TOWARDS PARITY IN BAR PASSAGE RATES
AND LAW SCHOOL PERFORMANCE:
EXPLORING THE SOURCES OF DISPARITIES
BETWEEN RACIAL AND ETHNIC GROUPS

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There is a dream in this land,
with its back against the wall

...To save the dream for one, it must
be saved for all.

Langston Hughes

I. INTRODUCTION: THE DATA AND DEBATES

Current studies indicate that significant disparities in bar passage rates among racial and ethnic groups on bar examinations exist no matter the test format or subject area content of the examination.² In

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As for the extent of the disparity, Anglo first time test-takers from ABA-approved law schools passed the California bar examination at approximately eighty percent on a recent July examination. Menocal, Letter From the Chair, 60 The Bar Examiner 2, 2-3 (February 1991). While for Asians only sixty-five percent passed; for Hispanics only fifty-five to sixty percent and for African-Americans only fifty percent passed. Id. Other than California, no states report this kind of race-ethnic data. One commentator suggests that the California data on bar passage is mostly typical for other jurisdictions. R. Abel, AMERICAN LAWYERS 103 (1989). Anecdotal information reported by deans also paints a rather bleak picture. See
other words, people of color tend to perform less well than their white counterparts on all aspects of the bar examination. A remedy for the disparity in bar passage rates, however, cannot be prescribed until the reasons for poor performance are properly diagnosed and the sources of the problem accurately identified and corrected. Furthermore, efforts to obtain a court-mandated resolution of this problem are not likely to yield constructive results. Thus, a comprehensive solution to the problem does not lie in the courtrooms. Rather, resolving the problem involves a concerted effort. Scattered approaches to a resolution only dissipates energies devoted to this important enterprise.

Given the complexities of the problem and limited nature of the extant data, a concrete solution is not readily apparent. Nonetheless,

Bernstine, Minority Law Students, supra (reporting on comments of deans at the “better” law schools). And most bar examiners acknowledge that disproportionate pass rates exist among these subgroups. See e.g., Menocal, Letter From the Chair, supra at 2.


3. As discussed infra, bar exam challenges advancing various legal theories during the seventies proved, for the most part, unsuccessful. Revisiting those issues today in new lawsuits is likely to prove equally unproductive. Moreover, the solution to the problem of low minority bar passage rates does not lie in the courtroom. See, e.g., Delgado v. McTighe, 522 F. Supp. 886 (E.D. Pa. 1981)(suggesting that a more systematic, in-depth study be undertaken to determine reasons for low bar passage rates among minority bar applicants.).

4. Such an approach is unsatisfactory because the crux of the problem, namely inadequate academic preparation, cannot be remedied through court proceedings. Thus, resolving the problem comprehensively will have a far-reaching effect than the immediate satisfaction of a declaratory verdict. This is a fundamental problem which society as a whole must address and remedy. Meanwhile, the legal profession is equipped with many talented people able to grapple with an interim resolution affecting minority law students and bar applicants.

As reported by the multi-racial members of the bench, bar, and academy that comprised the special subcommittee of the California Committee of Bar Examiners formed to study the pass rates of minority group members on the California bar examination, “a substantial increase in the minority representation in the profession is one of the greatest challenges facing the legal profession in California and must be addressed by the profession as a whole as rapidly as possible.” Special Subcommittee Report on the Minority Passing Rates on the Bar Examination, Committee of Bar Examiners of the State Bar of California 24 (1988) (hereinafter Report on Minority Passing Rates).

5. Today, little comprehensive and accurate data about factors anent bar passage rates among racial and ethnic groups exists nationwide. See, e.g., G. Segal, Blacks in the Law, supra note 2, at xx (citing the lack of racial-distribution information available from bar associations and other professional organizations and from boards of bar examiners as one reason for the limited number of national studies of blacks in the legal profession). Twenty years ago, Professor George Neff Stevens recognized the need for such information and urged that action be taken to collect such data nationwide. See Stevens, Bar Examinations and Minority Group Applicants, 56 A.B.A. J. 969, 971 (Professor Stevens calls for a national data bank to collect information to answer important questions about minority performance on bar exams) (hereinafter Minority Group Applicants); see also Symposium: The Minority Candidate and the Bar Examination, 5 Black L.J. 120, 128 (1977) (keynoter calls for compilation of comprehensive data in order to define the magnitude of the problem to achieve a meaningful
what information is available is significant because it points in one direction. Thus, this lack of universal data is not an obstacle for any commentator desiring to propose particular strategies or approaches to resolving the problem.

A great deal of the discussion has already focused on the possible reasons for poor bar performance among racial and ethnic group members. The most frequently cited claim is that bar examinations, as presently constructed, administered, and graded, are racially or culturally biased. What is known presently is that minority bar examination performance mirrors the applicant’s performance in law school. As such, an approach to a solution seemingly lies in an exploration of the cause or causes that produce this phenomenon.

Current data on minority student performance in law school indicates that they are out-performed by their majority counterparts based on indicia such as class rank or grade point average. This is not surprising because students of color are often admitted to law school with statistical predictors of success which are, for the most part, not competitive with white students. By and large, minority bar applicants

resolution) [hereinafter Symposium: The Minority Candidate]. California is the only state that has funded comprehensive studies relating to the bar passage rates of such groups and collected race ethnic data. See, e.g., Report on Minority Passing Rates, supra note 4, at 2.

The Law School Admission Council (“LSAC”) is conducting a comprehensive study at ABA-approved law schools in an effort to obtain complete and accurate information about bar passage rates, as well as about factors that may influence performance in law school and success on the bar examination. Ramsey, Law Graduates, Law Schools and Bar Passage Rates, 60 The Bar Examiner 21 (February 1991); see generally LSAC Bar Passage Study Design (March 1991).

6. See, e.g., Pettit v. Gingerich, 427 F. Supp. 282, 290 (D. Md. 1977) (plaintiffs allege that “the examination is inherently discriminatory or culturally biased against blacks as evidenced by the disproportionately high black failure rate”); see also Symposium, The Minority Candidate, supra note 5, at id. (keynote suggests that difference in bar performance between minority and white candidates most likely the result of cultural bias or racist practices in the bar examination process than any difference in their respective skills and knowledge).


9. For example, the median LSAT score for Anglo students, was 32.5 in 1968-1987. Access 2000 Data Book, Law School Admission Services Inc., 1988 (Table 32). But for minorities, their median LSAT scores were below those for Anglos. The average by minority group in 1986-1987 was as follows: African Americans (22.3); American Indians (26.9); Chicano/Mexican American (27.2); Hispanic (27.8); Puerto Rican (18.7); Asian Pacific Islander (30.4). Id. See also, Romero, An Assessment of Affirmative Action in Law School Admission After Fifteen Years: A Need for Recommitment, 34 J. Legal Educ. 430, 433 (1984) [hereinafter An Assessment of Affirmative Action].
had lower LSAT scores and undergraduate grade point averages than their majority counterparts.\textsuperscript{10}  

Inadequate academic preparation beginning in the primary grades and continuing through higher education, is the most likely explanation for the lower performance rates among minority group members in law school compared to their majority counterparts.\textsuperscript{11}  Given the correlation between law school performance and bar passage rates, this cause and effect may also explain the low minority bar passage rates found in all the studies conducted to date including the evidence presented in the various lawsuits challenging bar examinations. As such, a link seemingly exists between academic preparedness in law school and bar performance.

Law schools admit certain minority group members who are viewed as academically “at risk” because of their lower admissions credentials.\textsuperscript{12}  Unfortunately, the law school curriculum is not structured to deal with inadequately prepared students. Consequently, law schools offer these students academic assistance through support programs ostensibly designed to ameliorate the disparities in predictors. Such programs are, however, only palliatives or mere adjuncts to the


\textsuperscript{11}  As noted in an article reporting on statistical data involving minority and nonminority law students,

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Disparities in the educational attainments of minority and nonminority students have, for some time, been documented extensively at nearly every level of education. (citations omitted.) These disparities typically increase, rather than decrease, over many years of formal education, probably because of continuing differences in the educational opportunities of minority and nonminority students.
\end{quote}

Powers, \textit{Differential Trends, supra} note 8, at 488.

\textsuperscript{12}  LSAT scores and undergraduate grade point averages are the traditional predictors of success in the first year of law school. Powers, \textit{Long-Term Predictive and Construct Validity of Two Traditional Predictors of Law School Performance}, 74 J. Educ. Psych. 568, 569 (1982). A recent validity study of the LSAT score or the traditional combination of LSAT score and undergraduate grade point average in predicting first year success in law school reports that these predictors are no less valid for any of the minority groups than the white group. Wightman & Muller, \textit{Differential Validity, supra}, note 10, at 23. As reported previously in another study, white students continue to enter law school with higher admissions criteria and outperform minority students in their first year of law school. \textit{Id.} at 27-29. In concluding, the report urged that further research be done on the “the predictor variables,” especially the LSAT score, as a diagnostic tool to identify the skills or quality of academic preparedness that are lacking among selected minority applicants in order to “lead to informed and eventually successful intervention programs.” \textit{Id.} at 29.
admissions process. They are, usually, remedial in nature and not designed to improve law school performance significantly.

As a result, the absence of effective intervention programs is arguably another reason why inadequately prepared students of color perform poorly on bar examinations. Whether effective intervention in law school can be achieved to remedy this lack of academic preparedness depends on the type and quality of the assistance program offered students of color with lower admissions predictors. Given the current state of law school assistance programs, however, effective intervention is problematic for several reasons.

First, putting aside financial considerations, academic support programs fail because law faculty do not consider the problem of inadequate academic preparation among students of color seriously. Second, given the large differential in the traditional law school predictors, law faculty tend to make negative assumptions about the potential of students of color, specially admitted, to perform well in law school. And, as reported anecdotally, these students tend to perform at the bottom quarter of their class.

As legal educators, law faculty are, in fact, novices. Although law professors are well adept at "inundat[ing] students with substantive and procedural rules of law, [law professors] rarely if ever provide any guidance or instructions in methods of learning." All students crave instructive guidance on mastering the new learning experience they encounter in law school. The law school experience, premised on a problem-solving model of learning, exhorts students to "think like

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13. Scanlon, The History and Culture of Affirmative Action, 1988 B.Y.U. L. Rev. 343, 352-53 [hereinafter Affirmative Action]. However, such academic support programs are distinguishable from those in which the law school commits significant resources, financial and instructional, in a comprehensive, programmatic fashion. Assistance programs at the University of New Mexico and University of California at Los Angeles, discussed infra, are examples of the latter.


15. See, e.g., Feinman & Feldman, Achieving Excellence: Mastery Learning in Legal Education, 35 J. Legal Educ. 528 (1985) [hereinafter Achieving Excellence]. The authors note that most law students possess the basic prerequisites for learning the law. But for minority students admitted under affirmative action programs, they opine that many teachers reject this proposition, asserting that a significant number of law students are so deficient in ability or preparation that efforts to improve their academic performance significantly are infeasible. Id. at 531, n.10.

16. See, e.g., Bernstine, Minority Law Students, supra note 2, at 11.

lawyers.” For the most part, law faculty expect students to be self-directed in this task. And fortunately for law faculty, a majority of the regularly-admitted students manage to learn this linear construct on their own. This should come as no surprise because their educational experience, since the primary grades, has prepared them—and all throughout their schooling prior to law school—for grasping the essential tenets of this “new,” content-specific, approach to problem-solving. For educationally disadvantaged minority students, however, such instructive guidance is essential if they are to be competitive in law school.

As their admissions predictors indicate, specially-admitted students of color have not experienced learning in the kind of structured or dynamic environment which is a prerequisite for competitive law school performance. Moreover, law faculty tends to make assumptions about the relative abilities of these students based on their comparatively inferior paper credentials. Because legal educators are not, in fact, educators in the true meaning of the term, they do not fully comprehend that paper credentials are not synonymous with academic ability or intelligence.

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18. For an excellent and insightful discussion of the type of dynamic, interactive learning environment that is likely to promote academic confidence necessary for competitive academic performance, see Cummins, Empowering Minority Students, 56 Harv. Educ. Rev. 18 (1986). See also Scott, Gender and Race Achievement Profiles of Black and White Third-Grade Students, 121 J. Psych. 629 (1987) [hereinafter Gender and Race Achievement Profiles]:

Test scores often mirror empirical shortcomings, including validity and reliability questions. Nonetheless, the extensive range of the subjects’ attainments on the CAT [California Achievement Test] seemingly serve notice that individualized curricular planning enabling students to become actively engaged in classroom activities through frequent and accurate responses to stimuli relevant to classroom tasks (citation omitted) may be required if compensatory programs are to provide many poor and minority youth with viable schooling enrichment.

Id. at 634.


Thus, tests may be useful in measuring how well students have acquired the skills taught by the school system and how well they may do at the next level in the educational hierarchy. (footnote omitted.) The tests, rather than reflecting cultural inferiority, are indicative of the educational—not genetic—deficiencies of minority children and, more important, perhaps the inadequacy of public schools in their present state.

Id. at 52-53. Cf. Herbert, Intelligence Test: Sizing Up a Newcomer, 122 Science News 280, 281 (1982) (quoting Asa Hilliard, a University of Georgia psychologist's response to a new “IQ” test that “prediction tests have no educational value.”); see also Herbert, Ability Testing Absolved of Racial Bias, 121 Science News 84 (emphasizing that educators recognize that test scores are not fixed measures of intelligence); see generally White, Culturally Biased Testing and Predictive Inability: Putting Them on the Record, 14 Harv. C.R.-C.L. L. Rev. 89 (1979).
Scores on standardized tests merely reflect student educational attainment, not potential.\textsuperscript{20} Indeed, all that tests can measure are limited portions of academic achievements.\textsuperscript{21} Thus, the gap in LSAT scores between students of color and their white counterparts should not be viewed as anything more than an indication that academic intervention is needed. In effect, LSAT scores predict nothing about capability to surmount past educational barriers if appropriate assistance is provided.\textsuperscript{22}

Misperceptions abound about minority student performance in law school among law faculty and students alike.\textsuperscript{23} Not surprisingly, low faculty expectations are all too common in light of the gap in academic achievement predictors for student admittees of color compared to those of their white counterparts. Unfortunately, faculty impressions of minority students’ academic deficiencies tend to become self-fulfilling prophesies.\textsuperscript{24}

In that regard, another variable conceivably plays a part of the low bar passage rates and law school performance equation. Namely, socio-psychological factors that may, albeit indirectly, affect law school academic performance and bar exam performance.\textsuperscript{25} For example,
students of color may find the law school environment somewhat alienating. If students are in an environment in which they feel that the instructor does not value their contributions or behaves in a manner that is insensitive or demeaning, whether it be well intentioned or otherwise, such an environment may adversely affect the learning experience. Specifically, students of color may lack the motivation to do as well as they might under different, or more hospitable circumstances. Hence this aspect of one's self-concept conceivably may affect students of color performance on the bar.

self-concept on academic performance. Although not directly determinative, positive correlations between self-concept and academic achievement, as well as study skills, were reported in a 1984 study. See generally Gadella & Williamson, Study Skills, Self-Concept, and Academic Achievement, 34 Psych. Rep. 923 (1984) [hereinafter Study Skills]. Another finding reported that study skills predict academic performance. Id. at 927. As such, the authors recommended that "it might be profitable for students to enroll in a study skills course and apply the skills they learn. Id.

26. The experiences of women in law school recently reported may be similar to that of students of color. See generally Homer & Schwartz, Admitted but Not Accepted: Outsiders Take an Inside Look at Law School, 5 Berkeley Women's L.J. 1 (1989-90). In discussing a study done at Berkeley, the authors describe traditional legal education, as characterized in the experiences of a selected group of female students at Yale Law School from 1984 to 1987 (the Yale Study), as "a process of 'self extrication,' or the rigorous exclusion of feelings and personal beliefs." Id. at 8.

The Yale study identified four aspects of women's alienation in law school: alienation from themselves, from the law school community, from the classroom, and from the content of legal education. Id. at 9. No doubt the same can be said for the experiences of students of color. See Banks, Gender Bias in the Classroom, 14 So. Ill. L.J. 527, 535 (author believes that "students of color share with women some of the negative perceptions about law school" citing to her current project Banks & Blocker, African-American and Hispanic American Student Perceptions of the Law School Classroom: Setting a Research Agenda, (unpublished manuscript on file with author)).

27. See Gerard, School Desegregation: The Social Science Role, 38 Am. Psych. 869, 874 (1983) (discussing desegregation data on tendency of teachers to underrate minority students which adversely affects their classroom performance) [hereinafter School Desegregation].

28. For one example of an effort to counteract these effects, I recall a comment that Armando M. Menocal III, currently the chair of the National Conference of Bar Examiners, made sometime following the 1980 California Committee of Bar Examiners ("CBE") administration of experimental bar sessions designed to test a broader range of skills, in an innovative effort to improve bar testing. He was then the committee chair and frustrated by the results of those sessions indicating no significant increase in minority bar passage rates. He opined whether calling a press conference the day before the next bar administration, announcing that the problem causing the disparate impact on minority bar applicants had been "corrected," would resolve the problem.

Of course, the desired effect of this press conference would be a means to cure the perceived "crisis in confidence" that people of color taking the bar exam no doubt encounter when confronted with the knowledge that only 30%, 40% or 60% of members of their particular ethnic or racial group are likely to pass on the first attempt. As for me, I entered law teaching —after serving nearly four years as a CBE member— with the view that this psychological "cure" was indeed the answer. It now seems all to clear to me that something fundamental in the educational experiences of most students of color causes the large disparities in law school and bar exam performance. Thus, if we, as legal educators, are going to accomplish any significant gains in diversifying the profession, effective academic intervention is imperative early on in their law school careers.
Similarly, the low self-esteem resulting from the psychological demoralization of non-member students of the dominant cultural hierarchy conceivably is another factor that may carry over into higher education.29 Admittedly, these factors are difficult to measure. Yet their potential impact is no less real or potentially detrimental to educational attainment.

Analogously, these same socio-psychological variables may contribute to the phenomenon of low bar passage rates as well. For example, the lack of academic confidence among students of color not allowed to realize their educational potential in the primary grades — as the low scores on standardized tests replicated throughout the early years and beyond suggest — no doubt affects bar performance if only how one approaches the bar exam. Countering the effects of these factors is admittedly problematic and an extensive discussion of their influence exceeds the scope of this article.

Thus focusing the bar passage debates on the issue of racial or cultural bias obscures a larger issue of potentially greater societal and professional significance: the failure of American society to fully implement the *Brown v. Board of Education*30 mandate to provide all with equal educational opportunity. In America students of color continue to receive unequal education; as a consequence, the promise of *Brown* remains unfulfilled.

This article, therefore, focuses more narrowly on the effect of inadequate educational backgrounds among students of color in the law school community and what law schools can do to compensate for that deprivation. This approach has several advantages. First, it promotes a dialogue with scholars in other disciplines about the impact of related factors;31 it provides, in effect, a context for the discussion of the socio-psychological variables that also play a part in the low bar passage rate equation. Second, an informed discourse could lead to development of methodologies that enhance the performance levels

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29. See, e.g., Fordham, *Racelessness as a Factor in Black Students' School Success: Pragmatic Strategy or Pyrrhic Victory?*. 58 Harv. Educ. Rev. 54, 79 (1988) (author presents a picture of high-achieving black students who must become "raceless" in order to be successful in "the individualistic, impersonal cultural system of the dominant society").


31. See, e.g., *A Report on the NBA/ABA Legal Education Conference: An Assessment of Minority Students' Performance in Law School: Implications for Admission, Placement and Bar Passage*, (N. Skillman ed.) 20 U.S.F. L. Rev. 525, 536 (1986) (discussing the reasons for inviting scholars from other disciplines to participate in the dialogue at a jointly-sponsored conference addressing the issues relating to poor performance in law school and on bar exams) [hereinafter *NBA/ABA Legal Education Conference Report*]; see also *National Conference on Minority Bar Passage: Bridging the Gap Between Theory and Practice* 16 T. Mar. L. Rev. 419 (1991) (the purpose of this conference was to bring together scholars in a variety of fields to discuss issues about minority bar passage).
of students of color in law school and thus improve their opportunities for success on bar examinations. Similarly, an equally significant consequence of improved academic performance would be increased employment opportunities in all sectors of the profession. Finally, focusing on factors that more directly affect minority bar passage rates leads to a better understanding of the critical issues and, thereby, creates the means to correct the problem areas.

As such, this article will address what the author considers to be the real issue of this dialogue. In effect, the learning pedagogy in law school is based on the dominant white male construct. Traditional legal analysis, the linear approach to problem solving, is characteristically viewed as a white male domain. Not surprisingly, bar examinations reflect the same construct because they are based on the law school experience. The likelihood that bar examinations will be eliminated or can be altered so as to avoid causing disproportionate failure rates among minority group members is unrealistic. Furthermore, the question is not whether bar examinations are discriminatory but whether the discriminatory impact is invidious. If not, the question becomes what—realistically—can be done to enhance the learning experience for minority group members in law school to increase their success in mastering the dominant, linear method of analyzing legal problems, and thus raise their level of performance in law school, enhance employment opportunities and improve bar passage rates.

II. THE DISPROPORTIONATE IMPACT OF BAR EXAMS ON MINORITIES

People of color were virtually excluded from the profession until the 1960s. Thus, the various obstacles to minority participation in the legal profession did not become apparent until the early seventies, when increasing numbers of minorities began to enter law school. At the same time, concerns about the disproportionate impact of the

32. Of course, when I speak of the white male construct or dominant culture in law school, I speak of a characteristic of the law school environment and not a physical attribute of a particular race or gender. For example, in my experience female members of the majority student group tend to perform as well, if not better than their majority male counterparts. Also, I do not intend to engage in a discussion regarding the correctness of this particular norm in the law school experience. The point is to be realistic about the options available to correct the problem of low bar passage rates among people of color at this point in time. Cf. Homer & Schwartz, Admitted but Not Accepted, supra note 25, at 2 (noting that "[w]omen and people of color find it difficult to spend three years as an outsider in a world created by and for the white male insider establishment.")

33. R. Abel, supra note 2, at 99.
34. Id. at 100-104.
bar examination on minority group members also began to escalate.  

Admission to law school—once considered a major obstacle to minorities seeking membership in the profession—no longer impedes minority participation given the commitment to diversity which most law schools share.  

Once access to law school was obtained, graduation then became a real hurdle for minorities seeking entry into the profession.  

Specifically, in the early days of affirmative action, graduation was a major obstacle to entry into the profession for a significant number of minorities because of their high attrition rates.  

In recent years, these rates have abated.  

Graduation from law school, therefore, is no longer a serious barrier for most minority group members.  

Despite the success of law school affirmative action programs—insofar as they have afforded opportunities for minorities who might not otherwise have been admitted—comparatively small numbers have gained admission to the profession in the last two decades.  

Some commentators have argued for more creativity in attracting larger numbers of minority group members to the relevant applicant pool.  

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36. As a matter of policy, most law schools have implemented affirmative action programs in order to meet this commitment. See, e.g., Ramsey, Affirmative Action at American Bar Association Approved Schools: 1979-1980, 30 J. Legal Educ. 377, 382 (1980). See also, Romero, An Assessment of Affirmative Action, supra note 9, at 431. Most law school admissions policies dictate consideration of other criteria in order to promote diversity in the law school student population. Law School Admission Council/Law School Admission Services, Minority DATABASE 45 (1990) [hereinafter LSAC/LSAS Minority DATABASE].  

37. See Hamlar, Minority Tokenism in American Law Schools, 26 How. L.J. 443, 532 (stating that in 1979-80 the minority attrition rate was 22.88%, almost double that of all law students.).  

38. See, e.g., R. Abel, American Lawyers, supra note 2, at 103; see also Rappaport, The Legal Educational Opportunity Program at UCLA: Eight Years of Experience, 4 Black L. J. 506, 510 (1975) (reporting on the disparity of UCLA minority law students in the early seventies in attrition rates depending on their “predictive index.”)  

39. Law School Admission Council/Law School Admission Services, Law School Admission and Graduation: Minority Student Experiences and Success Rates (January, 1986). While differences in performance between minority and nonminority students remain, approximately 78% of all minority students enrolled in law school graduated during the three years (1978-80) studied. Id. at 10. For the period post 1980-81 through 1987-88, see LSAC/LSAS Minority DATABASE 69-72 (1990). Thus, affirmative action programs are viewed as successful insofar as minority student graduation is concerned.  

40. R. Abel, American Lawyers, supra note 2, at 99.  

41. See, e.g., Scanlon, The History and Culture of Affirmative Action, supra note 13, at 352 (noting that law schools lack creativity in expanding the pool of potential applicants); Summers, Preferential Admissions: An Unreal Solution to a Real Problem, 1970 Tol. L. Rev. 377 (suggesting that law schools ought to redirect their efforts toward a better solution in achieving diversity within the legal profession).
Others have maintained that notwithstanding their relative success in law school, the racial or cultural disparate impact of the bar exam on minorities is the chief reason for these comparatively small numbers.\textsuperscript{42} As a result, various groups and jurisdictions began to explore and study the reasons for the low passage rates of minorities on the bar examination.\textsuperscript{43}

A. The Bar Passage Studies

In 1969, the Association of American Law Schools sponsored a bar examination study project designed to evaluate minority group performance on bar examinations in an effort to address the problem of their low bar passage rates.\textsuperscript{44} Since that early study, however, very little empirical data have been collected nationwide about the alleged discriminatory impact of state bar examinations on minority group members.\textsuperscript{45} Nonetheless, in some jurisdictions, most notably California\textsuperscript{46} and New Mexico,\textsuperscript{47} data-gathering, empirical studies or comprehensive investigations, have been undertaken.\textsuperscript{48}

\textsuperscript{42} See, e.g., Emsellem, \textit{Racial and Ethnic Barriers to the Legal Profession: The Case Against the Bar}, N.Y. St. B.J. 42 (April 1989); Antonides, \textit{Minorities and the Bar Exam: Color Them Angry}, 8 Juris. Dr. 56 (August/September 1978); Stevens, \textit{A Study of Programs for the Admission and Training of Disadvantaged Students for Admission to the Bar}, 44 The Bar Examiner 44 (1975) [hereinafter \textit{A Study of Programs}].

\textsuperscript{43} See, e.g., \textit{Symposium: The Minority Candidate}, supra note 5, at 127, 131, 152.

\textsuperscript{44} Stevens, \textit{A Study of Programs}, supra note 42, at 41. A few years later, a student urged that the study which Professor Stevens proposed be adopted. Bussey, \textit{Discrimination in Law School}, The National Bar Examiner 12 (1973).

\textsuperscript{45} See Bernstein, \textit{Minority Law Students}, supra note 2. This dearth of comprehensive data will be remedied after completion of the recently announced bar passage study project sponsored by the Law School Admission Council. See generally Ramsey, \textit{Law Graduates, Law Schools and Bar Passage Rates}, 60 The Bar Examiner 2 (February 1991) [hereinafter \textit{Bar Passage Rates}]; see also LSAC Bar Passage Study Design (1991) (stating that "the general purpose of the proposed study is to obtain complete and accurate information about bar passage among graduates from ABA-approved U.S. law schools and about factors that may influence successful entry to the legal profession.") [hereinafter \textit{Bar Passage Study Design}], \textit{Id.} at 1.

\textsuperscript{46} The California Committee of Bar Examiners (CBE) has conducted comprehensive studies in this area. In fact, the CBE has been studying minority bar passage rates in that state for more than ten years in an effort to determine the cause for and correct the disparity between racial and ethnic groups in its bar examination passage rates. See \textit{Report on Minority Passing Rates}, supra note 4.

\textsuperscript{47} In the matter of \textit{Melendez v. Burciaga}, an evidentiary hearing on the state of the art in bar examinations was conducted to determine the impact of the bar admissions process on minority group members. See generally Brown & Levay, \textit{Melendez v. Burciaga: Revealing the State of the Art in Bar Examinations}, 51 The Bar Examiner 4 (May 1982) [hereinafter \textit{Melendez}].

\textsuperscript{48} Actually, only bar examiners in California and New Mexico have engaged in such activities. In some states, for example New York and Massachusetts, their respective state bar
Beginning in 1977, the Committee of Bar Examiners of the State Bar of California experimented with various studies to assess applicant ability in an unsuccessful effort to increase the minority bar passage rates over a ten-year period. 49 None of these experiments proved effective in formulating policies in testing procedures that would close the large gap in performance between minority and non-minority applicants. 50 The same result was obtained with an innovative oral version the California Committee of Bar Examiners implemented in 1980 as part of an experimental program testing oral skills in an effort to increase the minority bar passage rates. 51 Whether the testing format used on the bar examination is essay, multiple-choice, performance-based, or an experimental program testing oral skills, the differential between minority passage rates and non-minority rates remained affected. 52

The California studies also experimented with lowering the passing score. The initial perception was that minority bar applicants scores clustered right below the pass/fail cutoff score. 53 Nonetheless, lowering
the passing standard failed to alleviate significantly the racial imbalance in passage rates.\textsuperscript{54} The special subcommittee investigating this problem accordingly recommended that any consideration of changing the standards for bar passage focus on whether the current admissions standards were unreasonably high or systematically excluded qualified applicants rather than adjusting the standards for the sole purpose of increasing minority admissions.\textsuperscript{55}

Notably, these studies concluded that bar exam scores are closely related to an applicant's academic ability as measured by law school grades and LSAT scores.\textsuperscript{56} Thus, the applicant's race had little or no impact on predictive accuracy once the factors of law school grade point average, LSAT score, and law school attended were controlled.\textsuperscript{57} The same holds true for each part and the whole of the examination.\textsuperscript{58}

In 1986, Howard University Law School, a historically black institution, completed a longitudinal study designed to investigate the

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No matter where the passing point is set, except at the very bottom, more blacks than whites will be failed.

The remedy for this situation is beyond the scope of the present inquiry. It seems clear, however, that further improvement in the Bar examination itself, through further increasing the reliability and the validity of the test, will not change the situation. The differences in the percentages failed will be eliminated only when the blacks as a group, come to the examination as well prepared as are the whites.

\textit{Id. (citation omitted.)}
\end{quote}

\textsuperscript{54} Only a relatively small number of minority applicants would have benefitted. Cf. Delgado v. McTighe, 522 F. Supp. at 898 (court considered the lowering of the bar passing score/standard a policy matter.) Furthermore, courts have upheld the seventy percent passing score utilized in many states as rationally related to the requisite level of assessment of minimum competency to practice law. Richardson v. McFadden, 540 F.2d 744, 749-50 (4th Cir. 1976) rev'd in part on reh'g. en banc, 563 F.2d 1130 (1977) \textit{cert. denied} 435 U.S. 968 (1978); Tyler v. Vickery, 517 F.2d 1089, 1102 (5th Cir. 1975) \textit{cert. denied}, 426 U.S. 940 (1976); Shenfield v. Prather, 387 F. Supp. 676, 689 (N.D. Miss. 1974).

\textsuperscript{55} Report on Minority Passing Rates, \textit{supra} note 4, at 6. Also, the rationale for the bar examination is the state's interest in protecting the general public from incompetent practitioners. Presumably, the score set for passing, as with the various test formats used to measure lawyer competency, satisfies the licensing function of safeguarding the public from practitioners who do not meet the minimum standards for admission to the profession.

\textsuperscript{56} Report on Minorities Passing Rates, \textit{supra} note 2, at 21; See Carlson & Werts, \textit{Relationships Among Law School Predicators}, \textit{supra} note 7, at \textit{id.} (describing relationships between academic performance data and subsequent bar performance in a study based on data from the July 1972 Multistate Bar Examination (MBE) administered in seven states.). Module II of the LSAC Bar Passage Study Design will be a partial replication of the Carlson and Werts study. However, the proposed study will be "broader in scope, use more recent data, analyze essay data as well as MBE data, be more generalizable . . . and focus more directly on comparisons among selected ethnic and gender subgroups." \textit{Bar Passage Study Design, supra} note 45, at 7.

\textsuperscript{57} Klein & Bolus, \textit{Minority Group Performance, supra} note 2, at 10.

\textsuperscript{58} \textit{Id.} at 7.
reasons for the low bar passage rates among its graduates.\textsuperscript{59} The stated purpose of the study was to determine overall bar passage rate statistics and what factors, if any, contribute to success on the bar exam. This study reported findings similar to those disclosed in the California studies. Because Howard is one of the few schools in the country with large numbers of minority graduates each year, the findings were considered particularly instructive in light of the perception that minorities perform less well than their majority counterparts nationwide.\textsuperscript{60}

As with earlier studies, the Howard findings reported, after taking all relevant factors into consideration, that LSAT scores and law school performance correlate very highly with successful bar passage rates.\textsuperscript{61} Other factors were studied, including undergraduate grade point average, age, and gender; however, none had any significant predictive value.\textsuperscript{62} The implications of the Howard study are significant because the same findings are reported, essentially, as previously reported for black students matriculating in predominantly white schools. The study underscores the critical importance of academic preparedness as demonstrated by the traditional indexes. Thus, the study gives further credence to the conclusion that race is not a significant factor in predicting success in law school or bar passage.

Experimental testing procedures or policy changes notwithstanding, the gaps among racial and ethnic groups did not change substantially. As these studies demonstrate,\textsuperscript{63} bar examinations do indeed have a disproportionate, adverse impact upon minority group test-takers.\textsuperscript{64}

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{59} Bernstein, Minority Law Students, supra note 2, at 10. The study considered graduates during the years 1980 to 1986 and was updated to include Howard students who graduated in 1988.
  \item \textsuperscript{60} Id. at 11.
  \item \textsuperscript{61} Predictably, the Howard study reported that the LSAT score correlates very highly with law school performance. Although the generally accepted view is that the LSAT does not predict law school performance beyond the first year, the Howard study disclosed that, at least for its students, "the LSAT predicts overall law school performance as well as success on the bar examination." Id. at 15, n.5.
  \item \textsuperscript{62} Id. at 11. The racial background and the predominant race of the graduates' undergraduate school was also reported as significant factors in the Howard study. However, once the factors of LSAT scores and undergraduate school are controlled, race and graduation from undergraduate school from a predominantly black institution are less significant as predictors.
  \item \textsuperscript{63} Also, as discussed below, the evidence of record in the lawsuits filed throughout the country challenging the bar exams also disclosed the exams' disproportionate impact upon minority bar applicants.
  \item \textsuperscript{64} Holley & Kleven, Minorities and the Legal Profession: Current Platitude, Current Barriers, 12 T. Mar. L. Rev. 299, 331-33 (1987) (discussing the allegations of those complaints charging an adverse impact based on the numbers taking the bar in various jurisdictions) [hereinafter Minorities and the Legal Profession].
\end{itemize}
\end{footnotesize}
Given the breadth of the disparity in bar passage rates among racial and ethnic groups, resorts to the courts to remedy this adverse impact came as no surprise to bar examiners in the 1970s. A few years earlier, litigants challenging the adverse impact of selection tests in the employment context met with success in the courts. However, the litigants in the bar challenge cases did not meet with similar success.

B. The Legal Challenges

All fifty states, including United States territories, engage in the process of licensure for admission to the legal profession. All licensing jurisdictions require passage of a written bar examination prior to

65. Id. As such, the need for more current information to determine whether such gaps continue to exist nationwide is acute.

66. One commentator has suggested extending the employer-employee relationship to the licensing context. See generally Rogers, Title VII Preemption of State Bar Examinations: Applicability of Title VII to State Occupational Licensing Tests, 32 How. L.J. 563 (1989) [hereinafter Title VII Preemption of State Bar Examinations]. However, the premise for this assertion fails to consider the nature of licensing examinations as opposed to employment examinations as well as dictum in Washington v. Davis, 426 U.S. 229, 248 (1976) ("A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white. (citations omitted.") which considered judicial intervention beyond the scope of the statute and "should await legislative prescription." Id.; See also Johnson, Albemarle Paper Company v. Moody: The Aftermath of Griggs and the Death of Employee Testing, 27 Hast. L.J. 1259 (1976) (discussing the difficulty an employer has in establishing that professionally developed employee selection tests which are race-neutral on their face but have a racially disparate impact are sufficiently job-related to withstand attack under the Title VII testing guidelines.) with Freeman, Antidiscrimination Law: The View From 1989, 64 Tul. L. Rev. 1407 (1990) (decrying the containment of Griggs v. Duke Power Co., 401 U.S. 424 (1971) (the seminal employee testing case), if not the obliteration of "the assumption, implicit in Weber, that serious statistical disparities are presumptive violations of Title VII") [hereinafter Antidiscrimination Law]. Id. at 1431. Professor Freeman further opines that "little is left of the Griggs notion that discriminatory results should compel persuasive justification . . . (which may be no further than North Carolina employers who adopted test and diploma requirements in 1965)."

67. R. Abel, American Lawyers, supra note 2, at 104; Larry Dean Bowens v. The Board of Law Examiners, 291 S.E.2d 170 (D.C.N.Car. 1986), aff'd, 804 F.2d 1250 (4th Cir. 1986) (noting that all courts which have considered the claim that bar exams as written unfairly discriminate against black examinees have rejected it). Although courts hearing bar challenge cases readily accepted the anecdotal evidence used to establish adverse impact, meeting the evidentiary burden to establish intentional discrimination proved insurmountable to bar applicants turned litigants in the 1970s. Unless proof of purposeful discrimination is presented, the fact that bar exams adversely affect minority group members is insufficient to establish a denial of equal protection. Tyler v. Vickers, 517 F.2d at 1106 (Adams, C.J., dissenting).

entering the profession.\textsuperscript{69} Thus, the bar examination represents the final rite of passage before a person is duly admitted to the practice law. For people of color, this final hurdle is viewed as a barrier to entry into the profession.\textsuperscript{70}

A state's right to regulate admission to the profession is unassailable.\textsuperscript{71} Thus, a state has the right to assure the public that newly-admitted members of the profession possess a minimum standard of legal competence as a requirement of licensure. In setting admission standards, a state can require, among other things, the successful passage of the bar examination as a demonstration of such competence. Although the litigants in bar challenge cases never questioned the state's right to regulate\textsuperscript{72}, they did question—among other things—whether the bar examination administered in the various jurisdictions is an adequate measure of competence to practice law.

\textbf{(1) The Nature of Licensing Tests}

Licensing officials are not required to test for all qualifications deemed appropriate for occupational and professional purposes.\textsuperscript{73} Given the nature of licensure, an all-encompassing examination may well be

\textsuperscript{69} National Conf. of Bar Examiners, The Bar Examiners' Handbook, 18 (S. Duhl ed., 2d ed. 1980) [hereinafter Handbook]. Even Wisconsin, the sole state that recognizes the limited "diploma privilege" for in-state law school graduates, requires all out-of-state law graduates to take a written bar examination administered by the Wisconsin Board of Bar Examiners. The diploma privilege permits state law school graduates to be admitted into the profession without the necessity of taking a written bar examination. In 1981, only four states—Montana, South Dakota, West Virginia and Wisconsin—retained the limited diploma privilege. Now, ten years later, only Wisconsin retains the "diploma privilege" for graduates of its two state schools.

\textsuperscript{70} R. Abel, American Lawyers, supra note 2, at 103. As discussed below, unsuccessful minority bar applicants have challenged the bar examination process as being unconstitutional because of the apparent racially disparate impact. Although the available evidence is limited, most observers and commentators agree that state bar exams exclude minority group members disproportionately. See, e.g., Rogers, Title VII Preemption of State Bar Examinations, supra note 66, at 564, n.6.

\textsuperscript{71} In In Re Griffiths, 413 U.S. 717, 722-23 (1973), the Court acknowledged that "[i]t is undisputed that a State has a constitutionally permissible and substantial interest in determining whether an applicant possesses ""the character and general fitness requisite for an attorney and counselor-at-law."" Law Students Research Council v. Wadmond, 401 U.S. 154, 159 (1971). See also Konigsburg v. State Bar, 366 U.S. 36, 40-41 (1961); Schwarz v. Board of Bar Examiners, 353 U.S. 225, 239 (1957). (citation omitted.)"

\textsuperscript{72} E.g., Pettit v. Gingerich, 427 F. Supp. 282, 285 (D.Md. 1977) (plaintiffs' bar challenge not directed at the constitutionality of the Maryland law governing admission to the bar but the bar examination administered pursuant to the requisite authorities.)

impossible to devise and impractical to administer.74 Consequently, present-day bar exams are not designed to measure all of the qualifications and attributes deemed appropriate for the practice of law.75 Bar exams do test, however, what bar examiners consider the requisite minimum level of legal competence.76 Furthermore, the knowledge and skills tested seemingly comport with professional expectations of a newly-admitted lawyer.77 As such, bar exams, as presently constructed, are appropriate measurements of professional knowledge and skills for licensure purposes.

74. Unlike employment exams which are specifically-related to a particular employment environment, licensing exams must accommodate the profession as a whole and all types of employment environments. Id. at 1140, 1146; see Carlson & Werts, Relationships Among Law School Predictors, supra note 7, at 214 (speculating that bar exams could not be revised to recognize broad components of lawyer competence until those elements were reflected in the law school curriculum.)

75. State bar examinations, for the most part, are designed to test the fundamental ability to recognize and apply legal principles in the context of particular hypothetical fact patterns. It cannot be gainsaid that much of the practice of law does not involve the lawyer’s ability to analyze complicated fact situations and apply them to the appropriate legal rules. As such, the fact that the bar examinations do not test all of the qualifications deemed necessary for the practice of law is not a basis for asserting that it is not rationally related to the practice of law. More appropriately, however, a better argument is that the bar examination could be improved. Tyler v. Vickery, 517 F.2d at 1102.

See also Redlich, We Train Our Students To Work For Wall Street, Learning and the Law 6, 7 (1976) (noting that the present system of bar admissions does not test for all of the qualities necessary for the practice of law); and O’Hara & Klein, Is the Bar Examination an Adequate Measure of Lawyer Competence?, 50 The Bar Examiner 28, 28-30 (authors acknowledge that “the bar examination, in its present form, tests only a limited number of the abilities and qualities listed as important by [the American Bar Association Task Force on Lawyer Competency and a group of Chicago lawyers”].) [hereinafter Adequate Measure of Lawyer Competence].

Specifically, in a report dated August 12, 1979, a Task Force of the Section of Legal Education and Admissions to the Bar, chaired by Professor Sam Thurman stated that lawyer competency has“...three basic elements: (a) certain fundamental skills; (b) knowledge about law and legal institutions; and (c) ability and motivation to apply both knowledge and skills with reasonable proficiency.” Id. at 29. Among the fundamental skills included in the task force’s report were the ability to:

1. Analyze legal problems;
2. Perform legal research;
3. Collect and sort facts;
4. Write effectively;
5. Communicate orally with effectiveness;
6. Perform important lawyer tasks, such as
   (i) interviewing,
   (ii) counselling; and
   (iii) negotiation and
7. Organize and manage legal work.

Id.

76. They do measure basic or fundamental lawyering skills—namely, legal knowledge and the ability to analyze legal problems. In addition, essay-type or performance-based examinations also require writing and organizational proficiency.

77. Id. at 30, 35.
Therefore, the criticism directed at bar exams as an accurate measurement of professional competence is actually a concern that bar exams do not test all of the qualifications for the practice of law.78 In this regard, critics charge that bar exams are not valid predictors of future performance. In other words, bar exams lack job-related validity.79 The concept of job-related validity arises from test validation standards for employment exams.80 Employment tests, however, are used to measure an individual’s ability to perform certain job tasks. The bar exam, on the other hand, serves a much broader purpose.

The practice of law is a public profession. Accordingly, bar examiners determine the admission standards with a view to protecting the public interest and not, necessarily, on the rights of the individuals seeking to become members of the legal profession.81 Bar examiners,

78. Although some critics have argued that law school graduation is a satisfactory demonstration of legal competence for licensing purposes, the bar examination does perform an important function. Compare Blackmar, Is the Bar Examination an Anachronism?, 60 A.B.A. J. 1240 (1971) (contending that quality legal education demands either the abolition of bar exams or their substantial modification) with Griswold, In Praise of Bar Examinations, 60 A.B.A. J. 81 (1974) (urging that abolishing bar exams would be a serious mistake) and others Sprecher, A Judicial Overview of Bar Admissions, 47 The Bar Examiner 6 (1978) (noting that bar exams serve an important educational purpose and are the only substantial comprehensive test of the applicant’s qualification to practice law).

Moreover, Dean Norman Redlich has identified five important functions of the bar exam as essential checks on the standards and quality of legal education. See Redlich, supra note 75, at 7. In assuring the public safety, bar exams also serve to maintain a level of public confidence in law schools’ ability to educate aspiring lawyers for the practice of law. Id. See also Bell, Law School Exams and Minority-Group Students, 7 Black L.J. 304, 308 (1982) (commenting that law professors are unlikely to fail students) [hereinafter Minority-Group Students]; Stameyer, A Better Bar Exam, supra note 35, at 492-93 (contending that the screening of prospective lawyers cannot be left solely to the law schools). Although law schools and bar examiners share in their respective roles as the gatekeepers of the profession, as Dean Redlich points out “[l]aw schools perform a far more exciting intellectual function and the existence of bar examinations makes this possible.” Redlich, supra note 75, at id. Thus, the missions of both law schools and bar examining agencies differ significantly. As such, bar exams function as valid checks on the standards and quality of the aspiring lawyer’s legal education.

79. Shimberg, Licensure Testing, supra note 73, at 1143-44. The concept of “job-relatedness” relates to employment selection tests. The Uniform Guidelines on Employment Selection Procedure describe three methods that may be used to validate an employment examination: (1) content validation, (2) construct validation, and (3) criterion-related validation. 29 C.F.R. §1607.5 (B). The licensing situation differs substantially from the employment selection process. First, the state licensing board is not an employer insofar as it performs its licensing function. The primary purpose for licensure testing is to protect the public from incompetent practitioners. As such, the goal of protecting the public is quite different from an employer’s goal of maximizing productivity. Thus, the appropriate standard for validating a licensure test seems to be evidence of content validity. Linn, Standards for Validity in Licensure Testing, 6 Professions Education Researcher Notes 13-14 (1985).

80. Shimberg, supra note 73, at 1143.

81. See McCrystal, Legitimizing Realities: State-Based Bar Admission, National Standards, and Multistate Practice, 3 Geo. J. of Leg. Ethics 533 (1990) (discussing the legitimate purposes
nonetheless, cannot exclude bar applicants from the profession in a manner or for reasons which are constitutionally impermissible.82

(2) The Legal Theories Advanced

During the 1970s, unsuccessful minority bar applicants turned litigants and challenged all aspects of the bar admissions process.83 Claims of intentional or inherent racial discrimination directed at bar exams and bar examiners reached their zenith during this period. Unsuccessful minority applicants, frustrated by their attempts to pass state bar examinations, filed an unprecedented number of lawsuits—ultimately unsuccessful—challenging the bar examinations on constitutional grounds.84 Actions based on Title VII analogies also met with similar defeat. Historically, the bar exam challenges were doomed to failure because of shifting and tightening Supreme Court standards for proof of unconstitutional discrimination.

Bar challenge complaints primarily alleged that in constructing, administering, and grading the exams bar examiners unlawfully, either intentionally or unintentionally, discriminated against minority candidates in violation of their equal protection rights; and in failing to afford minority candidates an opportunity to review their failing exam papers, bar examiners denied them due process of law.85 The

82. See generally Handbook, supra note 69, at 35-45.

83. Id. at 248-49 (Frankfurter, J., concurring).

84. Id. at 26-34.

85. Tyler v. Vickery, 517 F.2d 1089, 1103-05 (5th Cir. 1975), cert. denied, 426 U.S. 940 (1976); Whitfield v. Illinois Bd. of Law Examiners, 504 F.2d 474 (7th Cir. 1974). The denial of due process charge relates to an inability to review bar examination answers and questions or appeal bar failure. This claim is not specifically related to the topic of this article. The due process issue concerns the procedures available to review failed bar examinations. See Sutton v. Lionel, 585 F.2d 400, 403 (9th Cir. 1978) (holding that the rules governing admission to the Nevada bar, which allow the unsuccessful applicant to see his exam and petition the Nevada Supreme Court for review of the applicant's denial of admission, satisfy the requirements
legal theories routinely advanced in bar challenge cases covered three main areas.

First, the litigants claimed that bar examiners engaged in purposeful racial discrimination against minority applicants in the administration of the bar examination. They encountered difficulty in establishing purposeful discrimination because they lacked the requisite evidentiary proof to support their alleged claims of intentional discrimination.\(^\text{86}\) Accordingly, evidence—and generally accepted as fact—of the racially disparate impact alone was insufficient to trigger the strict scrutiny standard for analytical purposes in these cases.

In this regard, the courts relied on Washington v. Davis,\(^\text{87}\) a case which considered a challenge to a selection test in the employment and promotions context administered prior to the 1972 amendments to Title of due process. Furthermore, not all states provide review procedures. Courts addressing this issue have held the opportunity to retire the bar as constitutionally sufficient. Note, Constitutional Law-Fourteenth Amendment-Challenging the South Carolina Bar Exam, 60 Marquette L. Rev. 1134, 1141 (1977).

86. For example, in Tyler v. Vickery, supra note 85, after extensive discovery, the court upheld the district court’s summary dismissal of this claim on the basis of the record which contained no factual foundation to support the claim of intentional discrimination. See also, e. g., Pettit v. Gingerich, 427 F. Supp. 282, 291 (D.Md. 1977) (court found plaintiffs’ claims of intentional racial discrimination unsupported by the undisputed facts.) The court in Tyler v. Vickery also considered the litigants claim that although the bar examiners may not have been able to discover an applicant’s race, nonetheless, a fact issue remained because of the difference in writing styles between black and white applicants. This claim has been advanced in other jurisdictions. For example, one of the California studies reported on this very charge as well. See Klein, Minority Group Performance, supra note 2, at 5 (findings suggest that “the score on an essay answer is not affected by whether the race of the reader who graded it is the same or different than the race of the applicant who wrote it”). Furthermore, the court noted that the litigants also failed the MBE, a multiple-choice examination which, according to the court, is “immune to any variation arising from the use of Black English. (footnote omitted.)” Id. at 1094. See also Pettit v. Gingerich, 427 F. Supp. 282, 289 (D. Md. 1977) (court considered the administration of the MBE as part of the litigants claim on racial discrimination and noted that the state bar licensing board played no role in the actual grading of the MBE.)

87. 426 U.S. 229, 242 (1976). See also Kaye, Searching for Truth About Testing, supra note 21, at 445, n.69. Prior to the Court’s decision in Washington v. Davis, however, a federal appeals court had already concluded that bar examinations were constitutionally reviewed under the rational basis test and not the stricter scrutiny standard or, by analogy, to the rigors of the EEOC testing guidelines implemented in Title VII cases. Tyler v. Vickery, 517 F.2d 1089 (5th Cir. 1975) cert. denied 426 U.S. 940 (1976). As the Court stated in Washington v. Davis, 426 U.S. 229 (1975):

We have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than another. Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule, McLaughlin v. Florida, 379 U.S. 184 (1964), that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations.

Id. at 242.
VII which included governmental entities within its coverage. Like the litigants in the bar challenge cases, plaintiffs in Washington v. Davis argued that the validity of the governmental selection examination in that case should be analyzed by incorporation of the Title VII testing guidelines into the equal protection analytical framework. The Court expressly rejected this contention.88

Washington v. Davis established that proof of discriminatory racial purpose is necessary to make out an equal protection clause violation, rejecting the application in constitutional law cases of disparate impact theory. Recovery in bar exam challenge cases was precluded, accordingly, in cases based solely on differential pass rates without proof of discriminatory intent.

Next, the litigants attempted to recover on the theory that bar exams are inherently discriminatory because of their racially disparate impact. They contended that the lower bar passage rates of minority applicants established a prima facie case of unconstitutional racial discrimination under the equal protection clause, shifting the burden to the bar examiners to defend the validity of bar exams by showing passing results to be strongly correlated with success as a practitioner of law. While acknowledging the disparate impact on minority applicants taking the bar exams, the courts found them to be rationally related to a legitimate state interest and, therefore, valid for the purpose served.89 In fact, this particular aspect of the bar challenge cases was considered to be a matter well settled.90 Even if bar examiners could not show any real link between test passage and future performance as a lawyer,91 so long as the test reasonably related to the state’s interest

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88. Instead, the Supreme Court held that the substantially disproportionate racial impact of a statute or official practice standing alone and without regard to discriminatory purpose is insufficient to prove racial discrimination violating the Equal Protection Clause. Id. at 244-45. Accord Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 264-65 (1977).

89. See, e.g., Tyler v. Vickery, 517 F.2d at 1099.

90. Id., citing to Schwarte v. Board of Bar Examiners, 353 U.S. at 239; Tyler v. Vickery, 517 F.2d at 1099-1101; Whitfield v. Illinois Bd. of Law Examiners, 504 F.2d 474, 476 n.5 (7th Cir. 1974) (per curiam); Feldman v. State Bd. of Law Examiners, 438 F.2d 699, 705 (8th Cir. 1971); Chaney v. State Bar of California, 386 F.2d 962, 964-65 (9th Cir. 1967), cert. denied, 390 U.S. 1011, reh’g. denied, 391 U.S. 929 (1968); Lewis v. Hartsough, No. 73-16 at 15-16 (S.D. Ohio, Mar. 9, 1976) [check on published citation]; Shenfield v. Prather, 387 F. Supp. 676, 686 (N.D. Miss. 1974). See also Pettit v. Gingerich, 427 F. Supp. at 292 (court found a rational relationship between the bar examination and “the state’s admittedly valid interests in professional licensure.”

91. In Richardson v. McFadden, 540 F.2d 744, 748-749 (4th Cir. 1976), opinion reversed (reversing panel’s holding that discrepancies in scoring procedures on the South Carolina bar examination amounted to a violation of due process), in part, on reh’g en banc, 563 F.2d 1130 (1977), cert. denied 435 U.S. 968 (1978), the court found that the Supreme Court’s general reasoning in Washington v. Davis gave “substantial support to the Examiners’ argument
in regulating admissions to assure minimum competence bar challenge claims would always fail.\(^{92}\)

These litigants also contended that bar examinees who failed to pass were afforded inadequate procedural protections in jurisdictions that provided no right to review exam papers. This particular legal theory is not germane to the subject of this article. However, case law indicates a recognition of fair procedures in the examination process to guarantee procedural protections. Nonetheless, courts have found reexamination an adequate measure of protection.\(^{93}\)

In order to obtain relief in these cases, the litigants had to establish that bar exams were not rationally related to a legitimate state objective. This proved to be a daunting proposition given the precedent already established in this area.\(^{94}\) Unable to convince the courts that the racially disparate impact created a suspect classification requiring the courts to apply the strict scrutiny analysis, they then argued for the adoption of the Title VII analytical framework as an alternative to the traditional approach in deciding the constitutional validity of the bar exams.\(^{95}\)

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92. Admittedly, proof of intent to exclude minorities from entry into the legal profession, of course, would establish a \textit{prima facie} constitutional claim of unlawful discrimination and thus shift the burden to bar examiners to justify bar exams as presently constructed, administered and graded. No one has ever successfully challenged a bar examination on this basis, however, and no one is ever likely to do so. Accordingly, discriminatory intent is not the pertinent issue here.

93. For example, in Whitfield v. Illinois Board of Bar Examiners, 504 F.2d 474 (7th Cir. 1974), as in subsequent cases, the plaintiff argued that failure to permit him an opportunity to review his examination papers and compare them with model answers or answers of successful applicants in order to expose errors in grading was a denial of procedural due process. \textit{Id.} at 477-78. The court acknowledged that the due process clause required the state licensing board to employ fair procedures in processing applications for admission to the bar. However, under the circumstances of this case, reexamination provided adequate procedural protections under the due process clause. \textit{Id.} at 478. See generally Comment, \textit{Review of Failing Bar Examinations: Does Reexamination Satisfy Due Process?}, 52 B.U.L. Rev. 286 (1972).

94. \textit{Supra} notes 90 and 92.

95. In 1971, the Court decided a landmark Title VII case Griggs v. Duke Power Company, 401 U.S. 424 (1971), in which it held that employment discrimination plaintiffs could establish a statutory violation when the employer has used a test or employee selection criterion which produces a disparate impact on minorities. Under this doctrine, the employer could defend by proving that employment testing devices are "demonstrably a reasonable measure of job performance." \textit{Id.} at 436. Thus the bar litigants sought the application of Title VII law in light of the stricter validation scheme of the EEOC guidelines implementing \textit{Griggs}. Relying on \textit{Griggs}, litigants in bar challenge cases argued that the Equal Employment Opportunity Commission Guidelines on employee selection procedures in Title VII cases ought to control the outcome in fourteenth amendment cases challenging the bar admissions procedures. \textit{See, e.g.}, Woodard v. Virginia Bd. of Bar Examiners, 420 F. Supp. 211, 212 (E.D. Va. 1976), \textit{aff'd per curiam} 598 F.2d 1345 (4th Cir. 1979).

In other words, the litigants argued that the bar examination should not be viewed within
courts, however, routinely rejected this alternative, applying the traditional equal protection analysis instead. In essence, no court has found the traditional employer-employee relationship to exist in the bar licensing context. In other licensing contexts, courts have regularly held Title VII analysis inapplicable as well.

While the Supreme Court has never expressly considered this alternative theory in the context of bar examinations, it is unlikely that a challenge would be successful under either analysis, traditional or Title VII. Absent discriminatory intent, bar examiners can easily meet the rationally related test for equal protection purposes. Moreover, the framework of the traditional equal protection analysis, but that the bar examination should be considered in light of the Title VII testing guidelines promulgated by the EEOC. However, recent law review articles opine that even Title VII cases, particularly in light of the Supreme Court's opinion in Ward's Cove Packing Co. v. Antonio, 490 U.S. 642 (1989), may become more difficult to prove in the future. See generally Clark, The Future Civil Rights Agenda: Speculation on Litigation, Legislation, and Organization, 38 Cath. U.L. Rev. 795, 808-15 (1989) and Freeman, Antidiscrimination Law, supra note 66, at 1431 (suggesting that Ward's Cove has undermined the liberal underpinnings of Griggs.)

96. See infra note 97 and accompanying text.

97. Although courts acknowledged that the state was an employer for purposes of Title VII in some instances, in the licensing context, state supreme courts and bar examining agencies were not. Accordingly, licensing examinations are not employment examinations and, therefore, they are not appropriately decided on that basis. Thus, courts have consistently recognized that state boards of bar examiners are not employers within the meaning of Title VII. E.g., see Delgado v. McTighe, 442 F. Supp. at 730 (court found that neither the language of the Act nor its legislative history indicated that Congress ever intended Title VII to apply in the situation in which bar applicants seeking admission to the legal profession alleged unlawful racial discrimination under Title VII); see also Woodard v. Virginia Board of Bar Examiners, 420 F. Supp. 211, 212 (E.D. Va. 1976), aff'd, 598 F.2d 1345 (4th Cir. 1979) (per curiam) (court held that Title VII, by its terms, does not apply to the bar examination).

98. See, e.g., George v. New Jersey Bd. of Vet. Med. Exam., 635 F. Supp. 953 (D.N.J. 1985) aff'd 794 F.2d 113 (3rd Cir. 1986) (court held that state board's licensing activities do not come within terms of Title VII in a case involving an unsuccessful applicant for veterinary license against veterinary examiners for alleged employment discrimination.) See also Haddock v. Board of Dental Exam., 777 F.2d 462 (9th Cir. 1985) (court held Title VII inapplicable in a discrimination case involving the licensing of dentists) and Darks v. City of Cincinnati, 745 F.2d 1040 (6th Cir. 1984) (court held Title VII inapplicable in a case involving the licensing of dance halls).

99. Bar examinations are, appropriately, distinguishable from employment exams and are not designed to predict future performance. An Evaluation of the Multistate Bar Examination: A report Prepared for the National Conference of Bar Examiners 3 (Gansk & Associates, 1982) ("State bar examinations are not designed to predict who will become a good attorney. Rather, their goal is to identify those applicants to the bar who are not competent to practice (within the considerable limits of any testing device to make such a determination).") Furthermore, they satisfy content validity studies. See, e.g., id.

100. For example, several circuits have concluded that essay-type examinations administered by state bar examiners “have a rational connection with the capacity to practice law.” See Whitfield v. Illinois Board of Law Examiners, 504 F.2d 474, 476, n.5 (7th Cir. 1974) citing to Feldman v. State Board of Law Examiners, 438 F.2d 699, 705 (8th Cir. 1971); Chaney v. State Bar of California, 386 F.2d 962, 964-965 (9th Cir.) cert. denied 390 U.S. 1011 (1967). See also Application of Brewer, 430 F.2d 150, 152 (Alaska 1967). At least one court considered
courts have declared that the multiple-choice MBE test measurement meets this standard as well.\textsuperscript{101} As noted above, it is generally accepted that the bar exam measures qualifications considered important to the practice of law.\textsuperscript{102} They simply do not test, in some commentators' views, enough lawyering or practice-oriented skills.\textsuperscript{103} Thus, the courts' rulings in bar challenge cases consistently preserve the usual deference given to licensing examinations.

Although the litigants in these bar challenge cases failed in their efforts to alter the racially disparate impact in court cases, these lawsuits did provide bar examiners with an opportunity to consider the bar examination process objectively in light of these charges.\textsuperscript{104} Changes in bar testing procedures have therefore been driven by state policy, rather than by constitutionally required criteria. An example of such changes occurred approximately ten years ago in New Mexico.

In 1980, the Supreme Court of New Mexico convened \textit{en banc} to hear \textit{Melendez v. Burciaga}.\textsuperscript{105} The hearing in \textit{Melendez} marked the culmination of more than eight years of efforts by a coalition of minority and non-minority persons in the organized bar.\textsuperscript{106} The purpose

\textsuperscript{101} See, e.g., White, \textit{The Definition of Legal Competence: Will the Circle be Unbroken?}, 18 Santa Clara L. Rev. 641, 644-46 (1978) (law suits filed challenging discriminatory impact of bar examinations on minority group members “reflect the more widespread discontent with the exam”).

\textsuperscript{102} Id. at 3-7.

\textsuperscript{103} See \textit{Segal v. New Mexico}, supra note 2, at 16 (“While few minority plaintiffs have been successful in proving discrimination by bar examiners, it seems that bar examination litigation nonetheless has stimulated closer scrutiny of the examinations by bar examiners for fairness and for potential bias.”). This litigation, for the most part, has had a salutary effect on the validity and validation of bar examinations. In particular, the evidentiary hearing held in New Mexico on the state of the art of the bar examination, discussed more fully \textit{infra}, is instructive. \textit{See also} O'Hara, \textit{The California Response to Criticism of the Bar Examination}, 49 The Bar Examiner 6, 13 (1980) (stating that the California bar admission process is more reliable, precise and effectively administered now as a result of the criticism in recent years).

\textsuperscript{104} 49 The Bar Examiner 6, 13 (1980) (stating that the California bar admission process is more reliable, precise and effectively administered now as a result of the criticism in recent years).

\textsuperscript{105} See generally Brown & Levay, \textit{Melendez}, supra note 47, at 4.

\textsuperscript{106} The coalition was known as the New Mexico Bar Examination Litigation Committee. \textit{Id.} at 5. The chronology of events began with petitions filed with the New Mexico Supreme
of the hearing was to afford the petitioners, unsuccessful minority bar applicants, and the state board of bar examiners an opportunity to present expert testimony on bar testing procedures employed in New Mexico. Accordingly, the inquiry in Melendez was limited to the technical issues pertaining to the state of the art in bar examinations, rather than the legal issues antecedent intentional or inherent discrimination.

In addition, the hearing considered whether any equally valid alternative testing procedures existed—that would not have such a disparate impact on minority candidates—to measure professional competence. Although the Supreme Court of New Mexico did not adopt any alternative licensing procedures 107, the Court did implement certain procedures designed to professionalize the admissions process and assure fairness to all candidates. 108 Thus, the strategy of Melendez stands as a counterpoint to the more frontal bar challenge cases discussed above. This approach may indeed account for the apparently successful outcome. 109 Arguably, similar inquiries nationwide may be appropriate policy matters for bar examiners to pursue. 110

107. For example, the coalition suggested an apprenticeship program as an option to the written bar examinations or for those who failed the written bar examination as a means for admission. Id. at 13-14.

108. After implementing the revisions to the admissions process subsequent to Melendez, bar passage for first-time takers in New Mexico for the July 1981 administration was approximately 92 percent for University of New Mexico law graduates. Id. at 14. Anecdotal information indicates that this bar passage rate has remained high in subsequent administrations.

Furthermore, no appreciable disparity between first-time white and Hispanic applicants was reported. Not surprisingly, this parity in bar passage rates was deemed unprecedented. Some people concluded that this parity was due, in part, to the high qualifications of both white and Hispanic groups for that particular administration of the bar examination. Id. Also, I assume that the authors speak of academic qualifications because they refer to a conversation with the dean of the law school for this information.

109. No doubt the “upgrading” of the bar examination process had a positive effect. Moreover, it adds to the enhanced perception of fairness and integrity in the administration of the bar testing procedures. See supra note 104.

110. In granting the original mandamus writ in 1979, the New Mexico Supreme Court became the first in the nation to review its bar examination procedure in an open forum which permitted testimony and evidence by some of the most highly regarded experts in bar
Not surprisingly, litigating the adverse impact of low passage rates on qualifying examinations is not limited to bar challenge cases. During the early eighties when an educational reform movement swept the country in the wake of widespread concern about teacher incompetency, requirements to test prospective teachers from training program entry to teacher certification spread from state to state. As a consequence, concerns similar to those raised in the bar exam context were articulated in the courts and literature when minorities began failing teacher competency exams at greater rates than their majority counterparts.

As with lawyer testing, teacher competency tests are essentially an accepted and inexpensive method of measuring knowledge or characteristics associated with competent teachers. Like bar challenge cases, legal challenges to these assessments of professional competence, met with similar difficulty in establishing the alleged unconstitutionality of examinations and professional testing. Id. at 4. In effect, the state of the art of bar examinations was given an open forum. As the authors suggest, the significance of this proceeding need not be limited to the bar admissions practices in New Mexico because New Mexico's essay and Multistate Bar Examination procedures were similar to existing licensing practices in nearly all other states. Id. at 5 (suggesting that the New Mexico example should prove instructive to other jurisdictions). One word of caution is urged here, however. Although the New Mexico experience bears attention for other jurisdictions to consider in assuring the integrity of its procedures, the California studies are based on similar procedures which New Mexico adopted. In fact, the testing experts in the New Mexico hearing recommended the adoption of those procedures already in place in California. Thus other reasons for the apparent near parity in bar passage should be considered.

A likely reason for the unprecedented parity in bar passage as discussed above is due, in part no doubt, to the effective affirmative action programs employed at the University of New Mexico. Of course, the impact of the procedural changes should not be minimized. Cf. Holley & Kleven, Minorities and the Legal Profession, supra note 70, at 336 (commenting that “only the New Mexico Supreme Court has exhibited the courage to acknowledge that the difference in minority applicant bar examination performance may be attributable to the fact that the bar examination is not fair, and has taken steps to improve the examination”). However, unlike the California experience, there is no subsequent evidence of record or studies conducted, nor data collected, that would provide an adequate answer or explanation for this change. Id. at 336, n.138.

111. See, e.g., A Nation at Risk: The Imperative for Educational Reform, A Report to the Nation and the Secretary of Education by the National Commission on Excellence in Education, Am. Educ., June 1, 1983, at 2, 14 (making seven recommendations for improving the quality of teaching).

112. Note, Minimum Competency Testing of Teachers For Certification: Due Process, Equal Protection and Title VII Implications, 70 Cornell L. Rev. 494, nn.2-4 (1985) (suggesting difficulty in establishing unconstitutionality of testing requirements under similar theories advanced in bar challenge cases).

113. In a teacher competency study, a comparison of the passage rates for racial and ethnic minorities in each state reporting indicated a lower pass rate for people of color. See Garcia, A Study on Teacher Competency Testing and Test Validity with Implications for Minorities, etc., The National Institute of Education 61 (1985) [hereinafter NIE Report on Teacher Competency].

114. Id. at 6.
of testing requirements.\textsuperscript{115} Moreover, the same legal theories were advanced in these cases as in bar challenge cases with a similar lack of success.\textsuperscript{116}

Similar charges of racial or cultural bias were directed at these competency exams. According to a study of teacher competency exams, cultural bias and socio-economic factors may in fact explain the phenomenon of low pass rates for minorities.\textsuperscript{117} In that regard, the study cited research which pointed to various interrelated factors associated with low socio-economic households as the most probable causes of low scores among ethnic minorities.\textsuperscript{118} As with the results of the bar studies, the identifiable causes seemingly relate in varying degrees to unequal and inadequate educational opportunities.\textsuperscript{119} Thus, this correlation with other tests measuring educational attainment levels is not surprising.\textsuperscript{120}

\textsuperscript{115} See Minimum Competency Testing of Teachers, supra note 112, at 523-24 (concluding that plaintiffs in these cases are likely to encounter difficulty in establishing their claims under legal theories similarly advanced in the bar exam cases).

\textsuperscript{116} See, e.g., United States v. State of South Carolina, 445 F. Supp. 1094, 1108 (1977) (Although the court found that the National Teacher Examinations did not measure teaching skills, it concluded that they did measure the content of the academic preparation of respective teachers and therefore sufficient to withstand a Title VII and constitutional challenge, notwithstanding evidence of disparate impact on minorities).

\textsuperscript{117} In this regard, the author identified "cultural bias" as communication skills, languages and customs dissimilar to those required to be successful in a American Euro-centric world. Garcia, A Study on Teacher Competency Testing, supra note 113, at 38. However, the author does note that this differential in pass rates has its roots in very early childhood years. "Children learn and interact in an environment which may be substantially different in language and custom from that in which they are supposed to function in order to succeed in life."

\textit{Id.}

\textsuperscript{118} The study listed the following conditions as well documented factors impacting on low scores: "high ethnic minority school dropout rates, lack of parental interest, lack of English proficiency skills, reduced classroom participation, lower academic expectations, unfamiliarity with test construction, test anxiety, inappropriate test-taking strategies, and lack of familiarity with test vocabulary. . . ." Id. at 38-39. The study listed the following additional factors as contributing, in varying degrees influence test performance, to low scores: "known detrimental relationships among test performance, language background, parental socio-economic level, negative family and school experiences, and lower socio-economic status." Id. at 39.

\textsuperscript{119} This is in addition to the potential impact of the various interrelated factors associated with low socio-economic households.

\textsuperscript{120} As mentioned previously, bar examination performance mirrors an applicant's performance in law school as evidenced by grades received on law school exams, typically essay-type. In fact, the correlation between bar exams and law school essay tests is quite high. Bar examiners, as a rule, employ the traditional essay format to measure the legal knowledge and skills usually tested in law school. Even the relatively new multiple-choice test format measures these same skills. See Klein, On Testing, 55 The Bar Examiner 16, 16-18 (February 1986)(ample evidence indicates that the MBE measures important legal reasoning skills at least as accurately and more efficiently than the essay portion of the exam).

In other words, bar examiners design tests that measure theoretical or doctrinal analytical skills learned in the first year of law school as opposed to practical, lawyering skills acquired in clinical education programs. However, given the high correlation between performance-
II. EXPLORATION OF THE SOURCES OF DISPARITIES

A logical place of departure for an exploration of the sources of disparities that adversely affect minority student performance on bar exams is to examine the law school experience. An examination of the law school environment discloses the matriculation of minority students who, by traditional measures, are inadequately prepared academically. How law schools address this seemingly intractable problem is admittedly fraught with complexities and a host of cognitive and personal variables.

A. Legal Education

Affirmative action programs have unquestionably increased the numbers of minorities in law school classrooms. But for these programs, very little diversity would exist in law school student populations today given law school reliance on the traditional predictors for regular student admissions. Thus, law schools have, principally, two academically differentiated groups matriculating in the student population.

Based tests, such as California’s PTs, and the essay and MBE, a multiple-choice testing vehicle, undoubtedly a strong analytical component is required for success on the new practice-oriented test formats. The implications here are significant insofar as identifying the source of disparity in bar passage rates. No matter the test format, a good foundation in traditional analytical or problem-solving skills will ensure success on the bar exam. Thus this correlation points to the critical importance of academic preparedness, also an imperative for competitive performance in law school.

121. An essential part of being a competent lawyer includes knowledge of the basic principles of the law and the ability to reason and analyze legal problems coherently. In other words, a logical relationship between “a sound basic education in law” and lawyer competence does indeed exist. An opportunity to alter the present disparity in bar performance among racial and ethnic groups and ensure the continued viability of the quest for diversity in the profession is possible. However, understanding what lies at the source of the problem and a means to correct it is critical to ultimate success, i.e., achieving parity in bar performance rates.

122. At the 1991 Annual Meeting of the Association of American Law Schools, Professor Charles E. Daye started the session by describing the on-going dialogue on academic support programs as a “seamless web.” For an excellent overview of the magnitude of the undertaking, consider Professor Lee Teitelbaum’s presentation given at the 1991 AALS Academic Support Programs Roundtable discussion in D.C. See AALS Executive Committee Program, Tapes 126 & 127.

123. As noted supra, students of color do not possess competitive admissions predictors. See How Berkeley Created Its One-L Class for ’86, The National Law Journal, Monday, December 29, 1986-January 5, 1987, at 22: “Applicants with our median scores are a dime a dozen [where LSAT scores average 43 and GPAs average 3.60]. . . In 1985, only five blacks who took the LSAT [out of 95,129 nationwide] had scores and GPAs that equaled [Berkeley’s] average.” Id. at 23. Accordingly, Berkeley has an affirmative action plan that considers other factors for admissions of minority candidates.
The first group, comprised of those students regularly admitted, usually possess credentials considered by the traditional measures of academic achievement (i.e., grades and standardized test scores, including the LSAT) as impressive. These admissions criteria, however, are the results of independent learning skills which the regularly-admitted students acquired—for the most part—twenty or so years prior to entering law school.124 The second group, comprised of those students specially admitted,125 are predominantly minority group members or other students categorized as educationally disadvantaged who usually present less impressive credentials in the classical sense.

In general, legal educators have certain preconceived notions about how law students learn new concepts.126 Indeed, the expectation is that students regularly admitted will do well because they possess the requisite reasoning and analytical skills, as evidenced by their LSAT scores,127 and by their undergraduate grade point average, critical to law school success. On the other hand, the specially-admitted students enter law school at a distinct educational disadvantage. The term “academically at risk” based solely on their admissions predictors, is used frequently to describe their prospects for success in law school.128 In short, the expectation is that these students will perform less well.

The popularly stated mission or goal of legal education is to teach law students “how to think like lawyers.”129 Actually “thinking like lawyers” is shorthand for engaging students in the kind of problem-solving activity normally associated with prior educational experiences. These interchanges are characteristic of a learning experience that actively engaged the student in the process.

Thus, socialization in the law school “culture” or norm is no more than possessing the problem-solving ability which regularly-admitted

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124. Or, at least, the expectation is that majority students have acquired these requisite skills as evidenced by their high admissions predictors.
125. Students who are admitted to law school based on factors other than the traditional admissions criteria pursuant to a law school's special admissions or affirmative action programs.
126. However, this expectation may be contrary to the reality.
127. The LSAT is designed to test for those skills and abilities that are the hallmark of the legal profession. Specifically, the test items include sections on reading comprehension, logical reasoning, analytical reasoning, issues and facts. Standardized tests measure, for the most part, these same skills. Wightman & Muller, An Analysis of Differential Validity, supra note 10, at 4.
128. See generally Wangerin, Law School Academic Support Programs, 40 Hastings L. J. 771 (1989) (discussing the need to build a bridge between the fields of legal education and education theory in designing effective assistance programs for “high risk students” who are likely to find themselves in academic difficulty); see also Bell, Black Students in White Law Schools, supra note 23 (examining the impact of the psychological and sociological experiences of black students admitted to white law schools that might make them at risk academically).
students presumably acquired during their formative years in school.\textsuperscript{130} For students specially admitted, their admissions predictors suggest that their educational experience differed significantly and thus, did not benefit from a similar socialization. Admittedly, students of color enter law school highly motivated to do well. However, this motivation is not enough—in most circumstances—to ensure success without a grounding in the fundamental attributes that characterize the law school culture.\textsuperscript{131}

To acquaint specially-admitted students with this “culture,” some law schools rely on summer programs or other pre-orientation activities to acclimate these students with the law school environment and thus ease their transition. Popular wisdom then dictated that such orientation was needed, given the disparity in admissions criteria. Also, a perception that few specially-admitted students had role models or mentors who could provide them with important information about the law school experience suggested the same approach. The shortcomings of these early orientation programs is evidenced by student frustration at not being competitive—grade-wise—with the regularly-admitted students during the first year, further fueling the self-fulfilling prophecy phenomenon.\textsuperscript{132}

The tenets of law school culture must be learned early in the specially-admitted student’s law school career.\textsuperscript{133} With the advancements in undergraduate academic support programs, effective intervention may yet occur at an earlier stage.\textsuperscript{134} Academic support programs in law school would then serve as reinforcement of those recently-acquired learning skills.\textsuperscript{135}

Not surprisingly, bar examinations favor those in law school who are familiar with the requisite norm for academic success in law school. The ability to engage in critical thinking and analysis with rigor and precision has always been the hallmark of legal education and likewise the profession. However, the pedagogy of the educational process in the academy does not, presently, factor into the curriculum any

\textsuperscript{130} Problem solving ability relates to learning how to integrate knowledge learned instead of learning verbatim knowledge. Wangerin, \textit{Learning Strategies, supra} note 17, at 484, 509-11.

\textsuperscript{131} Bell, \textit{Minority-Group Students, supra} note 78, at 306-07.

\textsuperscript{132} See Bell, \textit{Black Students at White Law Schools, supra} note 23, at 550-51 (discussing minority students lack of confidence in their academic ability).

\textsuperscript{133} Bell, \textit{Minority-Group Students, supra} note 78, at 306-08.

\textsuperscript{134} Wangerin, \textit{Academic Support Programs, supra} note 128, at 773-86.

amelioration of the educational disadvantage that finds minority students performing at the bottom of their classes. Simply providing a head-start on the law school experience is not sufficient to correct this disparity.

So, students of color not only enter law school with an educational disadvantage, they also lack familiarity with the law school culture critical to academic success. Moreover, this norm is not learned intuitively. If specially-admitted students have not benefitted from an earlier educational experience which fostered this particular type of learning behavioral adaptation, instructor-directed training is imperative. Thus, stating simply that students must be self-sufficient and develop their own learning strategies is insufficient for purposes of effective intervention. Something more than an explanation of the construct is needed for instructional purposes. Thus, faculty must understand the various levels of difficulty each student group brings to the law school environment that makes it easier for members of one group to grasp and for others, more difficult. Simply stated, specially-admitted students need more programmatic indoctrination than an early exposure to the traditional curriculum offerings can provide.

Intervention programs that do little more than capitalize on what the students have already learned or acquired, skill-wise, are ineffective measures for enhancing performance beyond lowering attrition rates. Competitive academic performance ought to be the goal of any assistance program. Thus, effective intervention measures, arguably, consider the source of the educational deficit and design support programs that aim to close the gap in academic performance.

B. The Brown mandate

The disparity in academic attainment is the consequence of educational inequality not racial inferiority. A recognition of this inequality in our educational system is gaining increased attention from

136. Although race-based educational classifications have been declared unlawful, inequality in educational attainment levels still appears to be race-based (in the social injustice context) because of the racial disparity in academic achievement and employment opportunities is still pervasive despite judicial intervention. See, e.g., Scott, Gender and Race Achievement Profiles, supra note 18, at 629 (discussing the literature on researchers' efforts to find explanatory reasons for the current racial and ethnic achievement gap stimulated by "the failure of conventional desegregation schooling programs to raise black [academic] achievements (citations omitted) and the elevation of black unemployment levels since the 1970s (citations omitted)").
scholars. An issue not before the courts in the earlier bar challenge cases was whether the failure to implement fully the mandate of Brown v. Board of Education has in any way contributed adversely to the performance of minority group members on bar examinations. The promise of Brown was the assurance of equal educational opportunity for all in this society. Nonetheless, this promise remains unfulfilled because children of color continue to receive unequal education in this country. Thus, the lack of academic preparedness—a suggested reason for poor performance in law school and on bar exams—results from a disparity in educational attainment among racial and ethnic group members.

Several factors have contributed to this educational inequality. For example, prior to Brown, in almost every measurable criterion, the segregated schools which African-American children attended were educationally inferior because those schools lacked the requisite physical facilities, resources, and other tangible factors equal to the schools which their white counterparts attended. In other words, African-American children received an inferior education in these separate institutions because their physical facilities, resources—financial and

137. Bell, A School Desegregation Post-Mortem, 62 Tex. L. Rev. 175 (1983) (reviewing Prof. David L. Kirp's book Just Schools, Bell comments that "Kirp strives for and generally achieves objectivity in his school studies, but he is impatient with delays, annoyed at black leaders who opt for better black schools rather than racially balanced ones, and genuinely disappointed that so little desegregation has taken place and been maintained in most of the school districts he reviews.") (footnote omitted). Id. at 177. See, e.g., SHADES OF BROWN: NEW PERSPECTIVES ON SCHOOL ON SCHOOL SEGREGATION (D. Bell ed. 1980) (advocating that educational equality, as envisioned by advocates of integration, can be more readily attained if the quality of education in predominantly black schools were improved first). Id. at 178; see also Chang, The Bus Stops Here: Defining The Constitutional Right of Equal Educational Opportunity and An Appropriate Remedial Process, 63 Bos. L. Rev. 1, 6 (1983) ("Courts have perceived the denial of educational rights primarily in terms of racial segregation ever since Brown.")

138. 347 U.S. 483 (1954). When discussing the Brown mandate, the reference here is to the equalization mandate and not the desegregation mandate. See Freeman, Antidiscrimination Law, supra note 66, at 1415:

"...Integration could be understood as the quickest means of upgrading educational equality. Thus one can regard the Brown case as a victory for substantive educational equal opportunity — the idea that all American children should have a chance for educational success, unimpeded by artificial barriers such as racial exclusion. That view of Brown finds great support in the opinion itself, with its heavy rhetorical emphasis on the importance of public education. Yet, within twenty years of the Brown decision, it became clear that the case did not guarantee equal educational opportunity. (citation omitted.)"

Id.

139. "The flaw is in our educational system, from primary school right through college..." Green, In Defense of Measurement, 33 Am. Psych. 664, 669 (1978).

instructional—and other tangible factors were inferior, i.,e., lacking in quality to those provided white children. Little has changed since Brown, however.

In declaring the doctrine “separate but equal” unconstitutional, the Brown court found that purposeful racial segregation stigmatizes minority children.141 According to the Court, this stigmatization promoted their self-perception of racial inferiority.142 Unfortunately, lingering perceptions that African-Americans (and presumably other minorities) are inherently inferior still persist.143 This perception, no doubt, has contributed to the assumption that any approach taken to remedy the past effects of educational disadvantage should be remedial. Thus, academic assistance programs which take a remedial approach tend to foster this stigmatization.

Furthermore, in recognizing the need for academic assistance, law faculty must operate precariously between an approach that fosters a positive self-image yet avoids the negative effect of stigmatization. A negative psychological impact on African-American children (and presumably other minorities) is undeniable if a sense of their inferiority was somehow communicated in their early classroom experiences.144 Accordingly, students of color also bring a sense of low self-esteem which is difficult to overcome when they encounter overt or subtle treatment in a law school classroom that further undermines their self-confidence. Whether or not the instructor is well-intentioned, students of color may harbor debilitating resentment or perform less well if they

141. Some commentators have argued, however, that a more pernicious assumption may be implicit in the “separate is inherently unequal” declaration. Namely that African-Americans—in particular (and presumably other minorities)—are inherently inferior. Id. at 233. According to the authors, in ruling that “separate is inherently unequal,” the Court may have unwittingly sent an ineluctable message to African-American children (and other children of color) that their institutions, their teachers and their administrators are inherently inferior. Id. at 233-34.


144. “The original contention in Brown, that segregation itself generates low self-esteem, has more recently been called into question (citations omitted). . . The black child growing up in a black family with black friends and relatives probably develops as strong feelings of self-worth as does the white child growing up in a white world. Thrusting the black child into a predominantly white, status-oriented classroom does nothing to enhance the black child’s self-esteem. Instead, we find that self-esteem diminishes after desegregation, a consequence that is understandable in the light of recent research on the effect of ability comparison information on self-attribution (citations omitted). Gerard, School Desegregation, supra note 27, at 875.
perceive their treatment in the classroom as an indication that they are less able than their white counterparts.\textsuperscript{145}

Admittedly, a student’s sense of self-esteem in law school should not come from law school grades.\textsuperscript{146} However, most law students consider the grades they receive of the utmost importance and an indication of their successful matriculation.\textsuperscript{147} They are sought on a competitive basis; and, notwithstanding assertions to the contrary, grades are, for the most part, the only feedback they have to measure themselves. Moreover, prospective employers consider law school grades as the primary demonstration of a student’s qualifications. Therefore, to the extent that students of color perform at the bottom of this competitive hierarchy, a certain resignation about the implications of this ranking may guide their thinking. For most, this is just further evidence of racism in this society. This observation is troubling, however, because such an attitude may hinder their finding creative solutions for competitive success in law school.

Psychological studies have shown that students tend to perform in accordance with expectations.\textsuperscript{148} In law school, faculty expectations are usually that specially-admitted students will not perform as well as their white counterparts.\textsuperscript{149} Undoubtedly, this factor contributes to

\begin{itemize}
  \item 145. “There are fairly consistent findings that teachers pay more attention to white than to minority pupils. As pointed out earlier, there is also evidence that teachers underrate minority children. In our own data we found that teachers who tend to undervalue the achievement of minority pupils as compared with whites—and most teachers do—tend to have an adverse affect on the performance of minority children in their classes (citation omitted). Id. at 874.
  
  In summary, the researchers found desegregation failed to improve the educational experiences of minority students markedly stating that “[t]he lid that was on minority performance in the segregated classroom is still there. Id. at 875.
  
  146. Self-concept—described as one’s perception of self and the world—is a non-intellectual factor which may relate to academic achievement. Gadzella & Williamson, Study Skills, Self-Concept, and Academic Achievement, 54 Psych. R. 923, 923 (1984). Study skills, as distinguished from scholastic ability, is another such factor. Id.
  
  The relationships between study skills and self-concept with academic achievement, respectively, do not mean that academic achievement is determined by self-concept or study skills. Correlations do not imply cause-effect relationships; but the findings give the educators and psychologists a good reason to pursue other analyses of the data which might yield predictors of academic achievement. Id. at 924.
  
  
  148. Crain & Mahard, How Desegregation Orders May Improve Minority Academic Achievement, 16 HARV. C.R.-C.L.L. REV. 693, 699 (citing R. Rosenthal & L. Jacobson, Pygmalion in the Classroom: Teacher Expectations and Pupil Intellectual Development (1968); see also Bell, Black Students In White Law Schools, supra note 23, at 553.
  
\end{itemize}
the self-fulfilling prophecy phenomenon. Thus, students of color may not experience the kind of dynamic interaction between student and instructor needed to foster self-confidence. Studies indicate students of color succeed academically if they have a healthy sense of their own identity and self-worth and feel positively towards the learning environment. To the extent that students feel inferior and alienated in the classroom setting, they are discouraged and, therefore, may perform less well or as “expected.”

Thus, a framework of intervention which encourages students of color to excel and fosters reciprocal interaction in the learning environment is the paradigm for academic success. Students who are encouraged to excel develop the ability, confidence, and motivation to succeed academically. Students who are exposed to interactive learning experiences that promote independent learning behavior have the potential to perform better academically.

In the context of a constitutional challenge to bar examinations, this issue is, admittedly, a matter of educational reform, not a matter for legal redress given the available data. Although courts are venues for attaining social justice, they are ill-equipped to address matters of

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150. Students from “dominated” societal groups are either “empowered” or “disabled” depending on the quality of interaction received in the educational setting. Cummins, Empowering Minority Students, supra note 18, at 21. According to the author, intergroup power relations exert a major influence on school performance. Id.

151. Id. at 22.

152. Id. at 21-30 (describing a theoretical framework for examining minority students’ academic failure and for predicting the effects of educational intervention with emphasis on language-minority students); see also Prof. Treisman's thesis paper describing his research and the math workshop at Berkeley in which he advocates structuring intervention programs that emphasize a student's strengths and not a student's weaknesses. Treisman, A Study of the Mathematics Performance of Black Students at the University of California, Berkeley 1-3 (1985) (unpublished manuscript on file with author).

153. Cummins, Empowering Minority Students, supra note 18, at 23. “Although conceptually the cognitive/academic and social/emotional (identity-related) factors are distinct, the data suggest that they are extremely difficult to separate in the case of minority students who are "at risk" academically. Id.

154. Id. at 27. “[T]eaching that empowers will aim to liberate students from instruction by encouraging them to become active generators of their knowledge.” Id. The author distinguishes two major pedagogical orientations of instruction: the transmission model and the reciprocal interaction model. Id. at 28. Not surprisingly, the transmission model, the less interactive model, is the dominant model in North American schools.

“A central tenet of the reciprocal interaction model is that “talking and writing are means to learning" (citation omitted). The use of this model in teaching requires a genuine dialogue between student and teacher in both oral and written modalities, guidance and facilitation rather than control of student learning by the teacher, and the encouragement of student/student talk in a collaborative learning context. This model emphasizes the development of higher level cognitive skills rather than just factual recall, and meaningful language use by students rather than the correction of surface forms...”

Id.
social reform.\textsuperscript{155} Thus, a more programmatic approach to the problem is preferable.

As noted above, what is known is that bar passage follows law school performance.\textsuperscript{156} If a person does well in law school, that person is very likely to pass the bar on the first attempt. Accordingly, enhancement of academic performance is, arguably, the key to ultimate success on the bar. The most practical solution is to focus on new approaches in law school methodology that provide a context and structure to the learning process to promote academic success among students of color.\textsuperscript{157} Furthermore, as discussed below, any alternatives to the bar examination process are unlikely to resolve the problem of low bar passage rates among people of color, and may possibly create new or other problems.

IV. TWO MAJOR RESPONSES TO THE PROBLEM OF DISPROPORTIONATE IMPACT OF BAR EXAMINATIONS ON MINORITY GROUP MEMBERS

A. Exploring Alternatives to Bar Exams

In recent years, bar exam critics—whether charging cultural bias or lawyer incompetence—have advocated various bar examining reform

\textsuperscript{155} See, e.g., Yudof, \textit{Equal Educational Opportunity and the Courts}, 51 Tex. L. Rev. 411, 414 (1973) (describing those issues of educational inequalities as appropriate matters for legal redress and those which are not because courts are "ill-suited to unraveling complicated facts as a basis for setting broad policy. . .[footnote omitted].")

\textsuperscript{156} Because of the functional limitations of courts in considering matters of broad social policy and because of the vulnerability of the relevant social science data, the concept of equal educational opportunity defined as equal educational achievement is an inappropriate basis for judicial intervention. [Footnote omitted.]

Certain clear constraints limit the courts' ability to promote social reform. Even apart from considerations of judicial craftsmanship and the needs for principled decisions, courts are institutionally incapable of performing a fullfledged legislative role. For one thing, courts cannot make factual determinations as readily as legislatures and administrative agencies, which can hire staffs, hold extended hearings, commission lengthy studies, and examine in detail every aspect of a complex problem, giving all the conflicting interests an opportunity to be heard. . . .

\textit{Id.} at 413.

\textsuperscript{157} A more far-reaching goal, of course, is to close the gap in academic performance starting in the primary grades. For example, the law schools and members of the organized bar participate in partnership programs with primary and secondary public schools to promote reading and the kind of reciprocal interaction deemed important to promoting independent learning skills.

The LSAC is sponsoring the Academic Assistance Project to research, design, and disseminate a workbook for use by law schools desiring to develop or improve academic assistance programs. See 1991 AALS Academic Support Programs Roundtable Discussion.
measures. These critics have advocated either the total elimination of the traditional bar examination in favor of a universal diploma privilege; new test formats designed to measure more qualifications considered essential for the practice of law; or an apprenticeship program. Several jurisdictions have already experimented with new or innovative test formats in recent years, but none appear to have narrowed the gap in performance rates among racial and ethnic groups.

The calls for the complete elimination of the bar examination, voiced in the early seventies, were resoundingly rejected. At that time, five states had the limited “diploma privilege;” now only one state retains it. In other words, the direction of bar admissions reform is towards more examining requirements, not less. As for alternative testing mechanisms, three jurisdictions explored and adopted a new test format designed to measure lawyering or practice skills; one jurisdiction also experimented with testing lawyering skills orally. Nonetheless, the problem of low bar performance rates among minority group members seemingly still exists.

In California, the bar examiners considered the possibility of employing alternatives testing models. California experimented with testing lawyering skills during an experimental program conducted in 1980. Popular wisdom then was that minorities did not write well and would fair better if allowed to express themselves orally. The findings

158. Given the concerns about lawyer competence, the likelihood that any state would sanction the total elimination of testing is virtually nonexistent.


160. See supra notes 35 and 42.


162. That jurisdiction is the State of Wisconsin. And in that jurisdiction the state bar board of examiners “oversees” law school curriculum to assure that the public is protected. See Commentary, Admission Upon Diploma to the Wisconsin Bar, 58 Marquette L. Rev. 109 (1974).

163. See supra note 159; see also Stuckey, Apprenticeships and Clinical Education: The Only Real Performance Tests? 55 The Bar Examiners 4 (August 1986).

164. Note that oral bar examination testing was on the decline by the end of the nineteenth century as too time-consuming, inefficient and unsatisfactory insofar far as protecting the public interest was concerned. R. Axel, supra note 2, at 62-63.


166. In addition to determining whether additional lawyering skills could be tested, alternative testing methods were also explored in an effort to address perennial charges that the bar examination is culturally biased and to enhance minority representation within the legal profession. Id.

167. Id.
reported that none of the experimental models substantially altered the outcome for the majority of the minority group members.168 The correlation between the written and oral tests still existed. This finding is consistent with a lack of academic preparedness. Performance on a test whether oral or written, which is designed to measure, in essence, academic achievement is likely to produce the same results.169

Moreover, use of oral examinations — last used in the nineteenth century170 — would not be cost efficient. In addition, other considerations should militate against their employment. For example, "they compromise test security, standardized administration procedures, and timely score reporting;"171 and they provide an opportunity for bias to infect the grading process.172 In other words, the environments in which the testers observe the performance of the test-taker is not homogeneous. Once the racial or gender of the test-

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168. In 1980, the California Committee of Bar Examiners in joint sponsorship with the National Conference of Bar Examiners Research Program undertook to experiment with new methods of testing lawyer competency in an effort to determine, among other things, whether performance tests tended to widen or narrow the differences in passing rates between racial and ethnic groups. *Id.* at 14.

Another purpose of the research was to determine if those persons who possessed the legal knowledge and analytical skills presently tested on existing bar exams also possessed some of the other skills and knowledge that are required to function as an attorney. The answer was yes. *Id.* Nonetheless, as a matter of policy, the CBE adopted the performance test as a component part of the California Bar examination.

The 1980 experimental bar examination was divided into two parts: the Special Session and the Assessment Center. The research and video tasks given during the Special Session were designed to assess some of the important lawyering skills and knowledge that existing bar examinations may not be measuring. O'Hara & Klein, *Adequate Measure of Lawyer Competence*, supra note 75, at 33. The Assessment Center included the testing of oral skills. For a further description of the experimental testing session, see id. at 33-35.

169. All bar passage studies conducted to date indicate—and testing experts seem to agree—that the bar examination correlates statistically very highly with academic performance in law school. Moreover, the multiple choice (i.e., MBE) test form correlates very highly with the essay portion of the bar examination as it does with performance-based test formats. As such, it seems reasonable to conclude that these two distinct test formats measure fairly identical skills, namely the ability to reason analytically and with precision, i.e., "to think like a lawyer." Anecdotal information lends support to the conclusion that minority students by and large find themselves in the bottom quarter of the class ranks in law school. This would seem to be consistent with admissions predictors and underscores the fact that unless intervention in law school increases academic performance, first time success on bar examination is somewhat problematic for minority group members.


172. Graders would observe an applicant's race, sex, age, and other irrelevant characteristics. This latter observation has already been made and besides from a historical perspective, bar examiners stopped giving oral examinations in the latter part of the nineteenth century. R. Abel, supra note 2, at 62-63. While oral testing may work as described in innovative bar admissions program in Québec Programme, the testing population is probably more homogeneous. See infra note 183.
taker is disclosed the opportunity for bias is heightened, whether real or perceived.

The California bar examiners also considered other means to close the gap in passage rates among racial and ethnic groups. Specifically, they experimented with changing the rules governing the exam, increasing the time limits and hiring more minority bar readers.\textsuperscript{173} All to no avail. Again, the common theme or underlying thread connecting all of these studies and efforts to improve the passage rates of racial and ethnic minority groups should now be fairly apparent.

Given the high correlation between bar passage and law school performance, graduation from law school as the sole pre-requisite to the profession does have surface appeal.\textsuperscript{174} Admittedly, law school examinations measure, for the most part, what bar exams tests.\textsuperscript{175} Given the disproportionate impact on minority group members, the seduction is to advocate the elimination of bar examinations altogether and to urge adoption of a universal diploma privilege. In other words, graduation from an ABA accredited schools is the last obstacle to hurdle before entry into the profession.\textsuperscript{176}

Adoption of universal diploma privilege does not remedy or correct the compelling problem that is at the root of the source of causation of low bar passage rates. Moreover, enhancing performance in law school also enhances minority group members opportunities for employment. But most important, achieving competitive performances among all groups in law school promotes academic self confidence and enhances self-esteem.

Furthermore, at least one commentator has observed that law professors are loathe to fail anyone;\textsuperscript{177} thus, bar examiners are legitimately concerned that law schools may not be the proper gatekeepers for the profession. Bar examiner intervention, thus, serves

\textsuperscript{173} Report on Minority Passing Rates, supra note 4.

\textsuperscript{174} While law school graduation as the sole requirement for bar admission is appealing—given the apparent fact of the disparate impact of poor bar performance among minorities—present-day concerns about lawyer competence make the adoption of a universal diploma privilege unlikely.

\textsuperscript{175} In Chaney v. State Bar of California, 386 F.2d at 964, the court stated "[Bar exam(s)] admittedly [are] the form of examination employed generally in the law schools [throughout] the country." Also, both examination procedures, as noted earlier, test the knowledge and skills that the applicant or student has learned in law school. This tracks with the primary function of the bar examination which is to test the applicant's knowledge of the law comprehensively.

\textsuperscript{176} "Widespread rumors and attendant fears about poor minority performance on the bar examination make it impossible to ignore the subject of the bar examination as a formidable barrier to minority admission to the legal profession." Ramsey, Bar Passage Rates, supra note 45, at 25.

\textsuperscript{177} Bell, Minority-Group Students, supra note 78, at 308.
as a valid check on the law school's obligation as gatekeeper. The justification for this function is to assure that the public is protected from incompetent practitioners. The law school mission, on the other hand, aims higher in its quest to educate the aspiring lawyer.\(^{178}\)

More important, the relative functions of each institution are, historically, different. Almost seventy years ago the Section of Legal Education and Admissions to the Bar said that bar examiners, rather than the law schools, are the true gatekeepers of the profession.\(^{179}\) Although law schools share with bar examiners the concern that the public be protected, the mission of the law school differs considerably from that of state licensing boards.\(^{180}\) Law schools were established to upgrade the quality of legal education and training for those seeking entry into the profession.\(^{181}\) Keeping the two missions separate promotes and enhances the integrity of the profession as a whole and its public image.

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178. Although the traditional mission of a law school is professionally based, most law schools are, nonetheless, members of the academy, with "treasured ties" to the academic traditions of learning and inquiry. Keeton, *Teaching and Testing For Competence in Law Schools*, 40 Md. L. Rev. 203 (1981). Judge Keeton discusses this dual role of law schools as both academic and professional in describing the tension between the profession and law schools in educating aspiring lawyers. In other words, the law professor may seek to determine whether the law student has grasped a much more lofty understanding of the nature of the law and the role of the courts. And the debate rages on as to whether law schools effectively train aspiring lawyers for the practice of law. *Id.* at 203-04. Also, academic freedom dictates creativity in course and curriculum content which may be at odds with knowledge of subject areas deemed important to state bar examiners.

179. See Standard 102 of the ABA Standards for the Approval of Law Schools. AMERICAN BAR ASSOCIATION, STANDARDS FOR APPROVAL OF LAW SCHOOLS (1987). The mission of the bar licensing agency is relatively commonplace. As discussed previously, the interest served by the licensing function is to protect the public, i.e., to assure that newly licensed attorneys have demonstrated a minimum level of understanding of the substantive law deemed appropriate for testing the necessary skills of analysis and legal reasoning. A primary function of the bar examination tests the applicant's knowledge of the law comprehensively. See McCrystal, *State Based Bar Admissions*, supra note 81, at 552. The justification for this requirement is based on the state's interest in protecting the public from incompetent lawyers. *Id.* And, it is this interest which licensing examinations aim to serve.

180. In some quarters, law schools are also viewed as gatekeepers of the profession. In that regard, they share the same concern as bar examining agencies. Namely, that their graduates are professionally competent to represent the public in legal matters, an aspirational goal. However, the mission of bar examiners is to establish and enforce adequate minimum standards of competence for admission to the legal profession and to protect the public from incompetent lawyers. Thus, bar examinations presumably test applicants who meet the minimum qualifications for the practice of law. Passage, therefore, denotes minimum competence. The exact definition of this level of competence is elusive, however. Nonetheless, minimum competence assumes that the bar applicant has the requisite fitness to practice law. Most observers would concede that bar examinations do test basic skills such as the marshaling of facts, legal analysis and writing ability.

Another alternative is the re-institution of the system of articling or apprenticeship programs. But these methods were used in the evolutionary days of the profession and have long since fallen into disuse for one reason or another. Moreover, in countries that do employ them as part of the admissions process, passing a written bar examination is still a requirement. They are merely extensions of the bar admissions process after completion of the legal education requirements. Furthermore, when used in this country, they were not efficient, effective or satisfactory insofar as minority candidates are concerned. And in the terms of fairness, efficiency and effectiveness —given the ever-increasing numbers of bar applicants— they are adequate measures of the minimum qualifications which bar examiners deem appropriate for newly admitted members of the profession.

Like the critics who contend that bar exams are not valid predictors of future performance, the same criticism could be made about law school. Although most schools have clinical programs, bar examinations generally cover those substantive courses given in the first year. And anecdotal information suggests that students of color perform disproportionately at the bottom quarter of their class. For the most part, the law school curriculum is not structured to remedy this phenomenon.

B. Current Law School Academic Support Programs

Academic support programs are rarely given curricular attention, programmatic development or made the subject of empirical study. They usually function as extensions of the admissions process in recognition of the need to provide some sort of assistance to specially-admitted students. Most assistance programs are remedial in nature with the limited goal of higher minority retention.

Academic support programs are either a pre-law school summer orientation program, tutorial assistance programs operating during the

182. R. Abel, supra note 2, at 221-24 (discussing the revival of apprenticeships).
183. E.g., Morissette, Testing Professional Skills in the Quebec Bar Admissions Programme, 57 The Bar Examiner 13 (August 1988) (describing the lawyering skills examination as "not unlike traditional examinations — the written examination model").
184. Id.
185. Cf. R. Abel, supra note 2, at 43 (describing the problems immigrants encountered in finding apprenticeships).
186. Bernstein, Minority Law Students, supra note 2, at 10-11. Although minority students are not specifically mentioned, the court in Delgado v. McTighe, 522 F. Supp. at 894, noted that bar applicants who failed the bar examination also performed at the bottom of their class ranks.
first year, legal writing programs or bar exam preparatory courses. Very little information, however, has been published to indicate the relative success of the various forms of assistance programs. Thus, a critical need exists for studies evaluating the effectiveness of various support models. For the most part, any information reported is usually descriptive and rarely reports any connection with significant grade improvement or first time bar passage success. Therefore, no data currently available and empirically verifiable indicate any significant increase in academic performance among members of the specially admitted group as a result of these programs.

Any assistance program should be measured in terms of its success in narrowing the performance differential between students of color and their white counterparts. Mere survival is no longer an acceptable hallmark of a successful academic support program. Success is now

187. Minority Affairs Committee of the Law School Admission Council, Summary Report on the LSAC Questionnaire on Special Law School Programs for Minority Students (Law School Admissions Services, Inc., March 1988). More comprehensive programs provide assistance to the participants at every stage of their law school career, including bar exam preparation. For example, the directors of academic support programs at UCLA and University of Santa Clara report that their programs are innovative and comprehensive involving both student-led and faculty-led tutorials. See, e.g., Knaplund, Academic Support Programs at UCLA School of Law (1990) (on file with author).

188. Undoubtedly, the LSAC Questionnaire had this concern in mind. In March, 1988, the Law School Admission Council published a summary report of the responses to the LSAC Questionnaire on Special Law School Programs for Minority Students. This report is a companion volume to the Report on the LSAC Minority Enrollment Challenge Grant Program that was distributed to the law schools in December, 1987. This report was published in an effort to provide law school representatives with an interest in expanding their knowledge about existing programs and sharing information with others. LSAC Report at 2.

The purpose of this questionnaire was to collect data about programs other than those funded by the LSAC challenge grant program. The report does not necessarily include data concerning participation in national programs such as the Council on Legal Education Opportunity Program (CLEO) and various scholarship programs that serve minority students in law schools nationwide. Id. at 1.

In undertaking this project to gather information about special law school programs for minority students, the Committee had two major objectives: (1) to begin to establish a clearinghouse for information and materials on special law school programs for minority students and (2) to disseminate information about special law school programs among law schools. . . .

Id. at 2.

189. Some anecdotal information does get reported which suggests this kind of success. However, no hard data exists to verify these reports to assist others in developing effective programs. Some schools do provide supplemental bar preparatory courses for specially-admitted students in recognition of the potential for poor bar performance. It is unfortunate, however (given the correlation between law school grades and bar passage), that such assistance is still needed at the final stage of the student's law school career. Thus, another measure of the effectiveness of an academic support program should be based on the elimination of a continued need for supplemental bar preparatory assistance.
measured in terms of programs that promote academic excellence.\textsuperscript{190} Unfortunately, programs that actually deliver demonstrable results in grade improvement are still in the conceptual stage of development.

Contemporary academic support programs do not incorporate pedagogy designed to address the crux of the problem.\textsuperscript{191} For example, a typical summer program does little more that immerse students in substantive law courses or legal process methodology traditionally taught in the first year of law school.\textsuperscript{192} In other words, these participants gain a head-start on their law school career but no instruction on how to be successful academically.\textsuperscript{193} Some schools report success with tutorial assistance programs.\textsuperscript{194} However, tutorial programs are geared to retention, not excellence, and they convey a message of inferiority for those students who participate in them.\textsuperscript{195} Moreover, even if they are successful, only short-term grade improvement is attained.\textsuperscript{196}

\begin{itemize}
  \item \textsuperscript{190} See \textit{NBA/ABA Legal Education Conference}, supra note 31, at 551 (underscoring Professor Skillman's observation that "law students and faculty often perceive incorrectly the standard for minorities as being one of survival, rather than one of excellence" which galvanized the conference participants and presenters); see also 1990 AALS Academic Support Program Roundtable discussion.
  \item \textsuperscript{191} Professor Leslie Espinosa views most academic support programs as "rarely comprehensive" and "poorly designed." Espinosa, \textit{Empowerment}, supra note 14, at 282-83. Professor Espinosa also stresses the importance of programmatic development and evaluation of assistance programs but cautions against the harm of stigmatization, citing to Professor Stephen R. Rips's critique of undergraduate assistance programs for minority students. \textit{Cf.} Rips, \textit{A Curriculum Course Designed for Lowering the Attrition Rate for the Disadvantaged Law Student, 29 How. L.J. 457, 461-62} (1986) (citing Panos, \textit{Picking Winners or Developing Potential, 81 Sch. Rev. 437} (1973)).
  \item \textsuperscript{192} Summer programs are mainly viewed as orientation or early exposure to courses taught in the first year of law school. Although such programs attempt to acculturate the student of color to the traditional law school culture, they fail, nonetheless, to instruct them on the requisite skills needed to be competitive academically with their white counterparts. See Bell, \textit{Minority-Group Students, supra} note 78, at 306-07.
  \item \textsuperscript{193} For example, Professor Skillman offers study methods workshops and assistance programs to law schools designed to "demystify" the law school experience and, in particular, provide students of color with the requisite tools to achieve academic excellence through EXCEL: The Supplementary Bar Preparation CourseTM. Professor Skillman's program provides a structure and approach to learning the assigned materials.
  \item \textsuperscript{194} See, e.g., \textit{NBA/ABA Legal Education Conference, supra} note 31, at 534 (Georgetown reporting success with its program because writing needs identified early.)
  \item \textsuperscript{195} If, during the first year, the school sets up a special tutoring process for blacks, it usually worsens the problem and provides a negative signal to the law school's expectations for its black students. The lack of confidence in their ability conveyed through tutorial plans is both clear and painful to blacks whose resentment and rejection are predictable and understandable. This is particularly true when the special assistance offered is, in fact, badly needed.

Bell, \textit{Black Students in White Law Schools, supra} note 23, at 551.
  \item \textsuperscript{196} Furthermore, tutorial assistance programs are usually remedial in nature, uneven in educational quality and an unacceptable learning model for promoting excellence and, thereby, enhancing academic confidence and personal self-esteem. The tutorial model promotes dependency, not to mention the potential for a negative self-concept as Professor Espinosa observes. see
\end{itemize}
an insufficient result if academic excellence is the aspirational goal.197

Comprehensive writing programs offer the most promise for their participants’ long-term grade improvement.198 Writing courses are very good models for developing the critical problem-solving skill because they usually stress the importance of legal reasoning and analysis.199 Effective written communication requires the writer’s mastery in these skills.200 Moreover, good writing is hard work and insists on rigor and precision.

A movement is now underway to provide a model for an effective academic support program.201 However, it is imperative that the focus

also Wangerin, Academic Support Programs, supra note 128, at 786-90 (discussing the problem associated with assistance programs that promote the learner’s dependency on the tutor and short-term grade improvement).

197. For academic excellence (i.e., significant long-term grade improvement), specially-admitted students must be instructed in strategies designed for independent learning and effective studying skills. Id. at 786-94; Wangerin, Learning Strategies, supra note 17 at 517-27; see Feinman & Feldman, Achieving Excellence, supra note 15:

Student learning is a product of the extent to which the student possesses the prerequisite to the learning to be accomplished, the student is or can be motivated to learn, and the student is given appropriate instruction. (citation omitted.) In law school, most students possess the basic prerequisites to learning what they should learn. (citation omitted.) What is primarily missing in law school is appropriate instruction, an educational environment that provides students with the resources and the situations with which they can best learn. . . .

Id. at 531.

198. See, e.g., Mathewson, Academic Support Programs at UNM Law School (1988)(unpublished report on file with author). The University of New Mexico School of Law complements its affirmative action admissions process with two academic support programs. The first component is a summer pre-law offering and a legal analysis workshop offered during the fall semester as a substitute for one of the regular first year courses. Id. In addition, the school makes a writing lab available to all students on a volunteer basis as a part of the first year writing program. This writing lab is viewed as a teaching innovation and has reported success in its accomplishments and meeting its goals. Minnis, Writers' Lab Final Report For Fall 1986 (unpublished report on file with author). Student comments suggest that the writers' lab is a valuable resource as an adjunct to the legal analysis workshop.

The writers' lab provides students with a structured approach that clarified the interdependence of learning and writing. Id. at 9. In addition, the writers’ lab provides a setting in which common problems experienced by entering students could be noted and new methods for teaching writing could be developed and tested to address them. Id. And as anecdotal information suggests, students at UNM seemingly do well on the New Mexico bar exam. See supra note 108.

199. See, e.g., Kelly, Rogers & Bern, The Program at Kansas City, 1970 Tol. L. Rev. 891 (emphasizing the importance of assistance programs which include organizational techniques in writing and critical analysis in reading.)

200. See Bell, Minority-Group Students, supra note 78, at 305-06 (citing to Professor Stanley V. Kinyon's observations concerning the importance of language and writing skills in law school exams); see also Diggs, Communication Skills in Legal Materials: The Howard Law School Program, 1970 Tol. L. Rev. 763 (emphasizing the importance of effective communication skills for minority students as an indispensable component of legal education).

201. This is evidenced by the attention which the AALS has given to this problem at recent annual meeting programs as well as the LSAC Academic Assistance Project.
of development be on independent learning strategies and not, simply, assistance efforts of a remedial nature. If the apparent phenomenon of low bar passage rates is to be corrected, effective intervention programs are essential for a successful movement.

C. Attributes of A Model Intervention Program

Addressing the educational needs of students of color who enter law school at a distinct competitive disadvantage presents law faculty with a unique challenge. Meeting this challenge affords law faculty an opportunity to engage in a significant educational reform effort. In that regard, at least one commentator has suggested that law schools might benefit from the efforts of the undergraduate schools in developing effective intervention programs.\(^\text{202}\)

In teaching students how to “think like lawyers,” law school instruction assumes that most students have already mastered the requisite problem solving ability. This ability is central to law school success because the law school construct is premised on a linear thinking paradigm.\(^\text{203}\) For the most part, students with high predictors were undoubtedly socialized, accordingly, at every educational level beginning in the primary grades. The challenge for law faculty, therefore, is to teach those students with low predictors how to think in a linear fashion. For these students, their educational experience failed to acculturate them in like fashion.

As learning theorists, legal educators are novices, they do not necessarily understand how students learn, and are generally unaware of the large gulf in understanding between instructor and students.\(^\text{204}\) Law faculty are fortunate to have the regularly admitted group of students in the law school community—given their high admissions predictors—because it makes the task of instruction considerably

\(^\text{202}\) Wangerin, Academic Support Programs, supra note 128, at 777-78.

\(^\text{203}\) Observers may view this as a “cultural” matter, suggesting a distinction between “afro-circular” and “euro-linear” thinking processes. Cf. M.K. Asante, The Afrocentric Idea 16-18 (1986). I contend that this is not so much a “cultural” matter but rather, the dissimilar educational experiences of minority students which, in the main, differ considerably from that of white students even if the only difference is how the teacher interacts with them in an integrated classroom. See, e.g., Gerard, School Desegregation, supra note 27, at 874 (reporting that teachers pay more attention to white than to minority pupils in integrated classrooms); see also Moran Knocking At the Schoolhouse Door An Wondering What’s Inside, 4 Berkeley Women’s L.J. 259, 271 (1989)(discussing Eurocentric orientation in the classroom). However, there is a certain engagement in the learning process, a dynamic interaction that is needed for the students learning experience to be “enriched.” Scott, Gender and Race Achievement Profiles, supra, note 18, at 634.

\(^\text{204}\) See infra note 220 and accompanying text.
easier. But the same is not true for specially-admitted students. As Professor Derrick Bell once noted:

The necessity of teaching is reiterated because at some of the most highly regarded law schools the number of applicants exceed the number of admissions by so substantial a margin that the quality of student accepted is so high many of them could learn the law if the school merely provided them with the books. Whatever their merits as law students, the prior experiences of most black students argues against their being lumped in this category. . . .

Bell, Black Students at White Law Schools, supra note 23, at 555.

205. In the literature of educational psychology and learning theory, this is called "metacognition." For an excellent discussion of this theory and its application to the law school setting, see generally Wangerin, Learning Strategies, supra note 17, at 474-91 also citing to Sanacore, Metacognition and the Improvement of Reading: Some Important Links, 27 J. Reading 706, 707 (1984) (defining metacognition for the reader as "[u]nderstanding text is both a subconscious and a conscious act. As individuals become increasingly aware of processes involved, they can exercise degrees of control over some of them. Such conscious control is referred to as metacognition, and this area has the potential for improving reading performance). Id. at 472.

Professor Paul Wangerin draws heavily on this literature in an effort to provide legal educators with useful guidance in providing law students with successful learning strategies. Thus, application of educational learning theories in the law school setting can also be instructive in developing effective intervention programs for specially-admitted students. Wangerin, Academic Support Programs, supra note 178. Not only does it promote a better understanding of the real problem attendant here but it provides a structured approach for developing a concrete solution.

206. Sanacore, Metacognition and the Improvement of Reading: Some Important Links, 27 J. Reading 706, 707 (1984); cf. Wangerin, Learning Strategies, supra note 17, at 478-79 (discussing Clare Weinstein’s belief that educators should take a more active role in teaching students how to become “good learners” by exercising more control over their learning processes).

207. As noted supra, Professor Wangerin’s article on learning theories alerts us to this concept. Id. at 473. Its importance for academic support programs in law school can not be overstated too often.

208. According to Professor Wangerin, “metacognition” has become one of the hottest topics in the literature of education in recent years. Wangerin, Learning Strategies, supra note 17, at 474 (citing to Baker & Baker, Metacognitive Skills and Reading in HANDBOOK OF
using metacognitive processes would recognize that class assignments should be read one way if the goal of reading is memorization, and another way if the goal of reading is generation of rules to be applied to specific facts in subsequent cases (i.e., legal analysis). Whenever knowledge must be used flexibly (in any endeavor requiring more than the rote memorization or recall of information), problem solving is of "ubiquitous importance." Understanding the nature of the process aids in its mastery.

Moreover, strategies for independent learning and effective study skills that distinguish between learning "verbatim knowledge" and "integrated knowledge" are critical. In the former learning process, students acquire rote memorization skills. Such a skill does not require that the student understand the need to integrate information and facts. The latter process, on the other hand, requires such an understanding and is characteristic of the law school learning experience. Thus, it is the ability to learn "integrated knowledge" that is essential to developing legal reasoning and analysis skills and success in law school.

Academic support programs that empower students in mastering the learning process and, thereby, build their academic confidence are likely to be the most effective. Programs which do not empower students run the risk of assuring their "predictive certainty of failure." Instructional interaction that values the individual student and requires students to engage actively in the learning process is critical to their law school success.

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200. Wangerin, Learning Strategies, supra note 17, at 475-76.
201. Problem Solving and Education: Issues in Teaching and Research (Tuma & Reif, eds. 1980).
202. See Feinman & Feldman, Achieving Excellence, supra note 15, at 531-34 (describing the learning components which law students need to achieve mastery in the study of law). In other words, using Feigenbaum's Knowledge Principle "the more the learner (law student) knows (about legal reasoning and analysis), the easier it is to know more (about what it takes to perform well in law school)."
203. Wangerin, Learning Strategies, supra note 17, at 482-85.
204. Espinosa, Empowerment, supra note 14, at 282.
205. Concern about the stigmatizing effects of current support programs has been expressed already. See, e.g., id. For example, use of the terms "retention" and "tutorial" tended to evoke a vision of failure and incompetence. Id. at 286. Also, such terms create an expectation that the best a minority student can hope to do is survive. Skillman, Misperceptions, supra note 23, at 554.
206. Scott, Gender and Race Achievement Profiles, supra note 18, at 634.
Accordingly, a model academic assistance program would incorporate exercises designed to develop the problem solving ability. Thus, instruction would focus on the students' developing strategies that promoted independent learning skills. A workshop format which

217. Of particular note is the Thurgood Marshall School of Law's Case Analysis course. This is a critical thinking and basic writing skills course. The course content "focuses on the basic cognitive skills—reading, writing, and thinking—that are the primary tools needed for the study of law. It includes an accelerated English grammar and composition review devoted to improving critical thinking and basic writing skills." One of the course's seven premises is: The acquisition of critical thinking and basic writing skills will enhance a student's (sic) overall performance not only in the law school but also in his/her professional endeavors. This is in essence what I hope such an approach as the model for effective academic support programs aims to achieve. (Course description on file with the Law Review.) Also, the Law School's Summer 1991 Prep-For-Law Program, acknowledges that one of the goals of the course is "[t]o prepare . . . incoming students for their first-year studies by introducing them to the basic cognitive skills of reading, writing, and thinking that they will need for a higher overall performance not only in their first year of law school but also later in passing the bar and in their professional endeavors.

To me this is an implicit recognition that doing well in law school also ensures bar passage success. In addition, there is a value to learning these skills well to serve students professionally. Thus, the goal should not be the elimination of bar examinations because they do test, appropriately, the (minimum) level of acquired knowledge and skills to perform competently for licensing purposes.

218. For example, an instructional environment that is learner-centered—individual and collaborative—using the workshop format as the model is recommended. As for pedagogy, an integrated approach incorporating legal doctrine and skills taught in the first semester is suggested as a method for maximizing the participants understanding of the problem-solving aspect of legal reasoning and analysis. A workshop experience centered on the integration of two substantive courses (perhaps in conjunction with the instructors who are teaching those courses in the stand-up classrooms) would be ideal. For instance, a modification of a "contorts" course [see Feinman & Feldman Achieving Excellence, supra note 15, at 534-44] or an innovative course which combines civil procedure and a substantive course (e.g., torts or property) so long as coverage includes such areas as pleading, joinder, discovery, trial and claim and issue preclusion may be suitable for such an approach.

Whatever course is designed, it need not be duplicative of the traditional courses already taught in the first year. Specifically, the problem method (including non-law problem-solving exercises) rather than the case method should be used. In addition, in-class written exercises with students presenting the problems after the instructor or workshop leader has modeled the approach for learning the new material should aid the participants in acquiring "ownership in knowledge." As for the written exercises, the participants would complete some of them while collaborating with other participants in small groups in the learning center —thus promoting a learning community. The workshop coordinator would observe and challenge the participants to ask each other probing questions in resolving the assigned problem, similar in fashion to the workshop experience as described in the Berkeley Math Workshop project. See Asera, The Mathematics Workshop: A Description 5-7 (1988) (describing the workshop leader and assistant roles as different from the traditional role of teacher; rather they function as learning guides in support of the students' development and ownership of knowledge) (unpublished report on file with the author).

The immediate goal of the workshop would be to enhance its participants problem-solving ability, through effective instruction that promotes independent learning and exercises which assist students in the mastery of this important skill. Academic excellence —as demonstrated by competitive law school grade performance—would be the ultimate goal as well as the measure for the workshop's success. Essentially, the design of the workshop experience would
involves students in the instruction —after the instructor has modeled the methodology of instruction— and encourages student collaboration in the learning process appears to work best in fostering this kind of independence and self-esteem.219 Students can gain substantial educational benefits when they study together rather than individually. Also, they do not depend on any one person, teacher, or student, for their learning and thus enhance their self-esteem.

Finally, early intervention is imperative if traditional law school success is the goal. First year law school grades are very important and set the stage for further law school perks and employment opportunities. Too often, intervention is not provided until it is virtually impossible for the student to make a significant improvement in performance. Similarly, the time constraints and pressures students face in the first year dictate a reduction in the first year course load to accommodate the workshop experience. This is the time in a student’s law school career that is most crucial to success on the bar exam. As such, students involvement in such a program should be on par with other curricular offerings. Effective intervention programs thus call for faculty involvement and on-going monitoring and assessment.

V. Conclusion: Fulfilling The Promise

Both the law schools and organized bar are committed to the full participation of minorities within the legal profession. Concluding that affirmative action programs achieve this diversity, however, is simply to ignore the magnitude of the problem. Specially-admitted students of color present admissions credentials that underscore the cumulative effects of repeated institutional failures to provide them with equal educational opportunities at every level of the educational hierarchy. Although law schools are at the end of that educational pipeline, they are academic institutions with the talent and resources capable of delivering on that unfulfilled promise.

Admittedly, the solution to this “seamless web” is problematic. Nonetheless, law schools can no longer ignore the linkage between law school grades and bar passage; nor can law schools be satisfied with merely improving minority retention rates. Current programs fall short if their participants fail to attain significant, long-term grade

\footnote{See Asera, The Mathematics Workshop, supra note 218 and Minnis, The Writers’ Lab, supra note 198.}
improvement (i.e., academic excellence) and enhanced class standing. Thus, on-going monitoring and statistical evaluation of current programs is imperative to assess their effectiveness in attaining this goal.

Finally, programs which fail to incorporate instructional formulations that address how students learn new concepts do little to enhance their participants' academic confidence and self-esteem. This is particularly important for students of color who have not been immersed in the traditional culture which is characteristic of the law school environment. Thus, legal educators must be innovative in the development and design of programs which have the potential to alter the current trend of differential performance rates between minority and majority students. Indeed, such innovation may even stimulate curricular reform efforts with implications for legal education in general.

220. In this regard, consider the observations expressed by Dr. Lisa Delpit, a MacArthur Foundation winner whose research aims at seeking better ways of teaching multicultural student populations:

One of the things we do [in public education] is assume that everybody learns exactly the same way. We don't try to understand how children may be different culturally as well as individually...To be a good teacher you have to be sensitive to whatever culture the children are from.

Steinbach, *Bridging the Nation's Multicultural Gap, Baltimore Sun*, March 10, 1991, at 4H, col. 3 (quote taken from an interview with Dr. Lisa Delpit of Morgan State University and recent MacArthur award winner.).

221. Appropriately designed academic support programs need not be time-consuming, labor-intensive undertakings which must be offered at every stage of the students law school career. For example, the innovative Berkeley math workshop model may be the answer if transferable to the law school setting. Once the participants are instructed in the development of independent learning strategies, they can teach themselves and critique each other's writing efforts and problem-solving ability. The appeal of this model is its promotion of a learning community in which the participants become self-reliant; thereby emphasizing their strengths while unmasking their weaknesses in a supportive environment that empowers the students to achieve academic excellence and most assuredly first-time bar passage.