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*Bar Pass Rates & “Quality” Law School Education
Do We Have a Nexus?-And the Remedy*

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I. INTRODUCTION

Legal scholars have concluded that there is “no automatic correlation between raw bar passage rates and the quality of legal education provided by a law school.” (See Letter from Prof. David J.R. Frakt, Western State University College of Law in “The Gathering Peasants’ Revolt in American Legal Education” (Prof. Kurt Olson & Dean Lawrence R. Velvel 2008 p.65.)

The good GBX/Unsatisfactory GBX pass rate dichotomy impedes a sophisticated analysis of the delivery of legal education. It conceals more than it reveals because of the different paradigms that inform passing law school examinations and passing the GBX.

II. BAR PASS RATES ALONE IS NOT REFLECTIVE OF
THE QUALITY OF LEGAL EDUCATION

A good place to start in analyzing the “correlation” question is to refer to some leading studies on the subject. These include American Bar Association reports and psychometric studies conducted on behalf of the State Bar of California.

At least five threads are interwoven through all these studies.

A. BAR PASS RATES ARE BASED ON UNIQUE TESTING SKILLS SETS

Addressing “Accreditation and Quality of J.D. Programs,” the 2014 ABA Task Force On The Future of Legal Education concluded the ‘quality of legal education’ is:

“[A]n abstract notion as to which there is no objective metric for progress or achievement.”

See: ABA Task Force on the Future of Legal Education Final Report. http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/report_and_recommendations_of_aba_task_force.authcheckdam.pdf.

In a State Bar commissioned study dated July 15, 2013 (PR-13-02) *Key Factors To Consider When Engaging In A Development Or Redevelopment Process For Examinations*—(California’s Two-Day Bar Examination Proposal) authored by Chad W. Buckendahl, Ph.D., its Director of Education, Licensure, and Professional Certification Services, categorically writes:

“One of the primary purposes of a professional licensure examination is to provide independent evidence that candidates possess sufficient competency for entry-level practice. It would be inappropriate to confound that intent with the purposes of educational training programs or accreditation activities with that program.” (p. 2)

“Although often misused for such purposes, licensure testing program scores are not intended to serve as a comprehensive evaluation of a program’s curriculum and instruction.” (p. 3)

**B. PRE-LAW EDUCATIONAL BACKGROUND IS A MAJOR
PREDICTOR OF PASSING THE GBX**

In a Study of Texas Law Schools by Klein and Bolus, who are the primary psychometric analysts used by the State Bar of California, they conclude:

*“[T]here is a nearly perfect relationship between a law school’s mean **total bar exam scale score** and its mean LSAT score (the correlation is .98 out of a possible 100).”*

<http://www.thefacultylounge.org/2011/05/interpretation-301-6-low-lsats-and-high-cut-scores.html>

Again, in a Draft Report of American Bar Association Section of Legal Education and Admissions to the Bar, Standards Review Committee (April 2011):

*“The LSAT can and does provide a fair measure of first-year law school performance and **correlates well** with the final law school grade-point average, rank in class, and performance on bar examinations.” (p.4)*

[http://apps.americanbar.org/legaled/committees/Standards%20Review%20documents/April%202011%20Meeting/Report%20of%20Subcommittee%20on%20Attracting%20and%20Matriculating%20Students%20\(redline%20to%20Standards\).pdf](http://apps.americanbar.org/legaled/committees/Standards%20Review%20documents/April%202011%20Meeting/Report%20of%20Subcommittee%20on%20Attracting%20and%20Matriculating%20Students%20(redline%20to%20Standards).pdf)

**C. PASSING RATES ARE SIGNIFICANTLY LOWER FOR MINORITY
APPLICANTS AND THOSE FOR WHOM
ENGLISH IS A SECOND LANGUAGE**

The study titled: *Eventual Passing Rates Among July 1997-2000 First Timers* (June 22, 2003, PR-03-06) authored by the State Bar’s psychometric analysts, Stephen P. Klein, Ph.D. and Roger Bolus Ph.D., examined various cohorts and the performance of over 22, 000 applicants. They provide some revealing insights.

(a) “Racial/ethnic minority group members (and especially Blacks) were not as likely to eventually pass as their class mates.” (p. 1).

- (b) “[Th]ere was a 23 percentage-point difference in eventual passing rates between Whites and Blacks in the 1990-91 cohorts and a 25-point difference between them across four 1997-2000 cohorts.” (p.4)

[http://www.seaphe.org/pdf/past-bar_research/Eventual Passing Rates Among July 1997-2000 First Timers.pdf](http://www.seaphe.org/pdf/past-bar_research/Eventual_Passing_Rates_Among_July_1997-2000_First_Timers.pdf)

D. COACHING AND TEACHING TO THE TEST SIGNIFICANTLY INCREASES BAR PASS RATES AS CONFIRMED BY THE EXPERIENCE OF CALIFORNIA ACCREDITED LAW SCHOOLS

In a RAND Education Study titled “What Do Test Scores in Texas Tell Us” authors Klein, Hamilton, McCaffrey, and Stecher write:

- (a) *[O]ur results illustrate the danger of relying on statewide test scores as the **sole measure** of student achievement when these scores are used to make high-stakes decisions about teachers and schools as well as students.” (p.1)*

*“To sum up, states that use high-stakes exams may encounter a plethora of problems that would undermine the interpretation of the scores obtained. Some of these problems include the following: (1) students being **coached to develop skills** that are unique to the specific types of questions that are asked on the statewide exam (i.e. as distinct from what is generally meant by reading, math, or the other subjects tested); (2) **narrowing the curriculum to improve scores** on the state exam at the expense of other important skills and subjects not tested; (3) an increase in the prevalence of activities that substantially reduce the validity of the scores; (p.13)*

http://www.rand.org/content/dam/rand/pubs/issue_papers/2006/IP202.pdf

CALS

Following the promulgation of Accreditation Law School Guideline 12.1 and 12.2, several California Accredited Law Schools (CALS) entered into exclusive contracting arrangements with large scale commercial bar preparation vendors like Bar-Bri and Kaplan whereby their forms, methods, and testing materials became part of the curriculum study from year one through the final year of graduation.

In some instances, the law schools contracted with Bar-Bri to have students purchase their *i*-Pads and with faculty being “advised” to use Bar-Bri instructional materials as part of the classroom pedagogy lesson plan and instruction that correlate with Bar-Bri materials.

The upshot of all this was appreciably higher costs in tuition to defray the costs of the outsourcing and of course, higher bar pass rates. It has been said the arguable authority for doing so is a provision in Accredited Law School Guideline 1.8 that reads:

ALS GUIDELINE 1.8

“A law school may offer and grant academic credit for a bar examination review, or preparation course. A law school may also require successful completion of a bar examination review or preparation course as a condition of graduation. Total credits for bar review courses must be kept to a minimum.”

SCIL does not believe that purchasing canned commercial course preparation and testing materials can be passed off as a “bar review, or preparation course” prepared by a law school.

What is sometimes presented to CALS is in the form of a Scylla and Charybdis choice: Either we reduce law schools to “bar-mills” or risk not meeting the threshold requirements mandate by Guideline 12.1 and 12.

SCIL has mounted a challenge to the constitutional validity of this Guideline before the United States Court of Appeals for the Ninth Circuit and the Superior Court of Los Angeles.

E. A BETTER YARDSTICK FOR MEASURING
THE QUALITY OF LEGAL EDUCATION

In a 2009 study titled “Critical Issues Summit,” The American Law Institute –ABA recommends that as one of markers of student learning outcomes:

“[R]egulatory authorities should consider **restructuring one-time bar examinations** into phased examinations over time, linked in part to the attainment of legal skills, with some parts of the examination occurring as early as in the law school years.”

<http://lawprofessors.typepad.com/files/finalreport.pdf> (p.8)

(Preamble, Recommendation No. 5)

There is support for this view from recent statistics involving lawyers who as a condition of their re-instatement were required to pass the CA GBX. The numbers speak for themselves.

July 2013 CA-GBX

“Out of the total taking the Attorneys’ Examination, **29** were disciplined lawyers who took the examination as a condition of reinstatement; **four** disciplined lawyers passed.

<http://www.calbar.ca.gov/AboutUs/News/Archives/2013NewsReleases/201332.aspx>

February 2014 CA-GBX

“Out of the total taking the Attorney’s Examination, **20** were disciplined lawyers who took the examination as a condition of reinstatement; **one** disciplined lawyer passed.”

<http://www.calbar.ca.gov/AboutUs/News/ThisYearsNewsReleases/201414.asp>

x

July 2014 CA-GBX

Out of the total taking the Attorney’s Examination, **13** were disciplined lawyers who took the exam as a condition of reinstatement, only **one** disciplined lawyer passed.

<http://www.calbarjournal.com/December2014/TopHeadlines/TH3.aspx>

February 2015 CA-GBX

“Out of the total taking the Attorney’s Examination, **29** were disciplined lawyers who took the examination as a condition of reinstatement; **no** disciplined lawyers passed.”

<http://www.calbar.ca.gov/AboutUs/News/ThisYearsNewsReleases/201510.aspx>

Thus out of the 91 disciplined lawyers who took the exam from July 2013 through February 2015 six (under **7%**) passed.

TABLE OF CALIFORNIA BAR PASS RATES INCLUSIVE OF ABA-ACCREDITED LAW SCHOOLS

http://admissions.calbar.ca.gov/Portals/4/documents/gbx/GBXpassratessummary_201502.pdf

[This shows pass rates ranging from **27.7%** (Spring: February 1983) to **63.2%** (Fall: July 1994)]

It sets up the indefensible matrix that when they passed the GBX their legal education was good but when they were required to re-take it and failed this earlier inference was nullified.

III. MAJOR DIFFERENCES IN LAW SCHOOL AND BAR EXAMINATION TESTING

The format, structure, content, and grading of law school and State-Bar examinations are different enough to defy reliable comparisons.

FORMAT

Law School examinations are typically essay-only type questions as opposed to the State Bar examination, which is divided into three sections: essay, multiple-choice, and performance, of which the essay portion alone accounts for thirty-nine percent (39%) of the total score.

STRUCTURE

Law School essay examinations examine on a single subject basis, with each subject being tested on a different date, and with a minimum of two questions per subject. Thus, a less than stellar performance on one question may be compensated for by an outstanding performance on the other, since it is the average score of 2-3 questions taken from both mid-terms and final examinations that count.

Thus, a student's final score in Constitutional Law, for example, is the product of anywhere from 4-6 questions covering two full semesters of material.

The bar examination consisting of six essay questions on a given test may not have a single question on Constitutional Law or even a basic first year class such as Torts or Contracts. Where the subject matter is tested, it will be in one area selected, as in Constitutional Law, from a large pool of testing areas.

A further crucial difference is that, unlike in the general bar examination, law school students know in advance exactly in what subject and to which parameters they will be tested when they arrive on the day of the examination, and also the grading emphasis of the instructor.

CONTENT

Law school examinations are usually far more comprehensive and exhaustive than state bar examinations.

In two-semester courses, students are examined through mid-term and finals. In some law schools, such as in our Institute, to secure a passing grade, application of policy rationales and jurisprudential underpinnings is demanded in support of the applicable rules. This is not the case either in bar examinations or bar-mill law schools.

GRADING & EXAMINATION PERFORMANCE

Law school students have the benefit of being graded by the person who instructed the subject and wrote the question. This is an advantage that cannot be overemphasized.

Over a period of one or two semesters as the case may be, students pick up on the nuances of what needs to be prioritized among a spectrum of testable issues.

Moreover, (and this is important) under state bar rules of accreditation, the grades of law school instructors teaching the same group of students must bear a reasonable correlation to one another. Thus raw grades are accordingly adjusted.

There is nothing comparable as to test score correlations with respect to GBX examinations. Indeed, it is not unusual for an unsuccessful candidate to score anywhere from 65-75 in five of the six essay questions and then be scored a 50 on the 6th essay question that would virtually sink any potential for passing the examination as a whole. One of SCIL's unsuccessful students scored an 85 (A+) on a Constitutional Law essay question on the bar examination and on the same test scored a 55 (D) on a different subject. The student did eventually pass the GBX on a subsequent attempt.

Over the course of a four-year legal education, students are essay tested as many as fifty times and have their examinations graded by dozens of different instructors.

Expounding an abstract concept, having the students comprehend it, and then requiring that they relay their understanding in analytical writing in a manner that is at once cogent, succinct, and persuasive, and performed in a given timeframe, are at the heart of law school education. Hence any qualitative assessments are more reliably made through an overall grade point average than when viewed through the lens of a single testing cycle.

IV. CALS' STUDENT POOL PROFILE IS VERY DIFFERENT FROM ABA-ACCREDITED LAW SCHOOLS

In ABA Law Schools, a fairly consistent and continuing academic profile prevails from year-to-year. For the most part, classes are confined to day-time hours, students are between 22-25 years of age, mostly single, live on campus dorms, have no long commutes to school, do not have full-time jobs or families, and rarely if ever are they single parents.

Whereas students at ABA-law schools all are entitled to federal tuition loans, except for law schools accredited by a regional agency, students at SCIL are not entitled to tuition loans. Guideline 12.1 and 12.2 fail to account for the critical distinction that SCIL's student body is comprised of a more diverse population than an ABA-law school.

Admissions criteria at ABA schools are relatively uniform as well. All students are required to have a bachelor's degree with a minimum 3.0 GPA and a reasonable range of LSAT scores, usually in the 50 percentile range and above

And yet, even among third-tier ABA-law schools like Golden Gate, Western State, Southwestern, Whittier, Jefferson, and La Verne University College of Law, GBX pass rates have sometime been on a downward spiral at times averaging less than 50%.

When contrasted with CA-accredited law schools, none of the parameters as applied to ABA-accredited law schools are consistent. Fluctuations in incoming student profiles vary from year-to-year. With no measurable changes in academic content or delivery, annual performance on bar examinations wildly oscillates from one extreme to another.

Evening law students are mainly in the 35-55 age range. Nearly all of them are working adults, many have families, and some are single parents. None of those attending law schools with state bar only accreditation are entitled to federally funded tuition loans, not all of them possess a bachelor's degree, and several have marginal undergraduate Grade Point Averages.

V. USE OF MEANINGFUL LSAT SCORES AS A PRE-LAW ADMISSION REQUIREMENT IS NOT FOUND AMONG CALS

The mandatory administration of the LSAT as a condition of admission enhance GBX pass rates by eliminating applicants whose scores are below the 50th percentile. This is the rate most ABA law schools require as a minimum condition for admission.

However, with the 20% or more drop in law school applications in 2014-1015, it is not unusual to have middle to bottom rung ABA law schools fish in the same pool of applicants that CALS do.

Typically, among those admitted to CALS with LSAT scores, the LSAT scores average in the bottom third or less. Whenever LSAT scores drop below the 50th percentile, there is a massive reduction in their predictability of passing the law school program. This in turn dramatically reduces the relevancy of such tests as part of reliable admissions criteria.

Some CALS have a 10% LSAT cut-off point, which renders the use of the LSAT meaningless. In order to broaden access to legal education, SCIL has simply dispensed with the LSAT requirement. Indeed, based on pre-law backgrounds, some ABA law schools have also done so.

To further confound the issue, in CA-accredited law schools roughly a third (at times, an even larger fraction) of those admitted, have English as their second language.

Any assumed nexus between GBX pass rates and quality of legal education is weakened further with respect to small law schools involving less than a dozen graduating students who take the GBX as first-time takers.

This translates into an issue of statistical irrelevance, and combined with an absence of any benchmarks of uniformity in student profile, GBX pass rates become yardsticks of even more dubious calibration.

CONCLUSION

Following the historically low results of the 2000 California General Bar Examination, former State Bar senior executive officer for admissions Jerome Braun put it well when, as reported in the Los Angeles Daily Journal, he said: *“Each person who takes the exam is unique. Each performs individually...It’s a question of preparation.”*

Our experience confirms Braun’s point. In the twenty-year history of our Institute we admitted only four “special” students who went on to take the general bar examination. As we know, these are students with less than 60-units of pre-law college credit and some with no college education at all. All four of these “special” students passed the bar examination. They would not have had the opportunity even to try at any ABA law school.

SCIL has had students who qualified for admission with barely any knowledge of English, one of Chinese descent and the other a Russian. They each passed the GBX. Another, an Afro-American student who was temporarily homeless and living out of a van, was admitted to SCIL and passed the GBX on her first attempt.

The same goes for two SCIL graduates who, having been excluded from a prior law school, were (on compelling reasons) admitted to SCIL and passed the bar examination.

In an article titled *“Pericles & the Plumber”* Professor Twining wrote that law professors must emulate Pericles and like an architect instruct to the grand design of the law. In short, the proper responsibility of the law school professor who assumes the role of architect is emphatically *NOT* to instruct to passing a standardized bar examination. That is the domain of bar review courses.

The practitioner is the stone mason whose job it is to use the specific bricks and mortar of facts in each client profile and construct the case within an analytical framework learned in law school.

Through a 3-day examination spanning three different types of skills, the GBX tests minimum competency in what is, for the most part, a bricklaying function. And to prepare student for this, we have a veritable cottage industry of bar prep review entities.

At one point the State Bar had resolved to change the 3-day examination into a 2-day examination, with heavier emphasis on the MBE and less weight and time accorded to the written essay portion of the examination. This proposal was later abandoned.

Unfortunately, with falling Bar Examination pass rates, deans of evening law schools are tempted to engineer their curricula and adjust instructional pedagogy in ways opaque enough to make them indistinguishable from bar review preparation courses.

To succumb to this is to acknowledge, albeit *sub silentio*, the law school mission may be viewed as a fraud, training bricklayers rather than thinkers, law school turned into bar mills betraying the vision and command of Justice Oliver Wendell Holmes that law schools must teach in the “grand manner.”

We emphasize to our students that they need to engage in a litany of specific test preparation and examination-taking study skills that would improve their prospects for passing the GBX, if they are to obtain a license to practice law.

Based upon feedback from our graduates who passed the GBX on their first try, our advice to students includes but is not limited to demanding that they practice on several thousand multiple choice questions and score in the high range, review scores of past GBX essay and performance examinations, and explore the need for a rigorous bar review course before taking the GBX.

It was brought to our attention recently that certain ABA- accredited law schools (California Western School of Law, San Diego, just to name one) now “fully reimburse” their graduating students for the cost of a bar review course.

We now have evidence that ABA law schools expend tens of thousands of dollars on support programs and test preparation review type courses to improve their GBX pass rates.

In short, such ABA-accredited law schools, despite their superior demographic and mostly full-time students, recognize that their GBX pass rates will be ramped up by third-party forms of review instruction external to the law school curriculum.

We have reviewed a fair spectrum of bar review courses, and they all lend themselves to the uniform theme that it is “they” in their capacity as “specialists” in preparing students to pass the GBX who play a vital role in success at the GBX. Here’s one from PMBR that recites: “PMBR is a supplemental multi-state course that specializes in preparing students for the Multi-State Bar-Examination...” Others emphasize “simulated bar examinations” and “stress management” techniques involving hypnotists and psychologists.

And when GBX results are released, each bar review provider trumpets these statistics to market what they deem is “their” success. Further, a point often overlooked is that this level of bar review instruction comes with a price tag that may not be within the level of financial access or time-commitment for some of our working students.

Much of this blame must lie at the feet of the Committee of Bar Examiners and their accreditation inspectors. Unlike other state agencies, the State Bar does not claim expertise in the field of legal education. By stressing the need to focus exclusively on GBX pass rates, they have driven many law schools to revamp their curriculum, examination testing mechanisms, and to place undue emphasis on black-letter law to the point that some have become bar exam prep law schools in residence.

In sum, unless and until the CBE can empirically establish a clear nexus between GBX pass rates and the quality of legal education, it must resist simple explanations in a complex issue by not impressing into service the principle of Occam’s razor.

The gossamer thread that holds together a dubious proposition that bar pass rates alone is a reliable predictor of the quality of a law school's curriculum needs to be severed, its torso held up, and the corpus of GBX pass rates and its arguable relevance to quality legal education reposed and entombed in a splendid mausoleum with vigilant law school deans forever lurking nearby with wooden stake and mallet.

THE REMEDY FOR IMPROVING BAR PASS RATES

We need to examine what other law schools are doing to improve their GBX pass rates. When top-ranked UC Berkeley found that only about one-half of the bottom half of their graduating class passed the July 2007 GBX, the administration and faculty studied the issue and decided to formulate and implement a mini-GBX Bar Review for their graduating students.

Until June of 2009, the State Bar Standards of Accreditation expressly prohibited the delivery of such in-house bar exam preparation courses and would emphatically not allow academic credit for such classes.

The Southern California Institute of Law initiated a pilot 3-day simulated bar examination devised by its own faculty that uses past GBX essay and Performance Tests and MBEs from the NCBE. In 2015, SCIL plans to make passing this test a prerequisite to earning the JD since those who have passed SCIL's simulated GBX have gone onto pass the CA-GBX on their first attempt.

Further, SCIL's faculty has established a "mock" Baby-Bar examination for all first year students who, beginning 2015, will be required to take and pass this test before being advanced into their second year of law school.

We believe these changes will produce a measurable effect within 3-4 years. Even more, students on academic probation, as is the case with all first year students, are now required to schedule a one-on-one one-half hour session of personal academic counseling with the Dean/Vice Dean or faculty.

