

# COOL DATA ON A HOT ISSUE: EMPIRICAL EVIDENCE THAT A LAW SCHOOL BAR SUPPORT PROGRAM ENHANCES BAR PERFORMANCE

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## I. INTRODUCTION

The bar examination is hot. It is a hot and controversial topic in the courtroom,<sup>1</sup> in state bar associations,<sup>2</sup> in law school faculty meetings,<sup>3</sup> and in academic literature.<sup>4</sup> Is a bar examination necessary to protect the public from

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<sup>1</sup> E.g., *Bester v. La. Supreme Court Comm'n on Bar Admissions*, 779 So. 2d 715 (La. 2001) (holding that a candidate's bar examination, the model answer, the grading guidelines, and the process for destroying the exams are exempt from the state's public disclosure laws); *In re Arnovick*, 52 P.3d 1246 (Utah 2002) (rejecting equal protection and due process challenges to the Utah bar examination).

<sup>2</sup> One of the "hottest" topics surrounding the bar examination currently is the decision of many states to raise the passing score. See *infra* notes 69-71 and accompanying text.

<sup>3</sup> See, e.g., Sam Hanson, *The Relationship Between Bar Admissions and Law Schools*, B. EXAMINER, Aug. 2003, at 2, 2 (law schools have recently focused on bar admissions); see *infra* notes 10-12, 16, 75-81 and accompanying text.

<sup>4</sup> E.g., Richard Cabrera, Essay, *Working to Improve: A Plan of Action for Improving the Bar Exam Pass Rate*, 27 WM. MITCHELL L. REV. 1169 (2000); Margaret Fuller Corneille, *Bar Admissions: New Opportunities to Enhance Professionalism*, 52 S.C. L. REV. 609 (2001); Andrea A. Curcio, *A Better Bar: Why and How the Existing Bar Exam Should*

attorney incompetence?<sup>5</sup> Does the bar examination test competency to practice law?<sup>6</sup> Is it a reliable and valid examination?<sup>7</sup> Does the bar examination unfairly exclude minorities from the profession?<sup>8</sup> Should the legal community explore alternatives to the bar examination?<sup>9</sup>

Despite the debate, and regardless of the merit of the criticisms of the bar examination, the bar examination is here to stay and is a reality that our graduates must face.<sup>10</sup> Thus, in the midst of this controversy, many law schools have become increasingly concerned about the bar passages rates of their graduates. Low bar passage rates may negatively impact student morale, accreditation, and future admissions. Law schools also are concerned about the emotional and financial impact on their graduates of failing the bar examination.<sup>11</sup> What, if anything, can and should law schools do to improve their graduates' chances of passing the bar examination?

Many law schools are deciding that they should do something. A significant number of law schools are now offering programs "specifically designed" to improve their graduates' performance on the bar examination.<sup>12</sup> And these schools *believe* that their programs are positively impacting bar performance.

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*Change*, 81 NEB. L. REV. 363 (2002); Kristin Booth Glen, *When and Where We Enter: Rethinking Admission to the Legal Profession*, 102 COLUM. L. REV. 1696, 1704 (2002); David A. Logan, *Upping the Ante: Curricular and Bar Exam Reform in Professional Responsibility*, 56 WASH. & LEE L. REV. 1023 (1999); Deborah J. Merritt et al., *Raising the Bar: A Social Science Critique of Recent Increases to Passing Scores on the Bar Exam*, 69 U. CIN. L. REV. 929 (2001).

<sup>5</sup> Bar examiners assert that law schools are not in a good position to determine who is competent to practice law. See *infra* notes 30-31 and accompanying text.

<sup>6</sup> The bar examination purportedly tests minimum competence to practice law. See, e.g., Amendments to Rules of the Supreme Court Relating to Admissions to the Bar, 843 So. 2d 245, 249 (Fla. 2003) [hereinafter Amendments]; *Dinger v. State Bar Bd.*, 312 N.W.2d 15, 18 (N.D. 1981) (The bar examination "is to give the public the assurance, and the protection, that those admitted to practice law have met the minimum requirements."); Corneille, *supra* note 4, at 611. The question whether the bar examination tests attorney competence encompasses several issues. Does the bar examination actually test for minimum competency? See *infra* notes 37, 39-44 and accompanying text and notes 69 and 73. Assuming the bar does measure competency to practice law, where do we draw the line between "competent" and "incompetent?" See *infra* notes 69-71 and accompanying text.

<sup>7</sup> See *infra* notes 32-33, 37, 40 and accompanying text.

<sup>8</sup> See *infra* notes 51-57 and accompanying text.

<sup>9</sup> For a detailed discussion of proposed alternatives to the written bar examination, see *infra* notes 63-65 and accompanying text.

<sup>10</sup> See Comm. on Bar Admissions & Lawyer Performance & Richard A. White, *AALS Survey of Law Schools on Programs and Courses Designed to Enhance Bar Examination Performance*, 52 J. LEGAL EDUC. 453, 454 (2002) [hereinafter Comm. on Bar Admissions].

<sup>11</sup> See *id.* at 455:

Failure to pass the bar creates many adverse personal consequences for our graduates. Students who fail will not easily find employment . . . . The sense of personal and professional failure and the financial insecurity that come from failing the bar can be devastating. Given the ever increasing educational debt carried by our students, these feelings of failure can only be intensified by the specter of financial liability . . . . In addition, the resulting anger may be turned against the school, thus depriving it of a valuable alumnus or alumna in the future.

<sup>12</sup> See *id.* at 455-56. The committee sent a survey to the deans of 182 law schools asking whether the school provided a program intended to or resulting in improved graduates' bar passage, and 108 schools responded. *Id.* at 455. One-third offer a program intended to increase the bar passage rate of their graduates. *Id.* at 456. Another one-third reported that

A significant percentage report seeing a recent “noteworthy success or improvement” in bar passage rates,<sup>13</sup> and they attribute that improvement, at least partially, to these programs.<sup>14</sup> But these schools have not subjected their programs to rigorous statistical analysis. None has “engaged in a statistically verifiable analysis of whether the programs materially affect a student’s chance of passing the bar on a first attempt.”<sup>15</sup> As law schools struggle with the question of how to assist their students in preparing for the bar examination,<sup>16</sup> there is a gaping hole in the information necessary to make rational decisions: What works?

Our research starts to fill that gap. Our statistical analysis supports the conclusion that a bar support program has improved the University of Richmond School of Law’s bar passage rate. More specifically, the bar support program has led to a dramatic improvement for those students most at risk of failing the examination: the bottom half of the graduating class.<sup>17</sup>

Before presenting the statistical analysis, we first review both arguments for and against the bar examination and conclude that a bar examination is a reality, regardless of whether it accurately assesses an applicant’s ability to practice law.<sup>18</sup> We then briefly describe law school academic support pro-

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they provide a program that they believe improves bar performance, while not having been intended for that purpose. *Id.*

<sup>13</sup> *Id.* at 460 (Twenty-six percent “observed noteworthy success or improvement in bar passage rates in recent years.”).

<sup>14</sup> *Id.* at 456-57 (The schools credited their increased bar passage rates not just to the bar programs, but to “a number of factors, including improving general academic assistance, making students more aware of bar requirements and opportunities for preparation, increased rigor in the law school classroom, and heightened academic standards.”).

<sup>15</sup> *Id.* at 462; see, e.g., Leslie Yalof Garfield & Kelly Koeing Levi, *Finding Success in the “Cauldron of Competition:” The Effectiveness of Academic Support Programs*, 2004 BYU EDUC. & L.J. 1, 24 (2004) (reporting an improvement in the bar passage rate of ten percentage points based on the results of only five students); Adam G. Todd, *Academic Support Programs: Effective Support Through a Systemic Approach*, 38 GONZ. L. REV. 187, 212 (2003) (implying without empirical support that the ASP “result[ed] in an increase in the bar exam pass rates” by ten percentage points). See generally Jonathan L. Entin, *Scholarship About Teaching*, 73 CHI.-KENT L. REV. 847, 854-55 (1998) (critiquing the lack of rigorous empirical research in this area).

<sup>16</sup> The Chair of the American Association of Law Schools (AALS) Section on Academic Support recently recognized that “many [academic support professionals] . . . have been asked to develop and implement programs for the bar exam . . . .” Teresa Wallace, *News from the Section Chair: Academic Support Programs at AALS 2005*, THE LEARNING CURVE, (AALS Section on Academic Support), Spring 2004, at 2, 2 (announcing a program for deans and faculty entitled “It Takes a Village: A Multi-faceted Approach to Bar Passage”) at [http://www.law.umkc.edu/faculty/profiles/glesnerfines/asp/Learning\\_CurveSp04.pdf](http://www.law.umkc.edu/faculty/profiles/glesnerfines/asp/Learning_CurveSp04.pdf) (last visited Apr. 8, 2005).

<sup>17</sup> At the University of Richmond, prior to the bar support program’s implementation, the pass rate for the bottom half of the graduating class was 51.3% compared to an overall pass rate of 73.3% for all first-time takers. See *infra* Table 2, note 147 and accompanying text, and note 155. Virginia’s statewide pass rate for all first-time takers during the corresponding period (July 1997 through February 2001) was 72.8%. (Data provided by the Virginia Board of Bar Examiners and on file with the authors.).

<sup>18</sup> The AALS Committee on Bar Admissions recognized that the bar examination may not test an applicant’s legal ability, but concluded that those in legal academia cannot ignore the bar as “it remains a requirement for licensure.” Comm. on Bar Admissions, *supra* note 10, at 454; see also Amendments, *supra* note 6, at 248-49 (“We must accept for purposes of

grams, which increasingly include bar examination support.<sup>19</sup> For schools considering a bar support program, we next describe the components of the University of Richmond's bar support program – individual tutoring and a bar preparation class. Finally, we use several statistical tests<sup>20</sup> to evaluate the effects of the program on the students' initial bar passage rate. The results of our analysis supports the conclusion that a bar support program can, and in this case did, significantly improve bar passage rates. Especially given its modest cost, a bar support program offers an important solution to the perplexing problem of how to prepare at-risk students for the rigors of the bar examination. Importantly, a bar support program not only increases bar passage rates, it also improves graduates' abilities to reason, analyze, write, and manage their time. Because these skills are critical to those graduates just beginning their legal careers, a bar support program is an ideal solution.

## II. WHY THE BAR EXAM PASSAGE RATE MATTERS

Before the proliferation of law schools, students became lawyers in this country through apprenticeships and oral examinations of varying consistency.<sup>21</sup> These admission procedures were criticized as "elitist and contrary to

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today's decision [raising the passing score] that the bar exam format as it exists now is an accurate system of measuring competence, because we are not prepared to shift to a system of open admission without testing . . .").

<sup>19</sup> The authors do not suggest that a bar support program must, or even necessarily should, be part of a larger academic support program. There may be good reasons for organizing these programs differently. Todd, *supra* note 15, at 197-98; cf. Paul T. Wangerin, Book Review, *A Little Assistance Regarding Academic Assistance Programs: An Introduction to Academic Assistance Programs*, 21 J. CONTEMP. L. 169, 192 (1995) ("[A] one-size-fits-all model is fatally flawed.").

<sup>20</sup> We have used both proportions and chi-square tests, which are the most appropriate tests for the data available, to determine the *existence* of an association among variables. See *infra* notes 151, 168. Multiple regression analysis, which measures the *degree* of association between several independent variables and a dependent variable, was not appropriate for this analysis. Our data is measured on a nominal scale – classifications such as pass and fail – while multiple regression analysis requires data measured on at least an interval scale. See SIDNEY SIEGEL & N. JOHN CASTELLAN, JR., *NONPARAMETRIC STATISTICS FOR THE BEHAVIORAL SCIENCES* 20, 23-33, 224-25 (2d ed. 1988) (discussing the types of measurement data).

<sup>21</sup> A. Christopher Bryant, *Reading the Law in the Office of Calvin Fletcher: The Apprenticeship System and the Practice of Law in Frontier Indiana*, 1 NEV. L.J. 19, 19 (2001) ("Until the latter part of the nineteenth century, the apprenticeship system constituted the dominant mode of preparation for a career in the American practice of law."); James P. White, *Legal Education in the Era of Change: Law School Autonomy*, 1987 DUKE L.J. 292, 292 (1987) ("We are all familiar with the story of Thomas Jefferson, who obtained his legal education by reading law and by being articulated to a practicing lawyer."); Daniel R. Hansen, Note, *Do We Need the Bar Examination? A Critical Evaluation of the Justifications for the Bar Examination and Proposed Alternatives*, 45 CASE W. RES. L. REV. 1191, 1201 (1995) (detailing the rationale for a written examination). New Jersey required an oral bar examination in 1755. Paul T. Hayden, *Putting Ethics to the (National Standardized) Test: Tracing the Origins of the MPRE*, 71 FORDHAM L. REV. 1299, 1315 (2003). Oral examinations generally were not rigorous. *Id.* ("there was little more formality in being admitted to the bar than there is today in getting a library card from a public library") (quoting Charles P. Megan, *Some Commentaries on Bar Examination Methods*, 3 B. EXAMINER 269, 269 (1934)). Nor were oral examinations uniform. *Id.* at 1316-18 (reciting the "well-worn story" of Abraham Lincoln examining a bar applicant from his bathtub).

the ideals of democracy.”<sup>22</sup>

In the late 1800s, Christopher Langdell’s educational theories gained ground and law schools began to proliferate.<sup>23</sup> As a result, the diploma privilege<sup>24</sup> became a common admission practice, in part, to entice law students away from apprenticeships and into law school.<sup>25</sup>

However, in 1921, the American Bar Association (ABA) rejected the diploma privilege as the basis for admission to the bar.<sup>26</sup> In 1971, the ABA reaffirmed its position saying:

Bar examinations . . . encourage law graduates to study subjects not taken in law school. They require the applicant to review all he has learned in law school with a result that he is made to realize the interrelation of the various divisions of the law – to view the separate subject courses which he took in law school as a related whole. This the curriculum of most law schools does not achieve. Also it is the first time many of the applicants will have been examined by persons other than those who taught them, a valuable experience in preparation in appearing before a completely strange judge.<sup>27</sup>

Today, Wisconsin is the only state that has retained the diploma privilege.<sup>28</sup>

Justifications for a written bar examination and independent bar commissions abound: (1) legal consumers need to be protected from incompetent lawyers;<sup>29</sup> (2) law schools lack uniform standards and programs;<sup>30</sup> (3) law schools,

<sup>22</sup> Hansen, *supra* note 21, at 1195.

<sup>23</sup> *Id.* at 1198-1201.

<sup>24</sup> The diploma privilege is a system by which a law license is earned solely by graduation from law school. Beverly Moran, *The Wisconsin Diploma Privilege: Try it, You’ll Like it*, 2000 WIS. L. REV. 645, 646 (2000).

<sup>25</sup> Hansen, *supra* note 21, at 1201.

<sup>26</sup> *Id.* According to the American Bar Association in 1921, “graduation from a law school should not confer the right to admission to the bar, and . . . every candidate should be subjected to an examination by a public authority to determine his fitness.” Moran, *supra* note 24, at 657 (quoting Elihu Root et al., *Report of the Special Committee to the Section of Legal Education and Admissions to the Bar of the American Bar Association*, 46 REP. ANNUAL MEETING A.B.A. . 679, 688 (1921)).

<sup>27</sup> Hansen, *supra* note 21, at 1201 (citing THE NAT’L CONFERENCE OF BAR EXAM’RS, THE BAR EXAMINERS’ HANDBOOK 190 (Stuart Duhl ed., 2d ed. 1980)).

<sup>28</sup> *Id.* at 1202. West Virginia, Montana, and Mississippi most recently abandoned the diploma privilege in 1988, 1983, and 1981 respectively. Derrick Nunnally, *State’s Law Students Get Free Pass on Bar Exam: Despite Detractors, Age-Old Privilege Likely to Remain*, MILWAUKEE J. SENTINEL, Aug. 6, 2004, at B1. The diploma privilege does not enjoy unanimous support in Wisconsin. *Id.*; see also Dianne Molvig, 2003 Bench and Bar Survey: *Weighing in on the Issues Affecting the Legal Profession*, WIS. LAW., Nov. 2003, at 12, 14 (Sixty-three percent of Wisconsin lawyers surveyed disagreed with the statement: “Wisconsin should abandon the diploma privilege and require the taking of a bar exam by all new lawyers”). It is unclear, however, to what extent the opposition to Wisconsin’s diploma privilege relates to the disadvantage to Wisconsin lawyers who attended law school outside of the state. See Molvig, *supra*, at 14; Nunnally, *supra*.

<sup>29</sup> Erica Moeser, *Rethinking Assessments and Alternatives to Assessments from the Perspective of a Bar Examiner*, 20 GA. ST. U. L. REV. 1051 (2004) (“Licensing processes, including most significantly the test instruments that are administered, should exist solely to meet the objectives of consumer protection.”). According to Erica Moeser, President of the National Conference of Bar Examiners (NCBE), “We now have people spilling out of law schools who may not have made the bottom rung several years ago . . . . The hard work of the board of law examiners is drawing the line on what a candidate should know before you give them [sic] this powerful tool of a law license.” William C. Kidder, *The Bar Examination and the*

which have personal relationships with their students and a financial interest in their tuition, are not in an unbiased position to assess their graduates' competency;<sup>31</sup> and (4) the bar examination is a reliable,<sup>32</sup> valid,<sup>33</sup> cost-effective<sup>34</sup> means of evaluating a large number of applicants on a large number of tasks and topics.<sup>35</sup>

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*Dream Deferred: A Critical Analysis of the MBE, Social Closure, and Racial and Ethnic Stratification*, 29 LAW & SOC. INQUIRY 547, 551 (citing Scott Carlson, *Minnesota Officials Debate Passing Score for State Bar Exam*, KNIGHT-RIDDER TRIB. BUS. NEWS, June 4, 2000, available at 2000 WL 22619756); see also Malcolm Getz et al., *Competition at the Bar: The Correlation Between the Bar Examination Pass Rate and the Profitability of Practice*, 67 VA. L. REV. 863, 881 (1981); *supra* note 6.

HALT-An Organization of Americans for Legal Reform, a consumer organization that supports legal reform to promote affordable access to the civil legal system, supports a bar examination to protect the public from attorney incompetence. E-mail from Amar Purewal, HALT staff, to Emmeline P. Reeves (Oct. 26, 2004) (on file with the authors) ("HALT believes that [bar] exams administered to test competency are appropriate restrictions on entry to a profession.").

<sup>30</sup> Hansen, *supra* note 21, at 1202; see also *id.* at 1217-18 (discussing bar examination justification that academics should not be "the only ones determining admission to practice.").

<sup>31</sup> Thirty years ago, Dean Erwin Griswold wrote:

I do not exalt bar examinations, but I regard them as necessary and proper. They provide a stimulus to the law schools, a means of encouraging the law schools to do the best job they can in legal education and not to slough it off in any way simply because the numbers of their students have become so large.

White, *supra* note 21, at 301 (quoting Griswold, *In Praise of Bar Examinations*, 60 A.B.A. J., at 81, 81 (1974)).

<sup>32</sup> "Any alternative to the bar examination must meet the essential measurement criteria of reliability and validity." Moeser, *supra* note 29, at 1052; see, e.g., Kristin Booth Glen, *In Defense of the PSABE and Other "Alternative" Thoughts*, 20 GA. ST. U. L. REV. 1029, 1040 (2004) ("There is no question that the [existing bar examination] scores highly on reliability."). See generally Susan M. Case, *The Testing Column: Bar Examining and Reliability*, B. EXAMINER, Aug. 2003, at 23-26.

See *infra* notes 180-87 and accompanying text describing the scaling that is done on the bar examination to ensure that the level of difficulty remains constant from year to year. In other words, scaling ensures that it is neither easier nor harder to pass the bar examination in one year than in another.

<sup>33</sup> Marcia Kuechenmeister, *Admission to the Bar: We've Come a Long Way*, B. EXAMINER, Feb. 1999, at 28 (Content validity studies of the MBE in 1980 and 1992 generally established that "the MBE covers topics that are material to the practice of law and that the exam requires legal reasoning skills and knowledge." The NCBE made some changes to the topics tested on the MBE based on the 1992 study.).

<sup>34</sup> See Clark D. Cunningham, *Rethinking the Licensing of New Attorneys – An Exploration of Alternatives to the Bar Exam: Introduction*, 20 GA. ST. U. L. REV. vii, xxv (2003) (reporting concern about costs of alternatives to the bar exam); Mae Flennoy & Erik Huey, *Evolution of the Bar Exam: Three Generations of Bar Members Reflect on the Bar Exam, Then and Now*, NEV. LAW., Nov. 2003, at 19, 20 (quoting Judge Bert Goldwater: "[I]t is a heavy burden to grade 400 papers.").

<sup>35</sup> Maureen Straub Kordesh, *Reinterpreting ABA Standard 302(f) in Light of the Multistate Performance Test*, 30 U. MEM. L. REV. 299, 302 (2000) ("For all its deficiencies, the argument goes, there simply is not a better way to assess, in a reasonable time and measurable format, the competence of candidates to practice law."); Kuechenmeister, *supra* note 33, at 25 (multiple-choice tests permit testing on a "broad range of content knowledge.").

Despite these valid justifications, criticism of the bar examination is growing.<sup>36</sup> The oft-repeated concern is that the bar examination measures only a few of the legal skills that lawyers need to practice competently.<sup>37</sup> It<sup>38</sup> (1) overemphasizes memorization,<sup>39</sup> (2) tests an applicant's legal knowledge in

<sup>36</sup> Despite the recent outcry against the bar examination, the criticism actually is not new. See, e.g., Leon Green, *Why Bar Examinations?* 33 NW. U. L. REV. 908, 911 (1931) ("[T]here is not a single similarity between the bar examination process and what a lawyer is called upon to do in his practice, unless it be to give a curbstone opinion."); Society of American Law Teachers, *Statement on the Bar Exam*, 52 J. LEGAL EDUC. 446, 447 (2002) [hereinafter SALT] (citing Professor Norman Dorsen, a co-founder of SALT, who critiqued the bar examination in *Juris Doctor* in March 1971, around the time of the multistate examination's beginning); Jeffrey M. Duban, *The Bar Exam as a Test of Competence: The Idea Whose Time Never Came*, 63 N.Y. ST. B.J. 34 (1991) (responding to the New York State Bar Association's 1990 meeting addressing such issues as "Is (the Bar Exam) undue harassment or a necessary hurdle?"; "Whom does (the Bar Exam) exclude and whom does it protect?"; and "Should the Bar Exam be retained, modified or abandoned?"). Interestingly, Duban implies that criticism of the New York bar examination coincided with John Kennedy, Jr.'s failure to pass the bar on his first two attempts. *Id.* at 35; see also White, *supra* note 21, at 300-01 ("The bar examination . . . has been the subject of much criticism. Law school faculty, law school graduates, members of the judiciary, members of the bar, state legislators, and the press frequently and often vociferously express concern about various aspects of the bar examination.").

<sup>37</sup> The bar examination does not even attempt to screen for many of the skills identified in the MacCrate Report, including key skills such as the ability to perform legal research, conduct factual investigations, communicate orally, counsel clients, and negotiate. Nor does it attempt to measure other qualities important to the profession, such as empathy for the client, problem-solving skills, the bar applicant's commitment to public service work, or the likelihood that the applicant will work with underserved communities. SALT, *supra* note 36, at 447; see also Curcio, *supra* note 4, at 383-84 (indicating that the bar examination does not test the skills that lead to the most bar complaints against practicing attorneys, such as the ability to file documents.); Glen, *supra* note 4, at 1709 n.37.

<sup>38</sup> The bar examination is not one test, as its name might suggest. The NCBE produces four individual tests, the Multistate Professional Responsibility Examination (MPRE), the Multistate Bar Examination (MBE), the Multistate Essay Examination (MEE), and the Multistate Performance Test (MPT). Most states require some or all of these multistate tests, and many states also add a component that tests solely the law in that jurisdiction. See NAT'L CONFERENCE OF BAR EXAM'RS & A.B.A. SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, COMPREHENSIVE GUIDE TO BAR ADMISSIONS REQUIREMENTS 2005, 17-21 (Chart V & VI) (2005), [hereinafter COMPREHENSIVE GUIDE], [http://www.ncbex.org/pubs/pdf/031505\\_COMPGUIDE2005.pdf](http://www.ncbex.org/pubs/pdf/031505_COMPGUIDE2005.pdf) (last visited Apr. 8, 2005). For an argument that the MPT better measures a candidate's ability to practice law, see Kordesh, *supra* note 35, at 310-25 and Stella L. Smetanka, *The Multi-State Performance Test: A Measure of Law Schools' Competence to Prepare Lawyers*, 62 U. PITT. L. REV. 747 (2001).

<sup>39</sup> SALT, *supra* note 36, at 447. Many of those admitted to practice do not retain for very long the law they memorize for the bar. Accord Duban, *supra* note 36, at 39. And, even if they did remember, practicing attorneys should not rely on memory alone. Failure to conduct research could expose them "to judicial sanctions and malpractice claims." SALT, *supra* note 36, at 447. "Competent lawyers do not rely on what they remember from their bar review course when asked to advise a client. This is particularly true because half of the . . . Bar Exam, . . . the Multistate portion . . ., tests common law rules that are no longer, and in some instances never were, applicable . . ." Glen, *supra* note 4, at 1706 n.24 (quoting Comments of SALT in *In re Pet. of Fla. Bd. of Bar Exam'rs to Amend Rules of the Sup. Ct. Relating to Admissions to the Bar* (No. 98,689) (Fla. Apr. 6, 2000)). For a critique of SALT's position, see Suzanne Darrow-Kleinhaus, *A Response to the Society of American Law Teachers Statement on the Bar Exam*, 54 J. LEGAL EDUC. 442 (2004) (arguing that the bar exam does a good job of testing legal analytical skills).

"artificial ways;"<sup>40</sup> (3) tests law that is not applicable in the jurisdiction administering the test;<sup>41</sup> (4) ignores the fact that lawyers today specialize in specific areas of law;<sup>42</sup> and (5) requires applicants to spend thousands of dollars on preparation courses to cram doctrine into their heads and to learn "tricks" that help them answer the questions.<sup>43</sup> "The content of the review courses, and the necessity of taking the courses in order to pass, belie the argument that the bar examination is geared toward testing professional competence or aptitude in any meaningful way."<sup>44</sup> Critics further charge that the bar examination creates "false consumer confidence,"<sup>45</sup> allows law schools to avoid "responsibility for the competence of their graduates,"<sup>46</sup> influences "law school admission decisions,"<sup>47</sup> accords bar examiners "*de facto*, if not *de jure*, control over [law school] curriculum,"<sup>48</sup> and limits competition.<sup>49</sup>

More importantly,<sup>50</sup> the bar examination appears to negatively affect the diversity of the legal profession.<sup>51</sup> Historically, "black law graduates are four

<sup>40</sup> SALT, *supra* note 36, at 447. The MBE requires candidates to pick from four multiple choice answers and choose "the 'most correct,' or in some cases the 'least wrong.'" *Id.* at 448. "No practicing lawyer is faced with the need to apply a memorized legal principle to a set of facts she has never seen before and then choose, in 1.8 minutes, the 'most correct' of four given answers." *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*; Logan, *supra* note 4, at 1030.

<sup>44</sup> SALT, *supra* note 36, at 448.

<sup>45</sup> Glen, *supra* note 4, at 1709 n.37.

<sup>46</sup> *Id.* Perhaps somewhat ironically, some argue that law schools have abdicated their responsibility to legal consumers by refusing to fail incompetent students. *See supra* note 30.

<sup>47</sup> Glen, *supra* note 4, at 1709 n.37.

<sup>48</sup> *Id.*; but see *A Survey of Law School Curricula*, 2004 A.B.A. SEC. ON LEGAL EDUC. & ADMISSION TO THE BAR, 1992-2002, 17-18 (2004) (concluding that, with the exception of law schools recently approved by the ABA, "there is little statistical evidence to suggest that the [bar examination] drove law school decision-making of which upper division courses were required").

<sup>49</sup> Getz, *supra* note 29, at 865; Glen, *supra* note 4, at 1079 n.37.

The ABA, NCBE, and AALS jointly published a Code of Recommended Standards for Bar Examiners, which states that the purpose the bar examination "is to protect the public, not to limit the number of lawyers admitted to practice." COMPREHENSIVE GUIDE, *supra* note 38, at ix.

<sup>50</sup> We have identified only the tip of the iceberg of bar-examination controversy. Accommodation of disabled applicants is, for example, another current concern about the bar. *See, e.g.,* W. Ray Williams, *Hand-up or Handout? The Americans with Disabilities Act and "Unreasonable Accommodation" of Learning Disabled Bar Applicants: Toward a New Paradigm*, 34 CREIGHTON L. REV. 611 (2001).

<sup>51</sup> In its critique of the bar examination and its impact on minorities, SALT relied upon the widely circulated and often-cited 1998 report of the Law School Admissions Council (LSAC). SALT, *supra* note 36, at 449-50. "A six-year study commissioned by the Law School Admission Council indicates that first-time bar examination pass rates are 92 percent for whites, 61 percent for African-Americans, 66 percent for Native Americans, 75 percent for Latino/Latinas, and 81 percent for Asian-Americans." *Id.* (citing LINDA F. WIGHTMAN, LSAC NATIONAL LONGITUDINAL BAR PASSAGE STUDY 27 (1998) [hereinafter LSAC BAR PASSAGE STUDY]). *See also* Glen, *supra* note 4, at 1712 (noting that the LSAC BAR PASSAGE STUDY, *supra*, confirmed that the bar passage rate for minorities is substantially lower than that for non-minorities); Merritt, *supra* note 4, at 930 (citing Stephen P. Klein & Roger Bolus, *The Size and Source of Differences in Bar Exam Passing Rates Among Racial and*



times more likely than white graduates to fail the bar examination on the first taking.”<sup>52</sup> Bar passage rates of Native, Mexican, and Asian Americans are also lower than those of non-minorities.<sup>53</sup> Not only do minority students have a more difficult time passing the bar, their “persistence”<sup>54</sup> rate is lower.<sup>55</sup> Students with low LSAT<sup>56</sup> scores also struggle to pass the bar.<sup>57</sup>

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*Ethnic Groups*, B. EXAMINER, Nov. 1997, at 8). The LSAC has had its critics also. Glen, *supra* note 32, at n.172.

This racial disparity has been challenged, unsuccessfully, in the courts. *See, e.g.*, Tyler v. Vickery, 517 F.2d 1089 (5th Cir. 1975). In Tyler, minority applicants argued that the Georgia bar examination violated Title VII and the Equal Protection Clause because black applicants failed the examination at a higher rate than white applicants. The court acknowledged that “it is undisputed that the Georgia bar examination has a greater adverse impact on black applicants than on whites and has never been the subject of a professional validation study, [thus] acceptance of appellants’ suggested standard of review [from Title VII] would inexorably compel the conclusion that the examination is unconstitutional.” *Id.* at 1096. The court held, however, that Title VII, which prohibits discrimination in employment, did not apply because the Board of Bar Examiners is not an employer as required by the statute. *Id.* Instead, the court held that the rational relationship test applied. *Id.* at 1099-1101. The court found no constitutional violation despite the disparate impact on minorities. *Id.*

Additionally, the current controversy over raising the passing score on the bar examination has largely focused on the impact on minorities. *See, e.g.*, Amendments, *supra* note 6, at 252 (Pariante, J., dissenting). The dissent was “very concerned about the potential adverse effect this change could have on minorities.” *Id.* The majority of the Florida Supreme Court rejected this concern as unsupported by the evidence and concluded that “the only people disadvantaged by an increase in the pass/fail line would be those who are not qualified to become practicing members of The Florida Bar in the first place . . .” *Id.* at 250. The press quoted Dean Joseph Harbaugh of Nova Southeastern University School of Law as saying, “If the goal is to continue to diversify a profession in Florida that is about 90 percent white, increasing the score on the bar exam is unlikely to achieve that goal.” Cunningham, *supra* note 34; *see also* The Comms. on Legal Educ. & Admission to the Bar, *In Opposition to the Board of Law Examiners’ Proposal to Increase the Passing Score on the New York Bar Examination*, 58 RECORD 97, 102-05 (2003) (objecting to the proposal to raise the cut score, in part, because of the “disparate impact” on minorities); Thomas Adcock, *NY Bar Exam Passing Score to Rise Despite Widespread Opposition*, N.Y. LAW. (Dec. 16, 2004) (reporting that the New York bar examiners’ decision to raise the passing score could be challenged in litigation alleging racial or economic discrimination), at <http://www.nylawyer.com/news/04/12/121604d.html>. For an argument that “the psychometric research sponsored by the NCBE consistently minimizes and obscures the disparate impact and unfairness of the bar exam for people of color,” *see* Kidder, *supra* note 29, at 547.

<sup>52</sup> Glen, *supra* note 32, at 385 (citing the LSAC BAR PASSAGE STUDY, *supra* note 51); *see* Comm. on Bar Admissions, *supra* note 10, at 454 (citing Dannye Holley & Thomas Kleven, *Minorities and the Legal Profession: Current Platitudes, Current Barriers*, 12 T. MARSHALL L. REV. 299, 332 (1987); WIGHTMAN, *supra* note 51, at viii (eventual pass rate for white participants was 96.7%; eventual pass rate for all study participants of color was 84.7%).

<sup>53</sup> “The [LSAC] found that first-time pass rates were 92% for whites, compared to 61% for African Americans, 66% for Native Americans, 75% for Mexican Americans/Hispanics, and 81% for Asian Americans.” Curcio, *supra* note 4, at 390.

<sup>54</sup> Persistence rate is the rate at which applicants who fail the bar examination on their first attempt re-take the bar examination.

<sup>55</sup> Persistence rates are higher for white applicants than for minorities. Curcio, *supra* note 4, at 390. “[A] study noted that 2% of white and Asian American examinees did not make a second attempt at the bar examination, as compared to 5% of Latino/Latina and 11% of African American examinees.” *Id.* (citing LSAC BAR PASSAGE STUDY, *supra* note 51).

<sup>56</sup> Minority students generally have lower LSAT scores than white students. Glen, *supra* note 4, at 1715 n.66 (citing William C. Kidder, Comment, *Does the LSAT Mirror or Magnify*

Finally, students with fewer financial resources have greater difficulty passing the bar because they cannot afford the expensive bar review courses,<sup>58</sup> which have been shown to increase a student's likelihood of passing the examination.<sup>59</sup> Moreover, poorer students often do not have the financial luxury to study for two months without an income.<sup>60</sup> Thus, non-white students, students with low LSAT scores, and poorer students are severely disadvantaged when they sit for the bar examination.<sup>61</sup>

In response to these concerns, the current academic literature proposes numerous alternatives to decide who is competent to practice law.<sup>62</sup> Some examples include a return to the diploma privilege,<sup>63</sup> a practical-skills-teaching term,<sup>64</sup> a public service alternative, and a portfolio option.<sup>65</sup> But no consensus

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*Racial and Ethnic Differences in Educational Attainment?: A Study of Equally Achieving "Elite" College Students*, 89 CAL. L. REV. 1055, 1074 ("African Americans trail their equally accomplished White classmates by 9.2 points on the LSAT, with Chicanos and Latinos 6.8 points behind, Native Americans 4.0 points lower, and Asian Pacific Americans 2.5 points behind . . . the Black-White gap of 9.2 points is greater than a one standard deviation difference in the national applicant pool.")).

<sup>57</sup> Comm. on Bar Admissions, *supra* note 10, at 454 (citing Joan Howarth, *Teaching in the Shadow of the Bar*, 31 U.S.F. L. REV. 927, 928 (1997) (citing Cecil J. Hunt II, *Guests in Another's House: An Analysis of Racially Disparate Bar Performance*, 23 FLA. ST. U. L. REV. 721, 766-67 (1996))); Glen, *supra* note 4, at 1701 n.13 ("Not surprisingly, bar passage correlates to LSAT scores.") (citing LSAC BAR PASSAGE STUDY, *supra* note 51, at 37-38).

<sup>58</sup> Curcio, *supra* note 4, at 391.

<sup>59</sup> Comm. on Bar Admissions, *supra* note 10, at 454 (citing Mark Hyman, *West Gives Bar/Bri Run for Bar-Review Market*, BALT. SUN, Sept. 9, 1995, at 13C); see also Thomas Adcock, *Strong Opposition to Raising Bar Pass Score Voiced by Several Groups*, N.Y. LAW. (Feb. 13, 2003) (noting disproportionate impact on minorities and the working poor), at <http://www.nylawyer.com/news/03/02/021403b.html>; cf. Curcio, *supra* note 4, at 382 (claiming that standardized tests like the bar examination measure one's socioeconomic background rather than competency).

<sup>60</sup> See Glen, *supra* note 4, at 1704.

<sup>61</sup> See Curcio, *supra* note 4, at 382 ("[The MBE] is most likely to be weighted in favor of white bar applicants from affluent backgrounds . . .").

<sup>62</sup> See, e.g., *Id.* (describing, among other alternatives, an examination based on the Canadian "articling" or apprentice model); Glen, *supra* note 4 and Glen, *supra* note 32 (explaining New York's proposed public service alternative); Moran, *supra* note 26, at 676. Students at Arizona State College of Law are developing an alternative based on postgraduate work. Glen, *supra* note 4, at 1701 n.15; see also Glen, *supra* note 4, at 1719 (describing California's experiment in the late 1970s to implement an examination similar to the MPT).

<sup>63</sup> Such a system would grant licenses to graduates of all of a state's ABA-accredited law schools. Wisconsin uses this system. SALT, *supra* note 36, at 451.

<sup>64</sup> This proposal is similar to a system used in Canada. *Id.*

<sup>65</sup> *Id.* Additionally, in early 2004, Georgia State University College of Law, together with Georgia State University Law Review, hosted a symposium on alternatives to the bar examination. Participants discussed various alternatives, including public service alternatives and a portfolio option. Articles about the various proposals can be found in the summer 2004 Georgia State University Law Review. Cunningham, *supra* note 34; Lawrence M. Grosberg, *Standardized Clients: A Possible Improvement for the Bar Exam*, 20 GA. ST. U. L. REV. 841 (2004); David Stern, M.D., Ph.D., *Outside the Classroom: Teaching and Evaluating Future Physicians*, 20 GA. ST. U. L. REV. 877 (2004).

Dean Glen presented the public service alternative explained fully in Glen, *supra* note 4 and Glen, *supra* note 32. Additionally, students at the University of Arizona presented their postgraduate alternative. Sally Simpson & Toni M. Massaro, *Students with "CLAS": An Alternative to Traditional Bar Examinations*, 20 GA. ST. U. L. REV. 813 (2004). Also dis-

has been reached as to the most appropriate alternative,<sup>66</sup> and consensus seems unlikely in the near future.<sup>67</sup>

And while academic criticism of the bar examination grows, state bar examiners continue to defend the necessity of a bar examination.<sup>68</sup> Indeed, the current debate in some jurisdictions is not whether to jettison the examination, but whether to raise the passing score.<sup>69</sup> In recent years, at least fourteen states

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cussed were systems of licensure in other countries. Nigel Duncan, *Gatekeepers Training Hurdles: The Training and Accreditation of Lawyers in England and Wales*, 20 GA. ST. U. L. REV. 911 (2004); Peggy Maisel, *An Alternative Model to United States Bar Examinations: The South African Community Service Experience in Licensing Attorneys*, 20 GA. ST. U. L. REV. 977 (2004); Thuli Mhlungu, *Educating and Licensing Attorneys in South Africa*, 20 GA. ST. U. L. REV. 1005 (2004); see also, Jayne W. Barnard & Mark Greenspan, *Incremental Bar Admission: Lessons from the Medical Profession*, 53 J. LEGAL EDUC. 340 (2003) (suggesting a licensing model patterned after the medical profession).

See also Rebecca Luczycki, "Will There be a Bar Exam Next Year?" NAT'L JURIST, Mar. 2004, at 40, 40. Additionally, legal educators, practicing attorneys, bar examiners, and judges recently formed the Joint Working Group on Legal Education and Bar Admissions to address the current controversies surrounding the bar examination. In September of 2004, the group hosted a national conference in Chicago to evaluate the effectiveness of the bar examination. (Conference materials on file with the authors.).

<sup>66</sup> See Moeser, *supra* note 29, at 1052-53. Moeser criticizes many of the current proposed alternatives as unreliable and unworkable, but suggests that "it may be time to think in terms of a staging of the assessments such that candidates are tested . . . on substantive matters after their exposure to core areas of law – with testing of more skills-related competencies toward the end of their educational experience." *Id.* at 1054. She also identifies "a need for greater efficiencies in grading . . . [to reduce] the loss of time . . . candidates . . . wait for their results." *Id.* at 1054-55.

<sup>67</sup> Furthermore, the proposed alternatives do not seem to address completely all of the current concerns about the bar examination, while simultaneously presenting a cost-effective way of testing attorney competence.

A related issue is that each state administers its own examination; there is no national examination. Thus, attorneys who move to another state often have to take a second, third, or even, in one of our cases, a fifth examination. "[T]he legal profession has gone to some lengths to discourage license portability. . . ." Barnard, *supra* note 65, at 353; see, e.g., *In re Petition of Avery*, 358 P.2d 709, 710 (Haw. 1961) (per curiam) (denying applicant's request for admission to the bar after applicant failed the examination despite the fact that the applicant practiced for approximately fifty years in another state). While it is true that some states have recently adopted waive-in provisions or developed separate exams for attorneys who are licensed in other states, a national solution is needed. For a comprehensive listing of all the states and their comity procedures, see COMPREHENSIVE GUIDE, *supra* note 38, at 25-27 (Chart VIII); accord Erica Moeser, *President's Page*, 73 B. EXAMINER, Feb. 2004, at 1, 5 (asserting that "[i]t is time to reconsider a national bar examination.").

<sup>68</sup> See Amendments, *supra* note 6, at 247-48 (reiterating the importance of the bar examination to protect members of the public from the "unacceptable risks" posed by incompetent attorneys, but expressing the court's openness to "considering additional testing methodologies and expanding the testing required for admission . . .") (emphasis added); accord, Corneille, *supra* note 4, at 620 ("[T]he bar admission community is committed to developing and promoting new techniques and new tools to promote professionalism. Those tools will only be effective if the practicing bar and the law schools are interested in and supportive of maintaining high standards in bar admission.").

<sup>69</sup> The Florida Supreme Court recently approved its Board of Bar Examiners' controversial decision to increase the score required to pass the Florida bar examination. Amendments, *supra* note 6, at 245-46. The proposal attracted vigorous opposition from a wide cross-section of the legal community, including five deans and one associate dean of Florida law schools, the Florida Chapter of the ABA, SALT, and the Florida State Conference of the

have done so.<sup>70</sup> The effect of raising the cut score will be felt strongly by our graduates, especially those in the bottom half of the class. Thus, as states “‘race to the top’”<sup>71</sup> to raise the pass/fail line, law schools should be considering any cost-effective program that will help these students meet the challenge of the bar examination.

As the AALS Section on Legal Education and Admission to the Bar recognizes, the bar examination is a reality that law graduates must face, regardless of whether it reliably determines who is – and who is not – competent to practice law.<sup>72</sup> So although the bar examination’s efficacy as a screening

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NAACP, among others. *Id.* at 246; see Thomas A. Pobjecky, *The Long and Winding Road: Determining the Pass /Fail Line for Florida’s Bar Examination*, B. EXAMINER, May 2003, at 25, 30 (characterizing the debate as “heated”); Laurie Cunningham, *Raising the Bar*, BROWARD DAILY BUS. REV., Mar. 26, 2003, at A1 (noting the “strong objections” to the proposal to raise the passing score). Minnesota’s bar examiners recently withdrew a proposal to raise its passing score after meeting “strong opposition.” Rebecca Luczycki, “Who’s Got the Toughest Bar Exams?” NAT’L JURIST, Feb. 2002, at 33, 36; see also Susan Saulny, *Case for Tougher Bar Exam Prompts a Forceful Rebuttal*, N.Y. TIMES, Apr. 13, 2003, at 32 (reporting on the “chorus of opposition” to an increase to the cut score for the New York bar examination).

The debate over the recent efforts by many states to raise the passing score has ignited the controversy over the examination itself. See, e.g., Cunningham, *supra* note 34, at ix (opponents complain that the bar fails to test the ability to practice law); Merritt, *supra* note 4, at 949-68; Amendments, *supra* note 6, at 249 (“Criticism of the current testing method is inapposite” to the issue of the appropriate pass/fail line.).

<sup>70</sup> According to one commentator:

States that have raised their passing score include Arizona, Georgia, Illinois, Kansas, Maine, Missouri, Nebraska, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, Texas, and Wisconsin. Other states have implemented more complex changes that may have had the effect of making bar passage more difficult. Only one state, New Mexico, plainly lowered its passing score during the 1990s. Two others, Mississippi and New Jersey, both raised and lowered their passing scores with the net effect unclear. Florida and Minnesota currently are considering proposals to raise their passing scores, while Pennsylvania (which raised its score earlier in the decade) is considering a possible decline.

Merritt, *supra* note 4, at n.1. Subsequently, Florida adopted the proposal to raise its passing score, and the Minnesota bar examiners abandoned the proposal to raise the cut score on the Minnesota bar exam. See *supra* note 69. Pennsylvania raised its overall passing score but eliminated the separate passing scores for the individual sections of the bar examination as of the July 2001 exam. *In re: Standards for Passing the Pennsylvania Bar Examination*, No. 246 (Pa. 2000) (per curiam), <http://www.courts.state.pa.us/oppo-sting/supreme/out/246spt.1.pdf>. Maine lowered its cut score in 2004. Compare NAT’L CONFERENCE OF BAR EXAM’RS & A.B.A. SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, COMPREHENSIVE GUIDE TO BAR ADMISSIONS REQUIREMENTS 2004, Chart VII (2004), with NAT’L CONFERENCE OF BAR EXAM’RS & A.B.A. SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, COMPREHENSIVE GUIDE TO BAR ADMISSIONS REQUIREMENTS 2003, Chart VII (2003). Further, the New York bar examiners recently increased the passing score on the New York bar examination. See Press Release, Board of Law Examiners, <http://www.nybarexam.org/press.htm> (Sept. 24, 2004).

<sup>71</sup> Saulny, *supra* note 69 (quoting Professor Lawrence M. Grosberg); see also Press Release, Board of Law Examiners, *supra* note 70. In explaining the decision to increase the passing score, the New York bar examiners noted that New York’s standard was lower than that of thirty other states. *Id.*

<sup>72</sup> See Comm. on Bar Admissions, *supra* note 10, at 452.

device for the legal profession is debatable,<sup>73</sup> it would be unrealistic to think that the bar examination is going away anytime soon.<sup>74</sup>

Because the bar examination is here to stay, the success of law schools will continue to be measured, in part, by the ability of their graduates to pass bar examinations.<sup>75</sup> Although law schools legitimately should not teach to the bar examination,<sup>76</sup> “[they] must be concerned with bar passage rates.”<sup>77</sup> Bar passage rates are one factor considered in *U.S. News & World Report*’s evaluation of law schools,<sup>78</sup> and passage rates are relevant to ABA accreditation.<sup>79</sup>

<sup>73</sup> See Corneille, *supra* note 4, at 612-13 (discussing how the bar examination, and specifically the MPT, can improve professionalism); Erica Moeser, *President’s Page*, B. EXAMINER, Nov. 2002, at 4-5 (“[T]here needs to be a meaningful screen and the fairest and most effective screen continues to be the bar examination.”); see also Glen, *supra* note 32, at 370 (“[T]he bar examination’s main purpose is to ascertain minimum competence to practice law, and thus protect the consumer from incompetence.”); Alice E. Richmond, *Letter from the Chair*, B. EXAMINER, Feb. 2004, at 2 (refuting an assertion that the bar examination is “at best irrelevant to the practice of law and an embarrassment of a test” and the general perception among law deans and faculty that it “does not adequately test the skills that lawyers need in the practice of law”). In response to Dean Glen’s clerking proposal, see Judge Ralph Adam Fine, *Bar Exam Has Backers*, A.B.A. J., Apr. 2003, at 15, 15 (letter to editor) (“A chrysalis will never become a butterfly if it does not struggle to emerge from the cocoon. Slitting open the cocoon to permit easy exit deprives the butterfly of its strength to survive, and it will die. Letting lawyers practice without the struggle of a bar exam hurts not only the lawyers but, more important, those whom they will someday represent.”).

<sup>74</sup> See, e.g., Amendments, *supra* note 6, at 248-49 (“We must accept for purposes of today’s decision [raising the passing score] that the bar exam format as it exists now is an accurate system of measuring competence, because we are not prepared to shift to a system of open admission without testing . . .”).

<sup>75</sup> The ABA requires law schools to report the number of graduates who sat for and passed the bar examination on their first attempt. See ABA Section of Legal Educ. & Admission to the Bar, 2004 ABA Annual Questionnaire Part I, section 12 [hereinafter ABA Questionnaire], <http://www.abanet.org/legaled/questionnaire/questionnairefiles/generalinfo-formation.doc> (last visited Apr. 8, 2005). “Many believe that this sole reliance on first-time passage is deceptive and unfairly disadvantages law schools, especially those with substantial numbers of non-majority and/or poor students who tend to pass on their second or third attempt.” Glen, *supra* note 4, at n.19.

<sup>76</sup> SALT, *supra* note 36, at n.4.

<sup>77</sup> Comm. on Bar Admissions, *supra* note 10, at 455.

<sup>78</sup> See Glen, *supra* note 4, at 1705; SALT, *supra* note 36, at 449. Regardless of the merits of the ranking of law schools, it is clear that prospective students rely on such rankings in choosing a law school. See generally News Release, Am. Ass’n of Law Schs., at <http://www.aals.org/ranknews.html> (Feb. 18, 1998) (urging *US News & World Report* to stop publishing its annual “misleading and dangerous” rankings).

Although some commentators claim that law faculty have ignored the bar examination, see, e.g., Glen, *supra* note 4, at 1702 and Dale Whitman, *The President’s Message: Thinking About Bar Admissions*, AALS Newsletter (Aug. 2002), professors and administrators at many law schools are feeling the pressure to improve bar passage rates, and the bar is now at the forefront of legal educators’ attention. Cabrera, *supra* note 4, at 1174; Glen, *supra* note 32, at 349-50; see also Wallace, *supra* note 16, at 2.

<sup>79</sup> The ABA standards reflect the importance of bar passage rates in accreditation. Specifically, the ABA directs that a law school “shall maintain an educational program that prepares its graduates for admission to the bar . . .” ABA, Sect. on Legal Educ. & Admission to the Bar, STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS, 2004-05, § 301(a), [hereinafter ABA STANDARDS], <http://www.abanet.org/legaled/standards/standards.html> (last visited Apr. 11, 2005). According to the ABA, “Among the factors to be considered in assessing the extent to which a law school complies with [Standard 301(a) is]

More importantly, law schools should be concerned with the very real costs suffered by graduates who do not pass the bar examination.<sup>80</sup> Thus, in addition to focusing on innovative alternatives to the bar examination, law schools should work to improve their graduates' ability to pass the bar examination. With many states raising the score necessary to pass the bar examination, it is more important than ever for law schools to develop effective programs to assist their graduates on the bar examination.<sup>81</sup>

Programs aimed at improving bar passage rates already exist and are generally included within law school academic support programs. While the focus of academic support programs varies, many are beginning to include a bar preparation component.<sup>82</sup> The University of Richmond School of Law is one such school.

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... the bar passage rates of its graduates." *Id.* Standard 501(b) provides, "A law school shall not admit applicants who do not appear capable of satisfactorily completing its educational program and being admitted to the bar." *Id.* at § 501(b).

According to one commentator:

The ABA frequently applies these provisions to deny accreditation if the law school's bar pass rate for first-time takers is either low in absolute terms or lower than that of accredited schools in the state. For example, in denying accreditation to Thomas Jefferson School of Law, the ABA focused . . . on their [graduates'] rate of passing the bar. The ABA ruled that the school's bar pass rate was both too low in absolute terms and too low in comparison to that of California's accredited schools . . . . Likewise, in denying accreditation to John Marshall, the ABA cited. . . the students' low bar pass rates . . . . Similarly, the ABA's threat to deny reaccreditation to Texas Southern cited the school's first-time bar pass rate of 52 percent.

George B. Shepherd, *No African-American Lawyers Allowed: The Inefficient Racism of the ABA's Accreditation of Law Schools*, 53 J.L. & EDUC. 103, 116-17 (2003); see SALT, *supra* note 36, at 449 ("A high bar pass rate bodes well for alumni contributions, is perceived to play a role in *U.S. News and World Report* rankings, brings a sense of satisfaction to the faculty, eases students' fears about their own ability to pass the examination, and makes it easier to attract new students."); S. A. Miller, *UDC Law School Misses Full Credentials*, WASH. TIMES, June 24, 2003 (reporting that the ABA withheld full accreditation from UDC Law School "because of the low number of UDC law school graduates who pass the bar exam on the first try"), available at <http://washingtontimes.com/metro/20030623-114249-4126r.htm>.

<sup>80</sup> Students who fail to pass the bar suffer financially and emotionally. Comm. on Bar Admissions, *supra* note 10, at 455; accord Glen, *supra* note 4, at 1704 (noting the "misery and cost" of the bar examination). The process of studying for the bar exam and waiting for the results is similarly not pleasant. See Toni M. Massaro, *Foreword* to Simpson, *supra* note 65, at 814 ("For many . . . studying for the bar becomes a surreal experience in which 'ordinary' people – who watch television, go to movies, and continue their normal lives – now appear to lead alien, privileged existences that the bar sufferers envy.").

<sup>81</sup> In the midst of the angst over New York's recent decision to increase the passing score on its bar exam, the New York Board of Law Examiners noted its commitment to work with law schools to help applicants meet the new higher score. Press Release, Board of Law Examiners, *supra* note 70; see Thomas Adcock, *Groups Decry Increase in Bar Exam Cut Score*, N.Y. L.J., Oct. 1, 2004, at 1 (noting strong objection from the legal community in New York and reporting on potential challenges to the bar examiners' decision to raise the passing score).

<sup>82</sup> Comm. on Bar Admissions, *supra* note 10, at 456.

## III. ACADEMIC SUPPORT PROGRAMS

## A. Nationwide

Most law schools nationwide offer academic support programs<sup>83</sup> (ASPs).<sup>84</sup> Although the goals differ somewhat among programs, ASPs generally are designed to enhance student academic performance during law school and to increase student retention.<sup>85</sup> The type and level of academic assistance provided to students, however, vary significantly among law schools.<sup>86</sup> Typical ASP offerings include summer orientation programs, individual tutoring, first-year skills classes, substantive review sessions, and faculty-led study groups.<sup>87</sup>

In addition to assistance during law school, many ASPs are now focusing on supporting students in their efforts to pass the bar examination.<sup>88</sup> In fact, an increasing emphasis on bar passage seems to be a trend in the academic support field.<sup>89</sup> But while many law schools are developing programs designed to

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<sup>83</sup> For a thorough review of the history of academic support programs, see Garfield & Levi, *supra* note 15, at 2 n.8.

<sup>84</sup> See *id.* at 3 (“[T]here has been a proliferation of A[cademic] S[upport] P[rogram]s. [M]ost law schools have invested significant resources in developing and offering . . . programs.”). According to a recent survey of 151 ABA-accredited law schools, 137 or 90.7% of the schools responding to a survey reported having some form of an academic support program. Richard Cabrera & Stephanie Zeman, *Law School Academic Support Programs – A Survey of Available Academic Support Programs for the New Century*, 26 WM. MITCHELL L. REV. 205, 208 (2000); see also Kevin H. Smith, *Program Evaluation: Defining and Measuring “Success” in Academic Support Programs*, 2003 L. REV. MICH. ST. U. DET. C.L. 177, 178 (2003).

<sup>85</sup> See, e.g., LAW SCH. ADMISSION COUNCIL, A PRACTICAL GUIDE FOR LAW SCHOOL ACADEMIC ASSISTANCE PROGRAMS 1-3 (2000) [hereinafter A PRACTICAL GUIDE FOR LAW SCHOOL ACADEMIC ASSISTANCE PROGRAMS].

<sup>86</sup> See e.g., Emmeline M. Paulette, *An Introduction to the Mission and Methodology of Academic Support*, EDUC. & PRAC. (Va. State Bar/Section on Educ. of Lawyers, Richmond, Va.), Spring 2001, at 3, 3 (“There are as many models as examples of law school academic support programs.”); see generally A PRACTICAL GUIDE FOR LAW SCHOOL ACADEMIC ASSISTANCE PROGRAMS, *supra* note 85, at 1-12; Garfield & Levi, *supra* note 15, at 7-11.

<sup>87</sup> See A PRACTICAL GUIDE FOR LAW SCHOOL ACADEMIC ASSISTANCE PROGRAMS, *supra* note 85 *passim*; see also LSAC, AN INTRODUCTION TO ACADEMIC ASSISTANCE PROGRAMS (1992).

<sup>88</sup> Todd, *supra* note 15, at 189. Some bar support programs are run solely by the law school; others are administered jointly with commercial bar preparation organizations. See Comm. on Bar Admissions, *supra* note 10, at 461. The program components also vary. Some programs include lecture on doctrine and test-taking strategies, some offer individual tutoring, some give financial assistance, and some provide child-care. *Id.* at 460. For a detailed description of other bar support programs, see Cabrera, *supra* note 4, (William Mitchell College of Law) and Todd, *supra*, note 15, at 204-12 (Chase College of Law).

<sup>89</sup> The Chair of the AAL Section on Academic Support recently recognized that “many [academic support professionals] . . . have been asked to develop and implement programs for the bar exam . . . .” See Wallace, *supra* note 16, at 2 (announcing session to consider what schools are doing to increase bar passage rates at the 2005 AALS Annual Meeting). In addition to the 2005 program focusing on bar passage, the Section on Academic Support’s program at the 2001 annual AALS meeting and an academic support workshop in June of 2001 focused on the bar examination and bar passage. In July of 2003, LSAC sponsored a conference entitled, “Bar Support Programs.”

improve their graduates' bar passage performance,<sup>90</sup> no one has yet confirmed the effectiveness of these programs.<sup>91</sup>

### B. *University of Richmond's Bar Support Program*

In the fall of 1999, the University of Richmond School of Law secured funding to establish an ASP. The administration and faculty had several goals for the program. They believed that the law school should have a program dedicated to assisting students experiencing academic difficulty, and the school hoped that such a program would improve academic performance during law school, particularly among struggling students. But concern about the bar passage rate was the primary impetus for implementing an ASP.<sup>92</sup>

The Law School then created a new, non-tenure track faculty position ("academic support professor") and conducted a national search to fill the position. The academic support professor began at the law school in July 2000 with a charge: "do something to improve our bar passage rate."<sup>93</sup>

Over the past four years, the University of Richmond's academic support program has developed two separate, but related,<sup>94</sup> components: first-year support<sup>95</sup> and bar examination support.<sup>96</sup> This article focuses on the bar examination support component, which includes a bar preparation class and individual tutoring.

#### 1. *Bar Preparation Class*

The University of Richmond offers a Supplemental Bar Preparation Course ("bar preparation class"),<sup>97</sup> which is available to third-year students in both the fall and spring semesters. The class provides students with an inten-

<sup>90</sup> See generally Comm. on Bar Admissions, *supra* note 10, at 456.

<sup>91</sup> *Id.* at 462; Garfield & Levi, *supra* note 15, at 3 (citing Kristine S. Knaplund & Richard H. Sander, *The Art and Science of Academic Support*, 45 J. LEGAL EDUC. 157, 158 (1995)); Smith, *supra* note 84, at 178-79.

<sup>92</sup> A law school's bar passage rate often is an issue of great concern to alumni and to current and prospective students because it affects a school's position in *U.S. News & World Report's* ranking of American law schools. See *supra* note 78.

<sup>93</sup> In the years preceding the ASP's implementation, Richmond's pass rate for first-time takers averaged 73.3%. See *infra* note 155. The statewide pass rate for all first-time takers in Virginia was 72.8%. See *supra* note 17.

<sup>94</sup> The ASP at the University of Richmond strives to improve students' academic performance during law school and on the bar examination. "Those two goals complement each other well because of the thoroughly documented correlation between law school performance and first-time bar passage." Paulette, *supra* note 86, at 3.

<sup>95</sup> The first-year support includes a voluntary, non-credit class that meets regularly during first and second semesters and individual academic counseling. For a more detailed description of the first-year support program see *id.* It is possible that providing assistance early on to students in academic difficulty also positively affects bar passage rates; we have not tested this hypothesis.

<sup>96</sup> Professor Reeves also teaches an upper-level elective course as part of the Academic Success Program.

<sup>97</sup> The bar preparation class is based largely on a similar program designed and taught by Professor Richard Litvin at Quinnipiac University School of Law. Professor Reeves gratefully acknowledges Professor Litvin's indispensable assistance in implementing a successful bar support program at the University of Richmond.



sive substantive review of six subjects,<sup>98</sup> and it teaches test-taking skills and offers practice multiple-choice and essay exams. Because it is offered during the academic school year, the bar preparation class encourages third-year students to begin reviewing substantive material and improving test-taking skills for the bar examination much earlier than do traditional commercial bar review courses, which typically begin after graduation.

The bar preparation class begins the first week of each semester and runs approximately twelve weeks. The class is designed for students' final semester of law school. Because the University of Richmond graduates a small percentage of its students in December, the bar preparation class is offered in the fall semester for December graduates who plan to take the bar examination in February. May graduates are encouraged, but not required, to participate in the class during the spring semester rather than the fall semester. To increase student participation, two sections – one on a weekend day and the other on a weeknight – are offered during the spring semester. The students do not receive credit for attending the preparation course.<sup>99</sup>

The class meets once a week for approximately three hours. Each class begins with a two-hour, videotaped review of a substantive area.<sup>100</sup> The second portion of each class is devoted to multiple-choice and essay-writing practice and instruction on test-taking techniques. Following the lecture portion of the class, students answer, under timed conditions, twelve to fifteen Multistate Bar Exam questions<sup>101</sup> and one to two essay questions pertaining to the substantive lecture. After the mock examination, the academic support professor reviews the pertinent substantive law for each question and explains why certain distractor answers are not the best choice. Moreover, the lecture incorporates test-taking strategies into the discussion of the specific questions.

The bar preparation class does not focus specifically on the Virginia bar examination. Rather, the goals are to provide substantive review and to teach test-taking skills for nearly any state's bar examination. Over the past four years, approximately twenty percent of the regular attendees did not take the bar examination in Virginia.<sup>102</sup>

The bar preparation class teaches examination content and skills in a cost-effective setting. One professor can work with a nearly unlimited number of students. It is, thus, a useful vehicle for a bar support program.

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<sup>98</sup> Those subjects are Constitutional Law, Contracts, Sales, Real Property, Criminal Law, and Criminal Procedure, which are tested on the MBE and on most state essay exams.

<sup>99</sup> Until recently, law schools could not offer credit for these types of courses. The ABA House of Delegates, however, recently approved a proposal to allow law schools to offer limited credit for non-required bar examination preparation courses. The credit cannot count towards the graduation requirement. ABA STANDARDS, *supra* note 79, Standard 302, Interpretation 302-7.

<sup>100</sup> Bar-Bri and the Richmond Bar Review Course provide video-taped substantive lectures.

<sup>101</sup> These questions have been released by the National Conference of Bar Examiners and made available for public use.

<sup>102</sup> Attendance records for the Supplemental Bar Preparation Course are on file with the authors. After comparing the attendance records with the lists of applicants for the Virginia bar examination, we determined that approximately twenty percent of the regular participants did not sit for the bar in Virginia. Possibly, those students took the bar examination in another state, although Richmond has not kept formal records on students taking the bar in other states.

## 2. Individual Tutoring

In addition to the bar preparation class, Richmond offers individual tutoring to its graduates<sup>103</sup> preparing for the Virginia bar examination. This aspect of the bar support program focuses on developing essay-writing skills and teaching substantive rules of law.<sup>104</sup>

The tutoring runs concurrently with the commercial bar review courses. It begins when the students start to study for the bar examination and lasts ten to twelve weeks.<sup>105</sup> The academic support professor meets with each student individually for forty-five minutes to one hour once per week.<sup>106</sup>

For the first eight to ten weeks, the professor assigns three essay questions for each meeting. The participating students prepare answers on their own and submit their answers in advance. The professor reads and comments extensively on each answer. During the meeting with the student, the professor explains the comments and elaborates on essay-writing suggestions and substantive points.

In the final two weeks, the students write essay answers in the professor's office under test conditions. Before these meetings, the professor advises the students to be prepared on certain subjects. When the students arrive for their meeting, they are given two or three essays, which they answer without notes and in the time allocated for essays on the bar examination. The professor and student then discuss the answers.

Unlike the bar preparation class, one-on-one instruction requires tremendous resources to assist a limited number of students. Furthermore, substantive law and essay-writing skills – the main focuses of the tutoring program – are also taught in the group setting. So, why tutor students individually as part of a bar support program?

One-on-one instruction is simply more effective for some students. First, generic essay-writing advice is of limited usefulness. Take, for example, the suggestion to "be concise." That advice is not objectionable on its face. Conciseness is a virtue of good writing.<sup>107</sup> The efficacy of the suggestion, however, depends on the student's relative starting point. Some students will stray far from the central issue in an essay question, wasting valuable time and energy and calling into question their ability to distinguish dispositive issues

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<sup>103</sup> Most of the students are recent graduates taking the bar examination for the first time, but graduates retaking the bar also may receive tutoring. The passage rates for the repeat takers are not included in our analysis.

<sup>104</sup> The topics of substantive law covered in the tutoring sessions include nearly all of the subjects tested on the Virginia bar examination: agency, commercial paper, corporations, creditors' rights, criminal law, criminal procedure, domestic relations, equity, federal jurisdiction and procedure, local government law, partnership, personal property, professional responsibility, real property, sales, secured transactions, trusts, Virginia civil procedure, and wills. Students typically prepare essay answers on questions in each of these subject areas.

<sup>105</sup> For the February bar, tutoring begins the first of January and runs through the end of February; and for the July bar, tutoring begins mid-May and continues through the end of July.

<sup>106</sup> The number of students participating in the individual tutoring generally has increased since the program started. See *infra* section IV. D.

<sup>107</sup> See, e.g., CHARLES R. CALLEROS, *LEGAL METHOD AND WRITING* 3 (3d ed. 1998) ("The two most important characteristics of good legal writing style are clarity and conciseness.").

from tangential ones. Other students, in contrast, will leap to the ultimate conclusion and omit essential analysis.<sup>108</sup> Thus, tutoring permits tailored advice: after reviewing a particular student's writing, the professor can determine whether to advise the student to "be concise" or "be thorough."

Similarly, students learn best from *their* mistakes. In a class setting, the professor could put an example essay answer on an overhead screen and show a group of students where the hypothetical author lost points by not following various tenets of good essay writing. But as effective as such hypothetical examples may be, actual examples, from a student's *own* answers, are infinitely more so. Individualized critiques – and suggestions as to how the student can earn more points – resonate deeply.

Repetition and follow-up are additional benefits of individual tutoring. By reviewing written answers from each student, the professor can note a particular student's weaknesses and, in subsequent meetings, follow up on identified areas to determine whether the student is improving. Consider the example of an essay question that tests an exception to a general rule of law. In the first week, a student may jump straight to the exception without mentioning the general rule. The professor explains that a stronger answer puts the issue in context by first identifying the general rule.<sup>109</sup> In the following week, the professor revisits that suggestion on a different essay question in a new area of law.<sup>110</sup> Thus, the professor ensures that the student has internalized the skill and can apply it in a new situation,<sup>111</sup> and the student reinforces the skill through practice. By writing regularly, over an extended period, and by receiving immediate and personalized evaluation, the student learns to write more

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<sup>108</sup> For example, in answering a bar examination question about the enforceability of a promissory note in the hands of a transferee, some students may simply answer: "No, party A may not enforce the note because it isn't for a fixed amount." That is concise. It may also be correct. But that student does not earn points for identifying the main issue (*i.e.*, whether the note is negotiable), stating the applicable rule (*i.e.*, the elements of negotiability) and explaining how the student applied the law to the given facts in order to reach the conclusion.

<sup>109</sup> An essay question testing the "specially manufactured goods" exception to U.C.C. Article 2 statute of frauds demonstrates the point. See U.C.C. § 2-201(3)(a) (2001). A student may write an essay correctly concluding that an oral contract is enforceable because the goods were specially manufactured without ever mentioning the statute of frauds. The professor can then explain that a stronger answer provides context by stating the general rule (*i.e.*, a contract for the sale of goods of \$500 or more is within the statute of frauds and must be evidenced by a writing signed by the defendant to be enforceable) before stating and applying the exception (*i.e.*, specially manufactured goods exception).

<sup>110</sup> Consider our previous example of the student who correctly determines that a contract to buy unusual goods is enforceable without ever mentioning the statute of frauds. In week two, in a question testing the concept of piercing the corporate veil, for example, the professor and the student can evaluate whether the student's answer clearly stated the general rule (*i.e.*, shareholders are not personally liable for the debts of the corporation) before addressing the exception of piercing.

<sup>111</sup> A related benefit of individual tutoring is the interactive nature of the learning experience, which is exceedingly beneficial for some students. The student has an opportunity to ask questions in a safe and comfortable environment. The professor likewise can ask the student follow-up questions to ensure that the student understands the essay-writing pointers and substantive rules of law.

effectively. The writing techniques ultimately become second nature for the student, who will benefit not only on the bar examination, but also in practice.

One-on-one instruction also ensures accountability. In a group setting, it is easier for a student to fall behind, to disengage, or to disappear in the crowd. Because they have individual appointments to meet with the professor, tutored students are more likely to keep up with their work and to practice writing essay questions repeatedly.

Finally, tutoring allows the professor to coach students preparing for the bar examination.<sup>112</sup> The professor often provides general advice on preparing for the bar examination during the weekly tutoring sessions with students. Topics include scheduling, time management, stress management, and effective studying techniques. Moreover, the professor can read cues, which are sometimes quite subtle, as to what may help a particular student progress. A lack of confidence holds some students back, particularly those considered to be at-risk based on a low law school class rank. Boosting that all-important self-confidence may be one of the most important benefits of tutoring. In such a situation, the professor may minimize legitimate criticism to give the student more positive reinforcement. In contrast, other students suffer from over-confidence and a lack of motivation. The professor sometimes must deliver unwelcome criticism to motivate without alienating. This aspect of tutoring can be handled only on an individual basis.

In short, tutoring offers students individualized guidance on essay-writing skills, substantive instruction, general test-taking advice, and personal support. One student summarized the tutoring sessions this way: "They're like personal training – teaching me how to use the equipment correctly and keeping me on track."<sup>113</sup>

### 3. Eligibility for the Program

"Whom to serve?" is a question that continuously plagues academic support professionals.<sup>114</sup> On the one hand, resources are limited. Law schools certainly want neither to invest significant effort in "assisting" someone who would pass the bar without extra support, nor to displace resources that could otherwise be spent on those students genuinely at risk of failing.<sup>115</sup> On the other hand, there are compelling reasons to open a bar support program to all interested students. Although the correlation between class rank and first-time

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<sup>112</sup> See A PRACTICAL GUIDE FOR LAW SCHOOL ACADEMIC ASSISTANCE PROGRAMS, *supra* note 85, at 6 (academic support professionals "often find themselves in the role of personal as well as academic counselor to the students with whom they work.").

<sup>113</sup> This quote is based on an oral statement made by a student in the summer of 2003, which is on file with the authors.

<sup>114</sup> See Cabrera & Zeman, *supra* note 84, at 211; A PRACTICAL GUIDE FOR LAW SCHOOL ACADEMIC ASSISTANCE PROGRAMS, *supra* note 85, at 14-15.

<sup>115</sup> The scarcity of resources is a far greater concern with the individual tutoring program than with the bar preparation class. For the class, the cost of permitting non-targeted students is marginal. With individual tutoring, however, each student requires significant resources.

bar passage is quite strong,<sup>116</sup> it is imperfect, and one can never be certain who needs help and who does not. Additionally, and perhaps more importantly, inclusion of all students minimizes – or even eliminates – the potential stigma that can attach to the program.<sup>117</sup> The University of Richmond resolved this dilemma by including all interested students.<sup>118</sup> Although the program was developed to assist those students believed to be at the highest risk of failing the bar examination – those students ranked in the fourth quartile of the class – any student may participate.<sup>119</sup> All students are advised of the bar support programs, but the academic support professor individually contacts students ranked in the fourth quartile and encourages them to participate.

Students across all quartiles currently participate in the program. During the four-year period covered in our analysis,<sup>120</sup> forty-eight first-quartile students, forty-three second-quartile students, sixty third-quartile students, and sixty-two fourth-quartile students participated in individual tutoring, the bar preparation class, or both.<sup>121</sup> Thus, students from all quartiles feel welcome to,

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<sup>116</sup> See *infra* text accompanying notes 148-49; see also Comm. on Bar Admissions, *supra* note 10, at 454 (recognizing the correlation between grades and bar examination performance).

<sup>117</sup> See Todd, *supra* note 15, at 190, 192-94; Wangerin, *supra* note 19, at n.5 (“Participants in academic assistance programs, it seems, often feel stigmatized by their participation; conversely, non-participants in such programs often feel discriminated against by their exclusion.”); A PRACTICAL GUIDE FOR LAW SCHOOL ACADEMIC ASSISTANCE PROGRAMS, *supra* note 85, at 15-16 (discussing potential stigma in academic support programs); see generally Cabrera & Zeman, *supra* note 84, at 211.

<sup>118</sup> Because of limited resources, maximizing the number of at-risk participants and minimizing the number of clearly non-at-risk students in the individual tutoring program is a sound strategy. Thus, the University of Richmond affirmatively recruits fourth-quartile students while permitting other students to participate upon request. Also, after a few individual tutoring sessions, the academic support professor may advise a particularly strong student that further sessions are unnecessary, although such students are never excluded from the program.

<sup>119</sup> A related question sometimes faced by ASPs is whether to make programs mandatory for certain students. A PRACTICAL GUIDE FOR LAW SCHOOL ACADEMIC ASSISTANCE PROGRAMS, *supra* note 85, at 14 (including whether to require attendance among questions to address in establishing an academic support program). No aspect of Richmond’s bar support program is mandatory. The ABA does not allow law schools to require participation in bar examination programs as a condition of graduation. ABA STANDARDS, *supra* note 79, Interpretation 302-7. Requiring participation undermines the effectiveness of the program because students may resent mandatory remedial assistance. See Sheila Vance, *Should the Academic Support Professional Look to Counseling Theory and Practice to Help Students Achieve?*, 69 U.M.K.C. L. REV. 499, 521 (“Not every academic support student considers the ASP an ally, particularly if the program is mandatory.”)

<sup>120</sup> Our analysis includes data from the inception of Richmond’s bar support program in January 2001 through the July 2004 bar examination.

<sup>121</sup> In the section on empirical results, we have analyzed data only for those students who attended the bar support program and also sat for the Virginia bar examination because law schools generally report the passage rate for the state in which the majority of their graduates take the bar examination. ABA Questionnaire, *supra* note 75. For the University of Richmond, that state is Virginia. There were, however, students who participated in the program who took bar exams in other states. For example, during the time the program has been offered, approximately thirty additional students attended the bar preparation class and presumably took exams in other states.

and do, participate. The broad appeal of the bar support program ensures that participation carries no stigma.<sup>122</sup>

#### 4. Other Services

The bar preparation class and individual tutoring form the cornerstone of the bar support program at the University of Richmond. However, the academic support professor also offers other services and programs pertaining to the bar examination. For example, at the professor's invitation, the members of the Virginia Board of Bar Examiners have visited the law school to inform students about drafting and grading the bar examination and to advise them on selecting courses<sup>123</sup> and preparing for the bar examination. Moreover, the law school maintains an internal electronic notice board that provides students with logistical information about admission to the bar. The academic support professor also frequently counsels students, individually and in groups, about course selection<sup>124</sup> for the Virginia Bar Exam. We have not evaluated the impact of these services in this article; however, we believe that such programs raise student awareness and otherwise contribute to a stronger bar passage rate.

#### C. Cost of the Program

A program to improve graduates' ability to pass the bar is not cost-free. Law schools face budgetary constraints and limited staff resources. Accordingly, in deciding whether to implement a bar support program, the question following closely on the heels of "what works?" is "at what cost?"

The main cost associated with a bar support program like the one at the University of Richmond is the salary (and other employment costs) of the academic support professor. At the University of Richmond, a full-time, non-tenure track faculty member directs the academic support program, which includes both first-year and bar examination support. The bar support responsibilities consume roughly one-half of the time of a full-time, twelve-month position. The time demands vary significantly, however, over the course of a year, as demonstrated in Table 1 below, and this seasonal fluctuation will probably be important in structuring a part-time position or in pairing bar support duties with other responsibilities in a full-time position.

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<sup>122</sup> See *supra* note 117.

<sup>123</sup> See *supra* note 48 regarding the effect the bar examination has on law school curriculum.

<sup>124</sup> See *infra* note 188 concerning course selection as a possible cause of the improvement in Richmond's bar passage rate.

**Table 1**  
**Academic Support Professor Responsibilities**

Month	Primary Bar Support Duties	Approximate Hours Per Week <sup>125</sup>
January-February	Tutoring graduates preparing for the February bar exam; <sup>126</sup> spring bar preparation class (two sections, each meeting once per week for three to three and one-half hours)	20-25
March-April	Spring bar preparation class	10-15
mid-May-July	Tutoring graduates preparing for July bar exam	40+ <sup>127</sup>
August-December	Fall bar preparation class (one section meeting once per week for three to three and one-half hours)	5

In addition to the instructor's salary,<sup>128</sup> a bar support program requires a modest budget to cover administrative costs, such as copying and licensing or use fees.<sup>129</sup> The size of that budget will depend on several factors, including the number of students who participate and the extent to which the program uses copyrighted materials, such as commercial bar review course lectures and released Multistate bar examination questions. We believe, based on the budget of the bar support program at the University of Richmond, that most law schools could implement a similar program for approximately \$5,000 to \$7,000 per year in addition to the salary costs identified above. To keep costs down, a school could charge participating students a small fee to cover, or at least offset, expenses.<sup>130</sup>

<sup>125</sup> These time estimates are based upon the schedule of an experienced academic support professional. Class preparation time decreases substantially with experience, and tutoring also becomes more efficient; however, as with any type of one-on-one assistance, the tutoring is time-intensive and experience makes only a small difference.

<sup>126</sup> At the University of Richmond, roughly ten percent of the graduates take the bar examination for the first time in February, so tutoring for the February bar examination takes relatively little time.

<sup>127</sup> The academic support professor has some first-year support duties during the summer months, but tutoring for the July bar examination often takes more than forty hours per week.

<sup>128</sup> At the University of Richmond, the instructor is a non-tenure-track full-time associate professor; however, other options are available, such as tenure-track and part-time.

<sup>129</sup> Licensing or use fees are estimated at approximately \$4,000-5,000. These fees cover the use of the videotaped lectures and outlines from commercial bar review courses and the use of released MBE questions from the NCBE.

<sup>130</sup> The AALS Committee on Bar Admissions reported that most law schools have chosen not to charge students to participate in bar support programs. Comm. on Bar Admissions, *supra* note 10, at 461. The University of Richmond offers its bar support programs at no cost to the students.

## IV. DATA ANALYSIS &amp; RESULTS

A. *Controlling the Other Variables*

The University of Richmond's bar support program began in the spring of 2001 for students who would take the July 2001 bar examination.<sup>131</sup> Thus, the February 2001 examination was the last examination for which the students had no possibility of participating. The bar support program has been offered without interruption<sup>132</sup> since that time, up to and including the most recent examination for which there is data: July 2004. The data include the following for each first-time applicant for the Virginia bar: bar examination results,<sup>133</sup> class ranking, and type of bar support assistance, if any.<sup>134</sup>

In conducting statistical analysis of the bar support program at the University of Richmond, we had to make certain assumptions and choices. Our first choice involved determining the base period: the number of years before the bar support program was implemented to compare with the number of years after it was implemented. We opted to begin our analysis with data from the July 1997 bar examination to equate roughly the amount of data prior to the program with the amount of data during the program. Thus, we have analyzed data on eight bar exams before the program's implementation (July 1997 through February 2001) and seven bar exams after it was implemented (July 2001 through July 2004).<sup>135</sup> We needed to ensure an adequate sample size<sup>136</sup> while limiting the period to avoid other changes that could contaminate our results.

A second choice was how to define "participation" in the bar support program. Participation in the bar preparation class and tutoring is purely voluntary, and not surprisingly, students did not always attend consistently. Some students came only to one or two bar preparation classes or tutoring sessions. We made a judgment call about how much "help" a student had to receive to be considered a "participant" in the bar program. Before we decided to publish our results, the academic support professor had assessed the program for annual contract renewals and to seek permanent funding of the program.<sup>137</sup> At that

<sup>131</sup> Our results are based on first-time passage rates on the Virginia bar examination. See *supra* note 121.

<sup>132</sup> The academic support professor was on an extended medical leave during the fall semester of 2002, but the bar preparation class was offered in a somewhat modified form.

<sup>133</sup> The Virginia Board of Bar Examiners provides only pass/fail information for each applicant.

<sup>134</sup> Since the beginning of the bar support program in January of 2001, the academic support professor has recorded attendance at the bar preparation class and tutoring sessions. The law school also maintains records of its graduates' performance on the Virginia Bar Examination, class ranks, LSAT, and undergraduate GPAs. We have used this data to evaluate the success of the bar support program.

<sup>135</sup> Our sample included a total of four hundred seventy-two (472) bar applicants who took the bar before the program was offered and four hundred fifty-nine (459) who took the bar after the program was offered.

<sup>136</sup> Sample sizes that are too small are less likely to generate accurate test results. See generally Knaplund & Sander, *supra* note 91, at 167; Smith, *supra* note 84, at 186-87.

<sup>137</sup> When the University of Richmond first implemented its Academic Success Program, the program was funded for only four years. Based upon the results of the bar support and the first-year support programs, the Academic Success Program was permanently funded.



time, she defined "participation" as attending one-half of the bar preparation classes (i.e., six or more classes) or attending one tutoring session. We used this definition.

Attendance at one tutoring session counts as "participating" because tutoring sessions are intensive, are directed at the student's individual needs, require active participation of the student, and are close in time to the bar examination. Even one tutoring session likely is valuable, whereas a single bar preparation class taken months before the examination probably would not impact the student's performance on the bar.

By defining participation in the bar preparation class as attendance of six or more meetings and participation in tutoring as attendance of one or more sessions, we chose a broad definition of participation. If we had defined participation more narrowly (as attending more meetings or sessions), it is likely that the results we found would have been stronger than what we observed, assuming the samples were sufficiently large so that all combinations were adequately represented.

Third, we had to select control groups. All statistical tests in their purest form require randomness. Ideally, one would randomly select students to participate in the program and then compare participants and non-participants<sup>138</sup> so that the only difference between the two groups would be participation in the program.<sup>139</sup> In evaluating a bar support program, however, one cannot randomly assign individuals to a "treatment" group and a control group.<sup>140</sup> Hence, we have, in statistical terminology, a "quasi-experiment." Many statistical studies of this type use quasi-experiments because of the difficulty of obtaining data from a truly random sample.<sup>141</sup>

To minimize any noise in the data – the possibility that something other than the bar support program contributed to the stronger bar passage rate –, we used two control groups: the students who graduated prior to the implementation of the bar support program<sup>142</sup> and the students who had the opportunity to participate in the program but chose not to do so.<sup>143</sup> Although we cannot definitively prove that the bar support program caused an increase in the University of Richmond's bar passage rate,<sup>144</sup> the results of our investigation support this conclusion.

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<sup>138</sup> Knaplund & Sander, *supra* note 91, at 163.

<sup>139</sup> *Id.*

<sup>140</sup> As Professors Knaplund and Sander recognize, to randomly assign students to a treatment group (receive support on the bar examination) and a control group (no support) would be to "elevate evaluation over the program's substantive goals." *Id.*

<sup>141</sup> See Entin, *supra* note 15, at 856-57; Smith, *supra* note 84, at 185-86; Wangerin, *supra* note 19, at 175.

<sup>142</sup> Knaplund & Sander, *supra* note 91, at 163-64 ("The control problem, once recognized, may be greatly mitigated. For example, almost every school has a good control group in its registrar's office: students in the year before academic support began. So long as a school has not changed its admissions policies simultaneously with the introduction of academic support, a comparison of students receiving academic support with similar students from the previous class (or previous classes) is likely to be quite probative.").

<sup>143</sup> See *infra* text accompanying notes 189-93 for a discussion of how we addressed the possible effect of self-selection.

<sup>144</sup> It is possible that other unidentified factors contributed to the improvement. See *infra* notes 162-88 and accompanying text for a discussion of other *identified* factors. It is statisti-

### B. Empirical Results

Tables 2 and 3 identify the improvement we observed and tested. Table 2 shows the passage rates of the class as a whole both before and after the program was implemented; while Table 3 identifies the passage rates of the at-risk students based on whether they participated in the program.

#### Empirical Results

**Table 2**  
**Pass Rates of Graduates Prior to (Pre-ASP) and After (Post-ASP) the Program's Implementation**

	Pre-ASP	Post-ASP	Improvement
<b>Class Overall</b>	73.3%	79.5%	8.5%
<b>Top-1/2 Class</b>	93.9%	94.1%	0.2%
<b>Bottom-1/2 Class</b>	51.3%	64.0%	24.8%

**Table 3**  
**Pass Rates of At-Risk Graduates Who Participated in the Program and Who Did Not**

	Participant	Non-Participant	Improvement
<b>At-Risk Overall</b>	71.6%	55.7%	28.5%
<b>3rd Quartile</b>	91.9%	78.0%	17.8%
<b>4th Quartile</b>	48.1%	27.7%	73.6%

Since the implementation of the bar support program at the University of Richmond, there has been a statistically significant<sup>145</sup> improvement in the bar passage rate. Importantly, the improvement was most apparent in the bottom half of the class – those students most at risk of failing the bar examination on their first attempt.<sup>146</sup> Historically, students graduating in the bottom half of the class (“at-risk”), and particularly those students in the fourth quartile, have passed the bar at a lower rate than has the rest of the class. From the July 1997 examination through the February 2001 examination, the passage rate for students in the bottom half of the class was 51.3%.<sup>147</sup> The fourth-quartile passage

call impossible to eliminate all possible competing factors in this quasi-experiment; nonetheless, the consistency of the findings despite the use of two separate control groups strongly suggests that the bar support program substantially contributed to the improved bar passage rates.

<sup>145</sup> Statistically significant means that the results are unlikely to be caused by chance. By convention, results are usually considered significant if the probability that the observed event would occur is less than 0.05: meaning that the result would have occurred by chance no more than five out of 100 times. Thus, statistical significance means that the differences found are big enough to conclude that they are due to something other than chance. Siegel & Castellan, *supra* note 20, at 8-11.

<sup>146</sup> Not surprisingly, students in the top half of the class showed no statistically significant effect from the program. See *infra* text accompanying notes 157-58.

<sup>147</sup> One hundred seventeen (117) of 228 third- and fourth-quartile students passed.

rate was 26.0%.<sup>148</sup> In comparison, the passage rate for the top half of the class was 93.9%.<sup>149</sup>

We found significant improvement in the passage rate for students as a whole after the bar support program was implemented. Comparing the overall performance on the bar examination before implementation of the program with the overall performance on the bar examination after implementation, we found an 8.5% improvement in the bar passage rate for students *as a whole* after the bar support program was implemented.<sup>150</sup> Our hypothesis is that the bar support program was a significant factor in the increased bar passage rate. To test this hypothesis, we performed several statistical tests.

We begin by using a proportions test<sup>151</sup> to compare the passage rate of students who graduated and took the bar examination before the program was implemented with those students who did so after. Our null hypothesis<sup>152</sup> is that the percentage of students passing the examination prior to the program's implementation is greater than or equal to the percentage passing after.<sup>153</sup>

As noted previously,<sup>154</sup> the passage rate for Richmond students, *as a whole*, increased 6.2 percentage points, or 8.5%, after implementation of the bar support program.<sup>155</sup> The results of the proportions test lead us to reject the null hypothesis. The number of standard deviations observed, 2.25, is significant at the 0.05 level ( $p = 0.012$ ). Thus, we accept our alternative hypothesis – that the bar passage rate for students as a whole improved following the implementation of the bar support program.

We tested whether the top and bottom halves of the class were affected equally. We would not expect the bar passage rate for the top half of the class to have improved as a result of the bar support program. Most of these students will pass the bar without additional assistance.<sup>156</sup>

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<sup>148</sup> Twenty-six (26) of 100 fourth-quartile students passed.

<sup>149</sup> Two hundred twenty-nine (229) of 244 students passed.

<sup>150</sup> See *infra* note 155 and accompanying text discussing the statistical significance of this improvement.

<sup>151</sup> We use a proportions test to see if the improvement in the overall passage rate is greater than the improvement we might see as a result of chance. The proportions test, as used in this study, tests whether the proportion of subjects in the population of interest responds differently after a given event than before. See generally Siegel & Castellan, *supra* note 20, at 73-75. In the present case, the population of interest is graduates of the University of Richmond School of Law who take the Virginia bar examination. The event is the implementation of the bar support program.

<sup>152</sup> A null hypothesis is one that assumes no effect. It is "the negation of the point one is trying to make [such that if it is rejected, the alternative hypothesis [ ] is supported." Siegel & Castellan, *supra* note 20, at 7.

<sup>153</sup> A one-tailed test is appropriate in this case. See *id.* at 14-15.

<sup>154</sup> See *supra* text accompanying notes 147-50.

<sup>155</sup> From July 1997 to February 2001 (before the bar support program started), the University of Richmond's overall bar passage rate (for students in both the top and bottom half of the class) was 73.3%. Three hundred forty-eight (348) students passed the bar of the 475 who sat for the bar examination. From July 2001 until July 2004 (after the bar support program started), the bar passage rate improved to 79.5%. Three hundred sixty-five (365) passed the bar examination of the 459 students who sat for the bar examination. Thus, the improvement was 6.2 percentage points or 8.5%.

<sup>156</sup> See *supra* text accompanying note 149.

Our null hypotheses for each group (upper and lower halves of the class) is that the pass rate did not improve. We test both hypotheses using proportions tests. These statistical tests provide evidence to accept the null hypothesis for the top half of the class. Prior to the bar support program, the passage rate for the top half of the class was 93.9%.<sup>157</sup> After the bar support program, the passage rate was 94.1%,<sup>158</sup> a change of 0.2 percentage points or 0.2%, an insignificant change at the 0.05 probability level ( $p = 0.46$ ).

In contrast, we reject the null hypothesis for the bottom half of the class because of the statistically significant change in the passage rate. The passage rate for students in the bottom half of the class increased 12.7 percentage points, or 24.8%, with implementation of the bar support program: from 51.3%<sup>159</sup> to 64.0%.<sup>160</sup> The probability of observing a 12.7 percentage point difference is highly significant ( $p < 0.005$ ).<sup>161</sup> We can conclude from this analysis that the students' passage rate improved for the bottom half of the class after the bar support program was implemented.

Thus, we see that the overall passage rate has improved since the program was implemented four years ago. More critically, the passage rate for the bottom half of the class has improved dramatically, while the passage rate for the top half of the class has remained constant. It is possible, of course, that other factors could have caused the improvement during the observed time period. Other competing factors include: (1) admissions criteria became more selective; (2) the entire student body or only students in the bottom half of the class simply improved; and (3) the bar examination was easier.<sup>162</sup> However, for the reasons discussed below, we believe these factors did not affect the results.

First, the data do not support the hypothesis that the University of Richmond was more selective in its admission criteria during the testing time-frame. Although the University of Richmond adopted a floor LSAT score of 150 for the entering class in 2000, this floor probably did not affect the passage rate.<sup>163</sup> The University of Richmond historically has admitted only a small percentage of students with LSATs below 150.<sup>164</sup> Additionally, only some of the groups

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<sup>157</sup> Two hundred twenty-nine (229) students passed the bar; 244 took the bar prior to the program being offered.

<sup>158</sup> Two hundred twenty-three (223) students passed the bar; 237 took the bar after the program was offered.

<sup>159</sup> One hundred seventeen (117) at-risk students passed the bar; 228 took the bar prior to the program being offered.

<sup>160</sup> One hundred forty-two (142) at-risk students passed the bar; 222 took the bar after the program was offered.

<sup>161</sup> The number of standard deviations observed is 2.71. Significance at the 0.005 level means that the possibility that the event occurred due to chance alone is equal to or less than five in one thousand.

<sup>162</sup> See Merritt, *supra* note 4, at 936 (The MBE has not gotten easier with time: "[A]verage MBE scores since 1992 have been consistently higher . . . . Recent examinees have not achieved those high scores because today's MBE is easier than earlier versions of the test. Instead, those examinees are more competent than their predecessors – as measured by the bar exam itself.").

<sup>163</sup> This conclusion does not mean that the floor LSAT will not impact future passage rates. It simply has not had an effect at this point in time.

<sup>164</sup> The 1994 class had three students with LSATs below 150; the 1995 class had thirteen students; the 1996 class had four; the 1997 class had thirteen; the 1998 class (the class for

for which we had data could have been affected by this floor: the February 2003<sup>165</sup> through the July 2004 bar takers. The other groups were admitted before the floor was implemented.

To confirm that the floor did not affect our results, we run three statistical tests. First, we compare the bar passage rate of (1) the at-risk students who graduated and took the bar examination before the program was implemented with that of (2) the at-risk students who were admitted after the bar support program was implemented and before the floor LSAT was adopted. We find a significant difference. The passage rate for those at-risk students unable to participate in the bar support program (and admitted before the floor) was 51.3%.<sup>166</sup> The passage rate for those at-risk students able to participate in the bar support program (and admitted before the floor) was 62.8%;<sup>167</sup> the difference between these numbers is 11.5 percentage points. Using a proportions test to analyze this difference, we find the number of standard deviations, 2.01, to be significant at the 0.05 probability level ( $p = 0.022$ ). The results of this test show us that the bar passage rate improved after implementation of the bar support program and that improvement could not have been caused by the imposition of the floor LSAT.

To test whether the bar support program likely was responsible for the improvement, we turn to a chi-square test.<sup>168</sup> When we test the data from the years the program was available but before imposition of the floor LSAT (the July 2001 - July 2002 bar examination takers), we find a statistically significant improvement in the bar passage rate of those students participating in the bar support program compared with those who did not participate.<sup>169</sup> The results from that test are statistically significant at the 0.05 probability level, ( $\chi^2 =$

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which the bar support program began) had twelve students; the 1999 class had four students; and the 2000 class had no students with a LSAT below 150. Thus, during the time period of our study, thirty-three (33) students with LSATs below 150 were admitted before the bar support program was implemented and sixteen (16) were admitted after it was implemented. Of the forty-nine (49) total students admitted from 1994 to 2000 who had LSAT scores below 150, seven (7) passed the Virginia bar examination on the first try, eighteen (18) failed, and twenty-four (24) did not take the Virginia bar examination.

<sup>165</sup> The University of Richmond has a summer program enabling some students to graduate in two and one-half years.

<sup>166</sup> See *supra* note 159.

<sup>167</sup> Seventy-one (71) students passed of the 113 who took the examination.

<sup>168</sup> Both the proportions and chi-square tests are approximations for a multinomial test. The proportions test is more appropriate for a larger sample size (where  $np > 30$  and  $n(1-p) > 30$ ), while the chi-square is more appropriate for a smaller sample size. The chi-square tests, as used here, allow us to determine if a difference between the percentages of individuals in two groups responding to the same treatment is significant at a specified probability level. That is, how likely it is that the observed response-rate difference could be due simply to chance or due to another plausible hypothesis. See Siegel & Castellan, *supra* note 20, at 111-22. We compared (1) the at-risk students who were admitted after the bar support program began but before the new LSAT floor was adopted and who attended the program with (2) those at-risk students admitted during this same time frame who did not attend the bar support program.

<sup>169</sup> Forty-five (45) at-risk students participated in the program and passed the bar examination before the floor LSAT was adopted. Twenty-six (26) did not participate and passed. Eighteen (18) participated and failed. Twenty-four (24) did not participate and failed.

4.51;  $p = 0.034$ ),<sup>170</sup> suggesting that the bar support program was responsible for the observed improvement.

Last, we wish to rule out the possibility that the floor LSAT contributed to the improvement in the years 2003-2004. We test the difference between (1) the overall passage rate of the at-risk students who were admitted after the bar support program was implemented and before the floor LSAT was adopted (62.8%)<sup>171</sup> and (2) the overall passage rate of the at-risk students who were admitted after the bar support program was implemented and after the floor LSAT was adopted (65.1%).<sup>172</sup> Using a proportions test, we find no significant difference.<sup>173</sup>

If the floor LSAT were responsible for the improved bar passage rate, we would not expect any of these results. Rather, the difference between (1) the passage rate of the students who took the bar without the opportunity to participate in the bar support program and (2) the passage rate of those who were able to participate in the program and who were admitted before the adoption of the floor LSAT would be *insignificant*. Similarly, the difference between the participants' and the non-participants' passage rate would be *insignificant*. In contrast, the difference between passage rates before and after imposition of the floor LSAT would be *significant*. We find the opposite results. Thus, (1) the *significant* improvement in the passage rate after the program began and before implementation of the floor LSAT,<sup>174</sup> (2) the *significant* improvement in the passage rate of program participants admitted before the floor was implemented,<sup>175</sup> (3) the *insignificant* change in the passage rate after the floor LSAT was implemented,<sup>176</sup> and (4) the small percentage of students with LSATs below 150 who were admitted before the floor was adopted<sup>177</sup> all suggest that the imposition of the floor LSAT was not responsible for the improvement we observed; hence, we are again left with the bar support program as the explanation.

Second, there is little indication that students' credentials improved over the relevant time period. Median student LSAT and undergraduate GPAs did

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<sup>170</sup> For one degree of freedom, a chi-square equal to 3.84 is required for significance at the 0.05 probability level. Thus, the results continue to support the positive impact of the bar support program.

<sup>171</sup> See *supra* note 169.

<sup>172</sup> After the floor LSAT was adopted (February 2003 – July 2004), thirty-eight (38) at-risk students participated in the program and passed the bar examination. Thirty-three (33) did not participate and passed. Fifteen (15) participated and failed. Twenty-three (23) did not participate and failed.

<sup>173</sup> The difference between these passage rates is only 2.3 percentage points. The standard deviations for this difference is 0.36, an insignificant increase at the 0.05 level ( $p = 0.72$ ).

<sup>174</sup> See *supra* notes 166-67 and accompanying text.

<sup>175</sup> See *supra* notes 168-70 and accompanying text.

<sup>176</sup> See *supra* notes 171-73 and accompanying text.

<sup>177</sup> See *supra* note 164 and accompanying text.

not change appreciably during the test period.<sup>178</sup> The average median LSAT and undergraduate GPA for the four years prior to the program's implementation were 159 and 3.07 respectively, and the fourth quartiles – or the medians for the at-risk students – were 155.5 and 2.79. After the program was implemented, the average median LSAT decreased to 157, while the undergraduate GPA increased to 3.15, and the fourth quartiles were 155 and 2.86. Thus, the average median and average fourth-quartile LSAT scores, which are a clearer basis for comparison than undergraduate GPAs,<sup>179</sup> actually decreased for all students. Despite the slight increase in the undergraduate GPA for both groups, the LSAT decrease suggests that the admissions process was no more selective during our time frame.

Third, the bar examination is neither easier nor harder today than in years past. “[A] given score on the MBE reflects the same level of knowledge from year to year.”<sup>180</sup> This constancy is due to the examination's inclusion of both new and repeated questions each year<sup>181</sup> and the NCBE's scaling of the MBE based on a comparison of the sitting exam-takers' scores on these repeated or “equator” questions with prior exam-takers' scores.<sup>182</sup> For example, “[i]f current performances are worse, on average, than those of previous test takers, the

<sup>178</sup> The data for all enrolled students is as follows:

Year	Median High LSAT	25% Percentile LSAT	Median GPA	25% Percentile GPA
1994 (bar 1997)	160	157	3.06	2.82
1995 (bar 1998)	159	154	3.02	2.71
1996 (bar 1999)	159	156	3.11	2.85
1997 (bar 2000)	158	155	3.07	2.77
<b>Average</b>	<b>159</b>	<b>155.5</b>	<b>3.07</b>	<b>2.79</b>
1998 (bar 2001)*	157*	153*	3.07*	2.73*
1999 (bar 2002)*	157*	155*	3.18*	2.93*
2000 (bar 2003)*	158*	156*	3.12*	2.84*
2001 (bar 2004)*	157*	156*	3.21*	2.92*
<b>Average</b>	<b>157</b>	<b>155</b>	<b>3.15</b>	<b>2.86</b>

(\*) Starred years represent the years for which students could have benefited from the bar support program.

The entering credentials of Richmond's students remained relatively constant during our testing period. We did not use the index score because Richmond changed the formula used to calculate the index during the time period.

<sup>179</sup> Because LSAT scores are constant throughout the country and over time, they are a clearer indicator of the ability of a student than undergraduate GPAs, which vary depending on grade inflation, undergraduate institution and field of study. See Gail L. Heriot & Christopher T. Wonnell, *Standardized Tests Under the Magnifying Glass: A Defense of the LSAT Against Recent Charges of Bias*, 7 TEX. REV. L. & POL. 467, 475 (2003); Stephen P. Klein & Laura Hamilton, *The Validity of the U.S. News and World Report Ranking of ABA Law Schools*, <http://www.aals.org/validity.html> (Feb. 18, 1998) (noting the difficulty in comparing undergraduate GPAs and recognizing that “UGPA is . . . a very poor predictor of success on the bar exam.”). The average LSAT scores for the University of Richmond have remained relatively constant. See *supra* note 178.

<sup>180</sup> Merritt, *supra* note 4, at 932.

<sup>181</sup> *Id.*

<sup>182</sup> Merritt, *supra* note 4, at 932-33; Kidder, *supra* note 29, at 551-52.

NCBE scales down the current scores by subtracting the difference from every examinee's MBE score."<sup>183</sup> This process ensures that MBE scores are consistent throughout the years and among the states. Any variation in the score would thus not be caused by "fluctuations in test difficulty or grading standards."<sup>184</sup>

Moreover, most states, including Virginia,<sup>185</sup> scale the essay portion of the examination to correlate to the MBE score.<sup>186</sup> By scaling the state portion of the examination in this way, states reduce the chance that the difficulty of the state portion of the examination will change from year to year.<sup>187</sup> Therefore, the difficulty of the Virginia bar examination, including the MBE and the state essays, is unlikely to have changed during the data period.

Thus, we think it is unlikely that any of these competing factors<sup>188</sup> caused the improvement. But to further test our hypothesis that the bar support program caused the improvement, we turn to our second control group: those students who were in the bottom half of the class and could have participated in the bar support program, but chose not to. Because this control group (non-participants) and the "treatment" group (participants) matriculated at the same time, any change – such as a change in admission policy – that occurred simultaneously with the implementation of the bar support program would not impact the results in this comparison.

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<sup>183</sup> Merritt, *supra* note 4, at 933.

<sup>184</sup> *Id.*

<sup>185</sup> The Virginia Board of Bar Examiners score the exam in the following manner:

As a group, the essay and short answer questions asked on one administration of the Virginia Bar Examination could be harder or easier than those asked at another time. To adjust for these differences, the essay raw scores are converted to the same scale of measurement as that used to report the MBE scaled scores. As a result of this step, the average essay scaled score in Virginia will be equal to the average MBE scaled score. This method is designed to permit the passing standard to remain as constant as possible from one exam to the next, so that an applicant is neither rewarded nor penalized for having taken one exam or another.

Va. Bd. of Bar Exam'rs Website, <http://www.vbbe.state.va.us/faq.html#21> (last visited Apr. 8, 2005).

<sup>186</sup> For a thorough discussion of this process, *see generally* Merritt, *supra* note 4, at 933-34.

<sup>187</sup> If the overall quality of performance on a bar exam in a state, as measured by average scores on the MBE, remains constant from one year to the next, then the average standardized scores on the essay portion of that state's exam will also remain constant, regardless of whether the raw scores awarded on that portion of the exam change. Even if the state's essays were easier than essays in a previous year, so that raw scores rose, the standardized scores would remain the same as in the previous year. Similarly, even if essay graders became extravagantly lenient and "add[ed] . . . 100 points to every applicant's essay raw score, "that grade inflation would 'have absolutely no effect on an applicant's [standardized] essay . . . score and thereby on that applicant's chances of passing."

*Id.* at 935 (quoting Stephen Klein, *Options for Combining MBE and Essay Scores*, B. EXAMINER, Nov. 1995, at 39).

<sup>188</sup> We have addressed the most likely competing factors that could have impacted the bar passage rate. Other possibilities include a shift in students' course selection, different teaching methods, a change in the commercial bar review course, increased student awareness about the bar examination, or some other unidentified factor. The bar support program itself may increase student awareness about the bar examination. *See supra* Part III.B.4 discussing the other services provided. We are not aware of anything to suggest any noteworthy changes in these areas.



In contrast, however, we have a new potential complicating factor: students were not randomly assigned to participate in the bar support program and, thus, self-selection could be a contributing factor to the increased passage rate. Self-selection could overstate<sup>189</sup> the effect of the bar support program on the passage rate.<sup>190</sup> If more highly motivated students choose to participate, then their relatively strong motivation, rather than assistance from the bar support program, might cause the higher passage rate.<sup>191</sup> But our first control group (those students who took the examination before the program was offered) had no self-selection complication. If motivation were primarily responsible for the bar passage rate increase, then there should be no difference between the overall passage rates of students who took the examination before the program was implemented and the rate for those who took it after. In other words, both before and after the bar support program was offered, the University of Richmond likely had the same number of motivated and non-motivated students; thus, if motivation were the cause, the bar passage rate should be relatively constant.<sup>192</sup> However, we find a significant difference between these groups (all students taking the bar examination before the program and all students taking it after the program).<sup>193</sup>

Returning to our comparison of participants and non-participants, among students graduating in the lower half of the class, the passage rate for students who participated in the bar support program was 28.5% higher than the passage rate for non-participants.<sup>194</sup> To test the impact of the bar support program on bar passage rate, we evaluated the data using several chi-square tests.<sup>195</sup> First, we tested the data from the bottom half of the class (see Table 4 below) to see if the 28.5% improvement is statistically significant. The results from that test

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<sup>189</sup> Self-selection could also understate the effect of the program. If those students who are aware that they are likely to have difficulty on the bar examination – due to weakness on standardized tests, test-taking anxiety, or lower class ranking – self-select into the program, then the bar support program might have an even stronger impact than the numbers indicate. See Knaplund & Sander, *supra* note 91, at 163.

<sup>190</sup> See Siegel & Castellán, *supra* note 20, at 73.

<sup>191</sup> See Knaplund & Sander, *supra* note 91, at 163.

<sup>192</sup> It is unlikely that more motivated students attended after the bar support program was implemented for two reasons. First, the LSAT and UGPAs of the entering students remained essentially constant. See *supra* note 178. Second, the passage rate for the top half of the class, the portion of the class where we would expect to see the greatest concentration of motivated students, was not improved by the bar support program. See *supra* text accompanying notes 157-58.

<sup>193</sup> See *supra* text accompanying notes 154-55.

<sup>194</sup> In total, eighty-three (83) at-risk students took the bar program and passed, while fifty-nine (59) at-risk students who did not participate in the bar program passed the bar examination. Thirty-three (33) at-risk students participated in the bar program and later failed the bar examination, while forty-seven (47) at-risk students who did not participate in the bar program failed the examination. Thus, the pass rate was 71.6% for those at-risk students who took the bar support program, compared to 55.7% for those at-risk students who did not: an increase of 15.9 points or 28.5%.

<sup>195</sup> For this test, two subpopulations of the University of Richmond graduates are studied; the first is the upper half of the class and the second is the lower half of the class based on the students' grade-point average. The treatment applied to each student is whether that student participates in the bar support program or not. The chi-square test supports the conclusion that the bar support program had a positive impact on the bar passage rate for these students.

show significance at the 0.05 probability level ( $\chi^2 = 6.07$ ;  $p = .014$ ).<sup>196</sup> The results from this chi-square test suggest that the bar support program at the University of Richmond is increasing the at-risk students' bar passage rate.

**Table 4**  
**Bottom ½ of Class Results**  
**July 2001- July 2004**

	Program Participant	Not a Program Participant	Total
Passed the Bar	83	59	142
Failed the Bar	33	47	80
Total	116	106	222

Looking more specifically at the data from the third quartile and fourth quartile separately, we find that there was a 17.8% improvement in the bar passage rate of the third-quartile students who participated in the bar support program.<sup>197</sup> These results show significance at the .05 level ( $\chi^2 = 4.66$ ;  $p = 0.031$ ). More dramatically, there was a 73.6% improvement in the bar passage rate of the fourth-quartile students who participated in the bar support program.<sup>198</sup> These results are also significant at the 0.05 level ( $\chi^2 = 4.45$ ;  $p = 0.035$ ). This improvement suggests that the bar support program's positive impact on the passage rates is felt throughout the bottom half of the class.

Finally, we found that students in the top two quartiles did not benefit, at least not statistically, from taking the bar support program: ( $\chi^2 = 0.66$ ;  $p = 0.42$ )<sup>199</sup> (see Table 5 below). Generally, these students can be expected to pass the bar examination with no assistance. While there may be no statistically significant improvement in these students' bar passage rates, the bar support

<sup>196</sup> It is still possible that some factor we have not previously identified could be responsible for the improvement. Although we cannot prove with statistical analysis that the bar support program caused the improvement, we can assert, based on our work that it is highly unlikely the results we observed could have been caused by chance alone.

<sup>197</sup> Those third-quartile students who did participate in the bar support program had a passage rate of 91.9%, while students who did not participate had a passage rate of 78.0%: a 13.9 percentage point increase. Fifty-seven (57) third-quartile students received help and passed of the sixty-two (62) total students who received help and sat for the bar examination. Forty-six (46) third-quartile students did not receive help and passed of the fifty-nine (59) students who sat for the bar examination. See generally Siegel & Castellan, *supra* note 20, at 76-79.

<sup>198</sup> Those fourth-quartile students who participated in the bar support program had a passage rate of 48.1%, while those who did not had a passage rate of only 27.7%: a 20.4 percentage point increase or 73.6%. Twenty-six (26) fourth-quartile students received help and passed of the fifty-four (54) who sat for the bar examination. Thirteen (13) fourth-quartile students did not receive help and passed of the forty-seven (47) who sat for the bar examination.

<sup>199</sup> Those first and second quartile students who participated had a passage rate of 96.4%, while those who did not had a passage rate of 92.9%: a 3.5 percentage point increase. Eighty (80) of these students received help and passed; one hundred forty-three (143) passed without assistance. Three (3) of these students received assistance and failed; eleven (11) did not and failed. For one degree of freedom, a chi-square equal to 3.84 is required for significance at the 0.05 probability level. Chi square has been corrected throughout for continuity where, as here, it was necessary.

program may have provided intangible benefits – such as increased confidence on testing day – that are more difficult to measure.<sup>200</sup>

**Table 5**  
**Top ½ of Class Results**  
**July 2001- July 2004**

	Program Participant	Not a Program Participant	Total
Passed the Bar	80	143	223
Failed the Bar	3	11	14
Total	83	154	237

### C. Student Participation in the Program

One concern often raised about bar support programs is that “those students who need assistance the most often access programs the least.”<sup>201</sup> Although this observation has some truth to it, at-risk student participation in the bar support program at the University of Richmond generally has increased during its tenure. Significant student participation in the program is a second measure of success.

At the University of Richmond, as the bar support program has become better known, attendance has increased. The percentage of at-risk students who participated in both components has risen substantially, from just under 4% in the first year to approximately 27% in the second and third years and 20% in the fourth year (see Table 6). The tutoring program experienced similar growth. From its inaugural year to the second year, at-risk student participation in the tutoring program nearly tripled: from 19% to 54% (see Table 6).<sup>202</sup> Indeed, the demand taxed the available resources. The following years, 2003 and 2004, participation decreased<sup>203</sup> to 41% and 39%, respectively.<sup>204</sup> Participation of at-risk students in the bar preparation class similarly increased from 25% in the first year to 48% and 43% in the second and third years respectively; it then decreased to 22% in the fourth year (see Table 6). Finally, a

<sup>200</sup> See *infra* section IV.D. (Non-empirical Results).

<sup>201</sup> See Comm. on Bar Admissions, *supra* note 10, at 463.

<sup>202</sup> To track the increase in participation in tutoring, we have combined the number of students who participated in tutoring only with those who participated in both components. We did likewise with the bar preparation class.

<sup>203</sup> Overall first-time takers' participation in the tutoring program dipped somewhat in the fourth year. For the July bar examinations in 2002, 2003, and 2004, forty-one (41), thirty-five (35) and twenty-six (26) first-time takers participated, respectively. The bigger picture is as follows: In the second year of the bar support program (including the July 2002 and February 2003 bar examinations), a total of forty-seven (47) graduates were tutored, and in the third year (July 2003 and February 2004), forty-nine (49) students participated in tutoring. In the fourth year of the program (July 2004 and February 2005), thirty-eight (38) students participated. We included in these figures repeaters, first-time takers from all quartiles of the class, and data from the February bar because the tutoring program consumes significant resources.

<sup>204</sup> Programs should anticipate some fluctuation over time in the level of student participation.

substantial percentage of at-risk students participated in at least one component of the bar support program: 40% in July 2001, 73% in July 2002, 57% in July 2003 and 42% in July 2004 (see Table 6).

**Table 6**  
**University of Richmond Bar Support Program**  
**Participation of At-Risk Students**

**July 2001 Exam**

<b>Program Component</b>	<b>Percentage Participating</b>
Bar Preparation Class Only	20.8% (11/53)
Individual Tutoring Only	15.1% (8/53)
Both Components	3.8% (2/53)
At Least One Component	39.6% (21/53)
Neither Component	60.4% (32/53)
Total At-Risk Students Who Took Bar	53

**July 2002 Exam**

<b>Program Component</b>	<b>Percentage Participating</b>
Bar Preparation Class Only	19.2% (10/52)
Individual Tutoring Only	25.0% (13/52)
Both Components	28.8% (15/52)
At Least One Component	73.1% (38/52)
Neither Component	26.9% (14/52)
Total At-Risk Students Who Took Bar	52

**July 2003 Exam**

<b>Program Component</b>	<b>Percentage Participating</b>
Bar Preparation Class Only	16.1% (9/56)
Individual Tutoring Only	14.3% (8/56)
Both Components	26.8% (15/56)
At Least One Component	57.1% (32/56)
Neither Component	42.9% (24/56)
Total At-Risk Students Who Took Bar	56

**July 2004 Exam**

<b>Program Component</b>	<b>Percentage Participating</b>
Bar Preparation Class Only	2.4% (1/41)
Individual Tutoring Only	19.5% (8/41)
Both Components	19.5% (8/41)
At Least One Component	41.5% (17/41)
Neither Component	58.5% (24/41)
Total At-Risk Students Who Took Bar	41

Furthermore, the bar support program is popular with more than just the at-risk students. For the July 2002, 2003, and 2004 exams, on average approxi-

mately fifty percent of all of the University of Richmond's graduates took the Virginia bar examination after regularly attending the bar preparation class, tutoring, or both.<sup>205</sup>

For schools hesitating to implement a bar support program for fear that students most at risk for failing the bar examination will not participate, our advice is "build it and they will come."<sup>206</sup> They will not *all* come. Schools should not expect 100% participation. But, as the program at the University of Richmond demonstrates, if a school offers a quality bar support program, it is likely that enough students will participate to significantly impact the bar passage rate.<sup>207</sup>

#### D. *Non-empirical Results*

This paper provides empirical data and statistical analysis suggesting that the bar support program at the University of Richmond improved the bar passage rates. In addition to the data and the statistics, however, the program generates powerful intangible benefits, including the possibility that the graduates will become more competent attorneys. The bar support program teaches students legal reasoning, legal writing, and time management. Because the program helps graduates become more proficient in these areas, it serves a greater benefit than simply helping students pass the bar examination.

Student evaluations and unsolicited feedback about the program have been overwhelmingly positive and appreciative. As just one example, a student wrote: "Thanks to the school . . . for developing this program. I really appreciate the no-nonsense approach the [bar preparation class] takes towards early bar preparation . . . . I feel like students who take this course prior to taking a private bar review course will be at a big advantage." Another student wrote, "I know (without a doubt) that the essay reviews [during tutoring] were instrumental to my passing the bar exam." And:

Going into the exam, I felt that I had a thorough understanding of how to think about the essay questions and properly outline my response . . . . Without [the tutoring sessions], I am positive that I would not have had the confidence or the proper preparation to pass.<sup>208</sup>

Thus, in crunching the numbers and deciding whether a bar support program is "worth it," law schools should not overlook the very positive impact that such a program can have on their graduates as they sit for the bar on examination day and as they reflect on their law school and bar examination experiences in the future.

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<sup>205</sup> For the July 2002 Virginia bar examination, sixty-three (63) of the one hundred three (103), or 61.2%, of Richmond's first-time takers participated in at least one aspect of the bar support program. In July 2003 and July 2004, those figures were fifty-seven (57) of one hundred fifteen (115), or 49.6%, and forty-two (42) of ninety-two (92), or 45.7%, respectively. Additionally, students who took other bar exams also attended the bar preparation class, and some graduates who were repeating the Virginia bar examination participated in tutoring.

<sup>206</sup> *FIELD OF DREAMS* (Universal Studios 1989).

<sup>207</sup> Additionally, a law school could consider offering a bar support program for credit, *see supra* note 99, which may increase at-risk student participation.

<sup>208</sup> On file with the authors.

## V. CONCLUSION

The bar examination, in its current format, is imperfect. Yet despite these imperfections, it is likely to remain a reality that law students must face. As academics, we should encourage and work with bar examiners to improve the test format, content, and experience for our graduates.<sup>209</sup> While we work to improve the test itself, we must find ways of making sure our graduates have every opportunity to pass the bar examination. With the enormous debt that students incur to attend law school, law schools have an obligation to help every student who wishes to practice law pass the bar, and do so on his or her first attempt.

Data from the University of Richmond's last four years support the conclusion that the bar support program can be credited with improving the chances that graduates will pass the bar examination on the first attempt.<sup>210</sup> And the program does so for modest cost. Because a bar support program is relatively inexpensive to implement, while providing a distinct advantage to graduates, it makes good sense to consider offering such a program.

We have studied only one bar support program at one law school; and thus, we cannot say with certainty that such a program will benefit every school. Nonetheless, the empirical evidence strongly suggests the effort will benefit the students. Furthermore, while the University of Richmond has adopted a successful program and, thus, offers one model, other interested schools should consider implementing a program appropriate to their individual circumstances. We do not intend to imply that the University of Richmond's program is the only answer; it is just one cool way to address this hot issue.

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<sup>209</sup> Moeser, *supra* note 29, at 1052 (“[T]he purpose of the National Conference of Bar Examiners . . . since its formation in 1931, has been to foster better bar examining.”).

<sup>210</sup> See Smith, *supra* note 84, at 183. But such a “model program” eliminates the need to “reinvent the wheel.” *Id.*