional counseling and support for students with learning disabilities and for students who have not mastered proper study habits. The academic support office can offer testing, counseling, classes and other resources to help students who are at risk in law school and for the bar. The office, working with the faculty, can assist students in need and prepare

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111. The collection of data should be fairly simple. The Registrar has records of which states are involved and the names of the applicants. States now post the results on the web. Someone needs to crosscheck graduates with the states. Once the pass rate is determined, class rank and LSAT scores, race, gender, identifiable learning disabilities, and courses completed can be analyzed. Other data that would be useful may include financial concerns of the students, grades in the bar courses completed and whether the student attended the school's bar exam review courses.

112. For example, Utopia could dismiss failing students after the first semester and give such students the option to return the next academic year to start afresh. Many students would probably re-consider their career choice and forgo a second attempt. The second attempt might prove to be successful for students who analyzed their problems and made appropriate changes.

113. Career placement offices and law schools do tout non-traditional career paths for law school graduates. Nevertheless, employers of these non-traditional graduates still expect their law graduates to have passed the bar—it is a proxy for achievement that is ignored by

them for successful careers.<sup>114</sup>

The academic support office, the dean, career services, and faculty can all broach the bar subject early in the students' careers. During the first year, students should be informed of data on bar performance so that they can ascertain whether they may be at risk. The academic support staff can counsel identified at-risk students. Faculty and staff should be prepared to discuss and encourage the taking of "bar" courses. Academic support, career services and financial offices should help students prepare realistic budgets (for both time and money) to help them get through law school as well as study for the bar (without the distraction of a job during that period of intense study).

16. *Law schools can offer special, non-credit, bar prep courses. Some schools have taken the initiative and sponsor free bar preparation courses.*<sup>115</sup> Others have contracted with bar review providers to create a course that runs during the third year. Another solution is the one offered at Quinnipiac College of Law. Professor Richard Litvin created a supplemental course which consists of thirty class meetings spread over the academic year and extending into the summer before the bar. After introductory materials, students are pre-tested in November. January through April is used for about half the subjects on the MBE. In May, after graduation but before the commercial bar prep courses start, the balance of substantive subjects are covered and there is an essay writing class. In June and July, Professor Litvin gives mock bar exams (both essay and MBE) and holds individual conferences based upon need demonstrated by the mock score. He has had substantial success and his students have beaten the predictive factor of the LSAT.<sup>116</sup> Such supplemental programs, while not inexpensive, make early, affordable and organized bar preparation available to under-prepared students. Those who diligently stick with programs such as these succeed.<sup>117</sup>

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114. The inability to conquer stress can be a factor in bar exam failure. Faculty and academic support staff might consider distributing information to aid students in reducing stress. See, e.g., National Headache Foundation, 52 *Proven Stress Reducers*, available at [http://www.missico.com/personal/thoughts/fifty\\_two\\_proven\\_stress\\_reducers.htm](http://www.missico.com/personal/thoughts/fifty_two_proven_stress_reducers.htm) (last visited Mar. 17, 2004). The brochure is also available by contacting the National Headache Foundation at: 5252 N. Western Ave., Chicago, IL 60625. The ideas contained in the handout are useful for all of us and can be especially useful for helping law students.

115. Syracuse University offers a free mini bar review course open to all 3Ls in the spring semester. This course meets once a week for two hours and is taught by bar prep teachers. Scholarships are also offered to students taking a three-day MBE preparation course taught by bar preparation experts. Again, the scholarships are open to all 3Ls. Similar offerings of supplemental bar preparation programs were reported by law schools to the AALS Committee on Bar Admissions and Lawyer Performance & White, *supra* note 10, at 461. Such school sponsored review courses should be recommended without reservation.

116. Professor Richard Litvin, Address at the Academic Assistance & the Bar Examination Conference, Midwestern Region Academic Support Workshop (June 8, 2001).

117. While these programs cannot be mandatory, schools must make an effort to reach students at risk and convince them of the utility of such additional work. Perhaps being honest with the student body, sharing the bar pass statistics, advising them of the correlation between the LSAT and the bar pass rate, and leveling them that grade inflation may have given

17. *Law schools should limit or phase-out take-home and open-book exams.* Schools should utilize "authentic law school written exams" unless the departure from such exams is mandated by the curriculum.<sup>118</sup> Neither take-home exams nor open book exams replicate the bar exam. Nor do they reflect practice. Students need to perform at a high level under very demanding time pressures, as traditional closed-book exams require them to do.

18. *Schools might consider grading on the curve.* This offers the possibility of staunching grade inflation. It also, if used properly, can ensure a degree of fairness between different sections of the same course and different teachers.<sup>119</sup> If the curve is properly scaled or adjusted, it can go a long way toward ensuring fairness, not only in each class graded, but also from year to year.

19. *Law schools should create more small sections in basic courses.* Law schools know that students thrive in small sections. (So do faculty.) Maybe law schools should bite the bullet and expend funds (that will come out of some other bailiwick) to create smaller sections in first year courses and major upper class courses. This is not an inexpensive undertaking. Perhaps for a \$5,000 to \$6,000 add-on, some faculty will split their 100-student class into two fifty-student sections.<sup>120</sup> Maybe the price is load relief for faculty every third year. Some set of incentives should be created to reduce class size to promote learning of the basics.

20. *Law schools may have to reduce some of their offerings in order to make certain their students are grasping the basics.* Law schools may have to eliminate some favorite courses (or offer them less frequently) to re-deploy courses and modify class size. This is an uncomfortable suggestion. Many law faculty, the author included, love to teach small, interesting, specialty classes or seminars. Indeed, professors may use those small classes to excite their own interests and support research. But many law schools may no longer be able to afford the luxury of offering "The Law of Central New Amsterdam Blood Feuds" or "Basket Weaving, Law & the Economy." It

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them an inaccurate read on their mastery of the law and their study habits will entice many of the students at risk to double and re-double their efforts.

118. "All study should be evaluated by authentic written examination, except when such examination is inappropriate such as in seminars or practice court courses which are principally concerned with legal writing and research." N.Y. CT. APP. R. 520.3(c)(4) (Consol. 2003).

119. For an excellent piece on curve grading and other matters, see Paul T. Wangerin, *Calculating Rank-in-Class Numbers: The Impact of Grading Differences Among Law School Teachers*, 51 J. LEGAL EDUC. 98 (2001).

120. The cost of smaller sections might increase the instructional budget by \$100,000 to \$200,000. (These estimates assume many small sections for first year and certain upper division courses.) This seems to be a very reasonable use of scarce resources if it accomplishes the goal of preparing people for practice. It is critical that the burden of extra sessions and greater faculty counseling and support not fall only on first year teachers and upper level "bar course" teachers. This burden should be a faculty burden. The schools should equalize pedagogical demands made of faculty until the bar pass rate turns around. One way of doing this would be to ensure that the non-affected faculty have similar prep and service demands.

may be the sacrifice required until the bar pass challenge is successfully met.<sup>121</sup> If this approach is taken, the faculty should share the pain of curriculum-restructuring as equitably as possible. This solution, though it may be ugly to some, is justifiable because of the legal and moral obligations schools have to students and society. After all, it is the students who pay faculty salary and afford professors the privilege of teaching, researching, thinking about the law, and writing. It is in society where students are expected to be competent.

21. *Schools should eliminate "Pass/Fail" grades except in the most limited circumstances.* "Pass/Fail" grades, especially when earned in the so-called bar courses, do not give students a valid assessment of learning. Further, this type of grading, when coupled with non-traditional exams and assessment, has undoubtedly led to grade inflation. Grade inflation gives students most at risk a false sense of security. Thus, to give students the most accurate evaluations of their progress and success, the "Pass/Fail" option must be avoided except in extremely limited circumstances.<sup>122</sup>

22. *Last, but not least, reinstate and enforce attendance policies.* Today's students have acquired bad attendance habits in past classrooms, and can no longer be expected to make the disciplined decision to choose to come to class. But attendance is imperative for all law students.<sup>123</sup> Law school deans certify to bar examiners that their school's students have had good and regular attendance (thus satisfying the residency requirements and accreditation rules). Attendance must be required because the accrediting agencies, the examiners, and law school faculty believe that something important—learning—happens in the classroom. Classroom learning is critical to the mastery of law and cannot be replicated by distance learning or solitary study. If schools hold to attendance requirements and strive to make classes professionally sound, schools will likely help students to pass the bar.<sup>124</sup>

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121. This suggestion has personal and institutional risks. Some faculty might leave teaching and some gifted faculty might move up to law schools that are not experiencing bar exam problems.

122. The "Pass/Fail" option is appropriate for journals and moot court. The amount of credit is usually quite small: one to three credits. An institutional "Pass" might be utilized in the rare case where a student is permitted to re-take an exam to remove a grade. The vast majority of the exams should prepare students for the rigor of the bar exam.

123. The ABA requires "[r]egular and punctual class attendance. . . . [It] is necessary to satisfy the residence credit and credit hour requirements." STANDARDS, *supra* note 6, at 42. States, not surprisingly, also required regular attendance. *See e.g.*, N.Y. CT. APP. R. 520.3 (c)(1)(ii) (requiring "at least 1,120 hours of classroom study, exclusive of examination time"). Students should be in their seats and participating to fulfill this requirement.

124. While a real attendance policy may make it difficult for some to graduate if they have been working full-time while pursuing a law degree, schools may have to impose that policy. The study of law is a full-time endeavor unless a student elects to go part-time. Schools should insist that the study be full-time or the student (who may fail the bar) and certainly the public when it encounters the poorly prepared professional, will be shortchanged.<sup>30</sup>

## V. CONCLUSION

There are many things that law schools can do to improve students' success in the bar examination. None of them will cause a school to run the risk of becoming a "bar school." Most are fairly easy to implement. All law schools will have to work a little harder and a lot smarter if they want to change the disturbing trend in bar pass rates. It is clearly within the power of law schools to demand better effort and results from students and the law school itself. Faculty can show students the way to succeed. Indeed, it is an obligation as teachers and professionals to undertake this task. Law schools can meet their commitment to diversity and their obligation to the institution and society by addressing the bar pass problem. As caring and competent teachers and good colleagues, armed with the information and suggestions contained in this article, law schools will succeed.



## APPENDIX 1

*Instructions for the Pennsylvania Bar (circa 1970)*

The following are the instructions, which appear on each examination paper. The italicized text text elaborates upon these instructions and also contains suggestions intended to help you put your best foot forward in answering the questions.

## 1. WRITE LEGIBLY.

It is not important that you have a handsome handwriting; but it must be legible. If you must write slowly in order to write legibly - do so. If the examiner must put time and energy into trying to figure out what words you wrote, it is more difficult for him to evaluate your thoughts.

## 2. PLAN YOUR TIME

Do not indulge in the all-too-common mistake of spending too much time on any question. You should assume in the first instance that each question is to be given approximately the same amount of time. You are charged with the burden of keeping track of the time.

## 3. GET THE FACTS STRAIGHT IN YOUR MIND.

Ability to read accurately is very important. Avoid creating the suspicion that you cannot do so. Getting the facts mixed up or miscalling a party is some evidence of inability to read accurately.

## 4. DO NOT RESTATE THE FACTS, EXCEPT FOR EMPHASIS.

Do not begin: "It appears that," and then restate the facts. There are three reasons for this. First: It wastes time and you have none to waste. The questions are likely to keep you under pressure for time. Second: When the examiner reads your answer he knows the facts, and he will only be annoyed by having to read them again; and he has to read what you write in order to discover where you begin to put your analysis and solution down on paper. What he wants to find out is what you have to say. Third: Your restatement of the facts creates a suspicion that you are using the debater's trick—restating the question when you cannot think of a good answer.

## 5. THINK BEFORE YOU WRITE.

Do not read a question, and immediately start writing whatever comes into your head. This practice almost invariably leads to a meandering answer. Your answers should be in a logical order, not a series of disconnected remarks. One of the important qualities in a lawyer is the ability to organize his thoughts and his presentation of them. The questions are designed to test this ability in you. An apparent lack of organization casts doubt on your possession of this ability. *Be sure you thoroughly understand the interrogatories before proceeding with your answer.*

## 6. APPLY THE LAW TO THE FACTS: AVOID IRRELEVANCIES.

The examiner is interested in what you know about the application of the law to the facts. He is not interested in an essay on: "What I know about the law of. . ." Do not assume an unnecessary fact for the purpose of discuss-

ing a legal problem which is not raised by the facts given. For example: Do not write: "If this fact had appeared, then we should have had a problem of bailment," and continue with a statement of what you have learned by heart about the law of bailments. On the other hand, it is relevant to explain the reasons for excluding the possibility of recovery on a cause of action, if, on the surface, it would appear to lie.

#### 7. DO NOT FAIL TO DISCUSS ALL PROBLEMS RAISED.

While avoiding irrelevancy, do not miss a fact which is relevant to any issue. If you conclude that the question cannot be answered intelligently without the addition of some fact, assume it in the alternative and discuss both alternatives. It may be that more than one fact has been omitted, in which case you must go through this process with respect to each such fact. But be sure that the omitted fact is essential to an intelligent discussion. If it is not essential, you have simply shown ignorance of what is an essential fact, or you have followed a red herring.

#### 8. ANSWER A DIRECT QUESTION DIRECTLY.

If a direct question is asked, answer it directly. For example: If you are asked: "What judgment on appeal?"; answer "Affirmed" or "Reversed" or "Reversed and remanded." You may express your opinion that there is much to be said on both sides but then you must say which argument is the stronger, or the strongest, and why. Do not try to weasel out of a direct answer. Do not try to be on both sides, or to stay on the fence.

#### 9. AVOID INTERNAL INCONSISTENCY LIKE THE PLAGUE.

The lowest grades are likely to be given to examinees who make mutually inconsistent statements in the answer to a question, or to the several parts of a multiple question. For example: If a question has two parts, the second of which contains a new fact, do not reach one conclusion in the first part, and a different conclusion in the second, with respect to the facts that are common to both parts; nor should you state one conclusion as to the given facts and, later, a different conclusion as to the same facts. If you do either of these things, the examiner is driven to the inference that you have shown an undesirable quality. You have shown that you were not thinking at all when you wrote your answer; or that you do not know the meaning of logical consistency; or that you wrote the two inconsistent statements hoping that the examiner would assume that you wrote one of them inadvertently, and that he would also assume that you really meant to write the one that supports your ultimate conclusion. On this third alternative, the hope is vain.

#### 10. SHOW UNDERSTANDING, NOT MERE KNOWLEDGE.

What the examiner is trying to find out is: Do you approach a problem in a lawyerlike manner? Can you apply the law to the facts; not, how many rules of law do you know? Show understanding of the problems raised, not mere rote, knowledge of the applicable rules.

#### 11. WRITE CLEAR, CONCISE, GRAMMATICAL ENGLISH.

Write complete sentences. Do not omit articles or verbs. Show that you understand the use of punctuation marks, especially the period. Avoid long,

involved sentences. The same material is much easier to understand when presented in short sentences. Avoid verbosity. Most of what you want to say can be said in comparatively few words. If you say it at great length and with a lot of circumlocution, you make it harder to understand just what your thought was; and create some suspicion that you are trying to hide the absence of thought under a flood of words.

On the other hand, do not cast your answer in headline form, omitting articles and verbs. A few headings may add clarity, but they should be in grammatical English. Do not say: "Bank in collusion with corporation." Say, rather: "The bank colluded with the corporation."

Avoid undue repetition. A considerable proportion of the papers that get low grades contain the same statement several times, usually in slightly different words, but often in the same words. An answer which says three times: "X made an offer and Y accepted it," is not impressive.

Do not use slang phrases, such as: "P is out of luck." "D is stuck."

Use recognized legal terms. If you are told to give the judgment on appeal, answer, e.g.: "Judgment affirmed," not, "upheld."

*In short, use the sort of language a lawyer would use in a brief, or a judge in an opinion.*