



INDIANA UNIVERSITY

SCHOOL OF LAW

Bloomington

January 30, 2008

Professor Randy A. Hertz  
New York University Law School  
245 Sullivan Street, Office 626  
New York, NY 10012

RE: Recommendation to ABA Special Committee on Outcome Measures

Dear Professor Hertz,

My name is William Henderson. In response to a notice I read on the Best Practices Blog, I am writing to you in your capacity as Chairman of the newly created Special Committee on Outcome Measures. The blog posting stated that your committee was “particularly interested in receiving concrete suggestions for developing outcome measures for legal education that are amenable to feasible, reliable, and verifiable assessment.” The purpose of this letter is to respond to that request.

Before getting into the specifics of my recommendation, let me briefly summarize my professional background. I currently served as Associate Professor of Law at Indiana University School of Law, where I teach various business law classes and a course on the economics and sociology of the legal profession. My primary area of research is empirical analysis of the legal profession and legal education. To further these interests, I also serve as Director of the Law Firms Working Group (sponsored by the American Bar Foundation and Indiana Law), Research Associate for the Law School Survey of Student Engagement (LSSSE), and editor of the Empirical Legal Studies Blog ([www.elsblog.org](http://www.elsblog.org)). A more extensive biography, curriculum vitae, and a link to my publications are available online at <http://www.law.indiana.edu/directory/wihender.asp>. I am also a member of the ABA Section on Legal Education and Admissions to the Bar.

There are a large number of potential outcome measures that are valuable to prospective law students, but certainly, from the perspective of education accreditors, the Holy Grail would be reliable metric of “value added” during 3+ years of legal education. There are significant conceptual and institutional constraints that hinder this goal (which I directly address in the body of this letter). For several pragmatic reasons, however, I would propose the following value-added measure as a best starting place: What is the school-level effect on Multistate Bar Exam performance (MBE), after controlling for student credentials and other relevant school-level attributes, such as attrition and student transfers?<sup>1</sup> Although each state administers its own bar examination, 48 states rely upon the MBE for approximately 50 percent of the total bar score. Moreover, performance on

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<sup>1</sup> Some of my suggestions are discussed in greater detail in “Measuring Outcomes: Post Graduation Measures of Success in the *U.S. News & World Report* Law School Rankings” (forthcoming *Indiana Law Journal* 2008), online at <http://ssrn.com/abstract=954604>. This article is co-authored with Andrew Morris, a law professor and economist at the University of Illinois.

the MBE is strongly correlated with scores on essay and performance (MPT) components.<sup>2</sup> As a statistical matter, the motivational effects of different jurisdictional cut scores can be easily resolved (a point I address later).

There are four reasons why this approach should be very attractive to the ABA Section on Legal Education and Admissions to the Bar: (1) identifying school-level effects will enable students to identify law schools that will best prepare them to clear the bar exam hurdle; (2) it is fully responsive to government agencies (such as the DOE) that are demanding outcome measures that facilitate meaningful school-to-school comparisons; (3) it requires the assembly of a national law school database that can be augmented to include other important data, such as employment outcomes and the 90+ variables contained in the Law School Survey of Student Engagement (LSSSE), which will enable us to develop more refined outcome measures in the future;<sup>3</sup> and (4) it will prompt law schools to focus on outcome measures that go beyond the bar examination, thus re-channeling some of the socially harmful focus on inputs (such as UGPA and LSAT) prompted by the annual *U.S. News & World Report* rankings.

As I highlight the enormous advantages of this approach, I readily acknowledge that many law faculty and administrators will voice strong opposition. Heightened scrutiny on outcome measures will require many law schools to reevaluate their business models. But legal education is a multi-billion industry that is sustained by our students borrowing against their future earnings. As legal educators, we are fiduciaries, not business people charged with maximizing profits or law school prestige. Because prospective law students are not an organized interest group, the ABA Section on Legal Education and Admissions to the Bar is the institutional bulwark that ensures that they receive a high quality, cost-effective legal education. These students represent the next generation of lawyers, so the stakes are enormous.

The remainder of this letter summarizes some of the key details of my proposed outcome measure. I first address some important conceptual and institutional constraints. Thereafter, I discuss some of the technical and logistical issues raised by this proposal, including the scope of the required dataset.

### *Conceptual and Institutional Constraints*

As we approach the concept of “value added” in legal education, we immediately confront two difficult threshold issues. First, what constitutes “value” within a value-added regime? Even within the legal academy, the goals of legal education are often highly contested. Indeed, fifteen years after the publication of the renowned MacCrate Report, there is no consensus among legal educators regarding its merits or whether we have made any substantial progress toward its goals. Second, assuming the content of value added can be adequately defined, can it be operationalized into an observable and measurable construct?

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<sup>2</sup> See generally STEPHEN P. KLEIN, SUMMARY OF RESEARCH ON THE MULTISTATE BAR EXAMINATION (NCBE 1993).

<sup>3</sup> Since its inception in 2003, LSSSE has surveyed students at over 130 law schools, typically with response rates in excess of 50 percent. For more information on LSSSE, including its detailed and informative annual reports, see its website at <http://lssse.iub.edu/index.cfm>.

In my opinion, the Special Committee can waste a huge amount of time and energy trying to answer these very difficult questions. Indeed, the seeming intractability of these issues favors the status quo. It is a serious trap that the Committee needs to avoid. Therefore, in keeping with the maxim that the great should not be the enemy of the good, I urge you to consider a more pragmatic approach.

We can simplify the inquiry by viewing the issue of value added from the perspective of the law student. If the goal is to become a licensed practicing attorney, the threshold test of value added is how effectively a law school can prepare a student to pass the bar exam. Although many law professors are dismissive of “teaching to the bar,” perhaps because their own legal education (typically at an elite law school) had a much different focus, bar passage is a legitimate source of worry for many law students. Each year, approximately 25 percent of all applicants fail the bar exam on their first attempt, including a disproportionate number of minority candidates.<sup>4</sup> Moreover, in recent years, many states have increased their cut scores, thus making entry into the profession more difficult.<sup>5</sup> Under the licensing regimes of most states, a passing score on the bar examination is evidence of minimum competency. We can all agree that the bar exam is a highly imprecise way to make this assessment. But impugning the validity of the bar exam is, in my opinion, the worst type of academic exercise because this, for better or worse, is the licensing regime that applies to our students—at least for the medium term.

Taking the existing bar examination regime as a given, the key value-added measure is simple and straightforward: What is the school-level effect on bar passage, after controlling for credentials and other school-level attributes, such as transfers and attrition? There are several sound theoretical and empirical reasons that suggest that a law school, through a myriad of curricular and resource allocation decisions, can significantly effect (positively or negatively) subsequent bar performance. For example, every major validity study on bar performance has shown that law school performance (based on grades) is the single best predictor of bar passage;<sup>6</sup> LSAT scores, which reflect verbal reasoning ability as an incoming student, consistently have much lower explanatory power. These results should not be surprising. The bar exam is not an aptitude test; it requires knowledge of substantive law and the ability, presumably developed during three years of law school, to accurately apply that law to a discrete set of facts.<sup>7</sup>

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<sup>4</sup> See, e.g., LINDA F. WIGHTMAN, LSAC NATIONAL LONGITUDINAL BAR PASSAGE STUDY 27-32 (LSAC 1998) (summarizing overall bar passage statistics from the LSAC Bar Passage Study, including large racial disparities in pass rates); Stephen P. Klein, Ph.D. & Roger Bolus, Ph.D., *Initial and Eventual Passing Rates of the July 2004 First-Timers* (2006) (reporting essentially the same results for the Texas bar population).

<sup>5</sup> See Leigh Jones, *Bar Exam Failures are on the Rise*, NAT'L L. J., Mar. 13, 2006. See also Deborah J. Merritt, Lowell L. Hargens, & Barbara F. Reskin, *Raising the Bar: A Social Science Critique of Recent Increases to Passing Scores on the Bar Exam*, 69 U. CINN. L. REV. 929, 929 n.1 (2001) (reporting that during the 1990s approximately a dozen states raised the minimum score required to pass the bar exam).

<sup>6</sup> See, e.g., LSAC BAR PASSAGE STUDY, at 37-54 (presenting detailed empirical evidence showing that the law school GPA is the best predictor of bar passage, with a much smaller amount of the variance explained by LSAT scores); Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 442-225 & tbl. 6.1 (2004) (same).

<sup>7</sup> In addition to law school grades and LSAT scores, commercial bar preparation also enhances bar performance. Fortunately, the vast majority of bar applicants avail themselves of these extra resources. See

Further, within a given state jurisdiction, when a school's first-time bar passage is compared with the characteristics of its student body, there is evidence that some law schools are performing at a very high level. Specifically, among schools with the same primary bar jurisdiction, relative first-time bar passage is a function of several factors, including entering credentials, such as 25th percentile LSAT and 25th percentile undergraduate GPA. Bar passage can also be affected by aggressive affirmative action policies that admit substantial numbers of minority students with entering credentials that are significantly below the 25th percentile (a laudable goal that this proposal will enhance by highlighting the institutions that post the greatest success with low-credential students).

With these variables in mind, consider the strong relative performance of North Carolina Central University (a historically black law school) on the North Carolina bar, posting a first-time bar passage that was nearly comparable with UNC Chapel Hill despite dramatically lower student credentials:<sup>8</sup>

Law School	Bar Passage	25th GPA	25th LSAT	% Black	% Asian	% Hispanic
Wake Forest University	93%	3.19	161	5.8%	3.9%	3.9%
Campbell University	88%	3.04	152	2.0%	2.0%	1.8%
UNC Chapel Hill	83%	3.39	158	7.2%	6.3%	4.9%
North Carolina Central University	81%	2.93	144	45.1%	3.4%	1.5%

(North Carolina summer 2005/winter 2006 first-time bar passage rate was 71%)

When we focus on states whose primary bar jurisdiction is Tennessee, we observe a similar strong relative performance by the University of Memphis, which has relatively modest entering credentials and a large black student population.

Law School	Bar Passage	25th GPA	25th LSAT	% Black	% Asian	% Hispanic
University of Memphis	91%	3.06	153	15.4%	1.5%	0.7%
University of Tennessee	89%	3.37	155	13.6%	0.7%	1.1%
Vanderbilt University	88%	3.49	164	8.1%	6.5%	2.9%
Appalachian School Of Law	71%	2.59	147	1.4%	1.1%	2.4%

(Tennessee summer 2005/winter 2006 first-time bar passage rate was 80%)

Similarly, for schools with Massachusetts as the primary bar jurisdiction, Northeastern University posts the highest first-time bar passage (tied with Boston University) with comparably lower entering credentials and a very diverse student body.

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Stephen P. Klein, Ph.D. & Roger Bolus, Ph.D., *Analysis Of July 2004 Texas Bar Exam Results By Gender And Racial/Ethnic Group* (2004), online at [http://www.ble.state.tx.us/one/analysis\\_0704tbe.htm](http://www.ble.state.tx.us/one/analysis_0704tbe.htm).

<sup>8</sup> Some of this difference could be explained by higher academic attrition rates at North Carolina Central, and a larger proportion of strong UNC Chapel Hill students who leave the state upon graduation. Nonetheless, North Carolina Central is still outperforming the state first-time rate by a full 10 points. My preliminary regression analysis of bar differential performance (school's 1st-time bar passage minus state's 1st-time bar passage) shows that North Carolina Central has the greatest level of overperformance (technically, the largest positive residuals) after controlling for credentials and ethnicity of its students.

Law School	Bar Passage	25th GPA	25th LSAT	% Black	% Asian	% Hispanic
Northeastern University	94%	3.17	156	6.1%	11.3%	8.6%
Boston University	94%	3.52	163	3.9%	13.3%	2.3%
Boston College	90%	3.41	162	5.1%	12.0%	3.5%
Suffolk University	80%	2.96	153	2.9%	6.4%	3.1%
New England School Of Law	73%	3.04	150	1.8%	6.5%	2.0%

(Massachusetts summer 2005/winter 2006 first-time bar passage rate was 82%)

The results in Florida are no less striking. Consider the relative performance of Florida Coastal (a for-profit law school) and Florida International (a newly accredited public law school), which both have modest entering credentials and large minority populations, but impressive relative bar performance:

Law School	Bar Passage	25th GPA	25th LSAT	% Black	% Asian	% Hispanic
University of Florida	83%	3.42	155	5.9%	5.0%	9.4%
Florida Coastal School Of Law	80%	2.89	149	7.4%	4.1%	4.5%
Florida State University	79%	3.26	158	5.6%	4.3%	6.3%
Florida International	78%	2.93	151	9.7%	2.4%	41.4%
University of Miami	78%	3.25	156	7.0%	4.2%	11.8%
Stetson University	77%	3.13	152	5.8%	2.6%	8.5%
Nova Southeastern University	64%	2.91	148	4.5%	2.7%	15.0%
Barry University	60%	2.8	148	5.2%	4.3%	9.1%
Florida A&M School Of Law	54%	2.75	140	47.1%	3.3%	14.8%
St. Thomas University	53%	2.7	147	9.0%	4.7%	24.8%

(Florida's summer 2005/winter 2006 first-time bar passage rate is 71%)

My preliminary analysis reveals similar over-performance by schools in Ohio, New York, and Texas. These seeming disparities may be wholly or partially explained by several factors, including differences in academic attrition, net flows of transfer students, and out-of-state employment patterns. Yet, they could also be explained by differences in curriculum and faculty-student engagement, which in turn produce better performance on the bar exam. Because separating these effects requires better data than are currently available, the Special Committee should commit itself to resolving this deficit.

#### Measuring School-Level Effects on Bar Passage

As a statistical matter, it is not difficult to measure the effect of a given law school on bar exam performance. Multivariate regression analysis can be used to separate (i.e., statistically control for) the effect of a wide range of factors, such as attrition, entering credentials, net transfers, or out-of-state employment. Yet, this approach requires that the individual bar applicant, rather than the law school, become the unit of analysis. In turn, law school attended becomes an independent explanatory variable. Assuming the dataset includes control variables for all relevant factors that could systematically influence bar performance, the resulting coefficient for a given law school reflects, in essence, the school's "value added" on the bar exam.

The most important element of this analysis is a measure of bar performance (the “dependent variable”) that is commensurable across all law schools. The only plausible measure is the raw or scaled score on the Multistate Bar Exam. Several bar exam validity studies have used a simple dichotomous pass/fail variable. Unfortunately, differences in state “cut” scores and equating methods (i.e., statistical techniques that convert essay and MPT scores to the same scale and distribution as the MBE) make it possible for a failing score in State A to earn a passing score in State B. Further, because law school graduates migrate to different jurisdictions based on a host of non-random factors (e.g., high grades, geographic proximity to large out-of-state markets, local economic conditions), reliance on pass/fail outcomes will not produce valid school-level results. In contrast, the MBE is comprised of six areas of law (Torts, Contracts, Property, Criminal Law, Constitutional Law, and Evidence) that are core courses at every ABA-accredited law school. Although differential cut scores will likely affect a candidate’s MBE score by encouraging more (if the cut score is high) or less (if the cut score is low) preparation, these jurisdictional variations can be captured through a “fixed effects” regression model.

To calculate the school-level value added on MBE scores, it is necessary to assemble a dataset with a wide range of potentially relevant control variables. Such a dataset would include LSAT scores, undergraduate GPA, law school grades (standardized to facilitate school-to-school comparisons), race, gender, age, and, ideally, enrollment in commercial bar prep courses and full- or part-time employment during the time period leading up to the bar exam.<sup>9</sup> Assembling the required dataset will obviously require the cooperation of the National Conference of Bar Examiners (NCBE) and the Law School Admissions Council (LSAC). Fortunately, there is a precedent for this type of analysis. Over thirty years ago, the Educational Testing Service (ETS), at the request of the NCBE, the LSAC, the Association of American Law Schools (AALS), and the American Bar Foundation (ABF), used MBE scores as a dependent variable in a nationwide bar exam validity study.<sup>10</sup> That dataset contained all the essential variables needed to implement this proposal.

Because the calculation of value-added bar exam effects is based on *relative* law school performance, it is bound to be controversial among law faculty and administrators. Some law schools will fare very well and while others will fare poorly. Nonetheless, it is critical to separate two institutional dynamics: (1) the desire among law schools to avoid any direct school-to-school comparisons because the ensuing competition requires resource allocation decisions that are unpopular with law faculty; and (2) legitimate concerns that an excessive focus on the MBE will detract from other ways that a law school adds value to a student’s long-term professional success.

This second perspective needs to be taken seriously. The best way to accomplish this objective is for the ABA, in its accreditation capacity, to use the MBE value-added approach as a starting point, rather than an endpoint, in an iterative process that seeks to operationalize better and more valid outcome measures. The primary virtue of this approach is that it forces law schools out of a mode that resists outcome measures and

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<sup>9</sup> In an analysis of Texas bar exam results, bar prep courses had a positive effect on bar passage while employment in the weeks prior to the bar exam had a negative effect. See Klein & Bolus, *supra* note 7.

<sup>10</sup> See CARLSON & WERTS, RELATIONSHIPS AMONG LAW SCHOOL PREDICTORS, LAW SCHOOL PERFORMANCE, AND BAR EXAMINATION RESULTS (ETS 1976).

into a more creative and innovative mode that identifies and develops the best long-term outcome measures for students.

On this latter point, we have many reasons to be optimistic. Since the inception of LSSSE in 2003, over 130 law schools have participated in its annual survey, which provides data on a wide array of factors that affect the law school experience, including:

- Classroom environment and interactions with faculty (20 variables)
- Self-reported gains on constructs related to effective lawyering (5 variables)
- Type and volume of writing within law school (3 variables)
- Participation in extracurricular or co-curricular activities (9 variables)
- Satisfaction with law school experience (7 variables)
- Time allocation during law school (e.g., studying for class, socializing, exercising, volunteering) (12 variables)
- Collegial and supportive atmosphere (3 variables)
- Self-reported gains on various occupational and interpersonal skills (16 variables)
- Total satisfaction with law school and willingness to attend the same law school again (2 variables)
- Debt loads and career goals

Over the long term, the ABA can sponsor research that explores the relationship between a law school's LSSSE attributes and its gains (or deficits) on the MBE. In turn, qualitative follow-up studies can shed light on teaching practices and curriculums that truly do add value for law students.

#### Conclusion

This letter responds to the Special Committee's request for "concrete suggestions for developing outcome measures for legal education that are amenable to feasible, reliable, and verifiable assessment." As the cost of legal education continues to rise faster than inflation, thus increasing the debt burden on our students, this focus on outcome measures is entirely appropriate. I applaud the efforts and foresight of the ABA Section on Legal Education and Admissions to the Bar. Moreover, as a Section member, I would be willing to help resolve some of the technical and logistical issues that are raised by my proposal. In the interim, please feel free to contact me with any questions. I can be reached at 812-856-1788; my email address is [wihender@indiana.edu](mailto:wihender@indiana.edu). Thank you for your time.

Sincerely,



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