

Response: More Complicated Than We Think

Judith Welch Wegner

Hats off to the *Journal of Legal Education* and author Daniel Thies for posing an exceptionally timely question: how should we rethink legal education given the current recession and severely constrained legal job market? As a co-author of *Educating Lawyers*,¹ the recent study of legal education conducted by the Carnegie Foundation for the Advancement of Teaching, I have spent considerable time rethinking legal education from a different perspective, one that seeks to improve the quality of teaching and learning so as to strengthen the legal profession.

I agree with Thies that changes in legal education are needed, and concur that current economic conditions are likely to fuel such re-examination. This short essay provides some additional background on the current economic dilemmas facing law students and legal educators, but also contests a number of Thies's assumptions and proposed solutions. It concludes by offering a different prescription for reform in the face of the current economic challenges, one that involves bifurcating the bar examination in order to improve the quality of legal education and reducing racial disparities, while assisting law students and law firms now facing bleak economic times.

I. The Economic Problem. Prospects, Precursors, and Possible Solutions

A. Prospects

1. The Job Market

The legal job market has been worse than difficult in the last year. Various sources confirm the current harsh reality. A number of legal newspapers report massive layoffs. For example, the *National Law Journal's* most recent survey of the "NLJ 250" large firms concluded that 13.3 percent of large firm attorneys

Judith Welch Wegner is Burton Craige Professor of Law, University of North Carolina School of Law, Chapel Hill, N.C. Wegner served as dean of the UNC School of Law from 1989–1999, was president of the Association of American Law Schools in 1995, and a senior scholar at the Carnegie Foundation for the Advancement of Teaching from 1999–2001.

1. William M. Sullivan, Anne Colby, Judith Welch Wegner, Lloyd Bond & Lee S. Shulman, *Educating Lawyers: Preparation for the Profession of Law* (Jossey-Bass 2007).

working in New York City lost their jobs this year, as did 9.6 percent of those in Philadelphia, and 9.4 percent of those in Atlanta.² The U.S. Bureau of Labor Statistics recently reported that, when seasonally adjusted, the number of jobs in legal services fell from 1,157,700 in November 2008 to a projected 1,115,900 for November 2009 (a decline of 9.6 percent over the prior year and an estimated decline of 2.9 percent from October to November 2009).³ The Bureau's projections for legal employment opportunities in the next decade are also daunting.⁴ States with substantial budget shortfalls⁵ will likely face continuing hiring freezes. Smaller law firms have been increasingly vulnerable and have declined as a proportion of the legal market in recent years,⁶ so there is unlikely to be great joy for those seeking jobs in this segment either. Industry leaders convened by the National Association for Law Placement in Summer 2009 believed that the economic slow-down will have a major impact on many facets of legal employment, including patterns of advancement, recruitment dates, summer employment, law firm structure, training, compensation, and

2. Voir Dire, Hard Hit, Nat'l L.J., Nov. 16, 2009, at 3. A recent analysis of related data suggests that there is significant variation in job loss by geographic location. See New Data on BigLaw Contraction: Patterns of Winners & Losers (*available at* http://www.elsblog.org/the_empirical_legal_studi/2009/11/new-data-on-biglaw-contraction-patterns-of-winners-losers.html) (last visited Dec. 19, 2009) (Using National Law Journal 250 data to track the contraction of major law firms headquartered in various cities, and comparing baseline data from 2008 with 2009 data, William Henderson concluded that nearly half the loss of lawyer headcount during that period came from 45 large firms headquartered in New York City, with an additional 20 percent lost from 17 large firms headquartered in Chicago.). For further discussion of the trials of "BigLaw" firms, see Larry Riblstein, The Death of BigLaw, Univ. of Illinois Law & Econ. Res. Paper No. LE09-025 (September 3, 2009), *available at* <http://ssrn.com/abstract=1467730>.
3. U. S. Bureau of Labor Statistics, Economic Situation (Dec. 4, 2009), Table B-1, Employees on Nonfarm Payrolls by Industry Sector and Selected Industry Detail (*available at* <http://www.bls.gov/news.release/empisit.t14.htm>) (last visited Dec. 19, 2009).
4. See T. Alan Lacey & Benjamin Wright, Occupational Employment Projections to 2018, Monthly Labor Review Online, Nov. 2009 (*available at* <http://www.bls.gov/opub/mlr/2009/11/art5full.pdf>). According to this analysis, employment in legal services is expected to grow from 1,251,000 in 2008 to 1,439,100 in 2018. *Id.* at 85. The news is not especially good for lawyers, however. According to the study,

Legal occupations are expected to add the fewest new jobs among all the professional and related occupations, increasing by roughly 188,400. However, with a projected growth rate of almost 15.1 percent, legal occupations will grow faster than the average for all occupations in the economy. It is anticipated that lawyers will account for 98,500 of these jobs and that paralegals and legal assistants will account for 74,100. In part because legal establishments are expected to continue to expand the role of paralegals and legal assistants and assign them more of the tasks once performed by lawyers, it is estimated that the employment of paralegals and legal assistants will increase at a rate of 28.1 percent.

Id. at 86.
5. For data on state budget shortfalls, see National Conference of State Legislatures compilation, *available at* <http://www.ncsl.org/?tabid=18690> (last visited Nov. 22, 2009).
6. See data compiled by the National Association for Law Placement regarding employment trends, *available at* <http://www.nalp.org/july09trendsgadempl> (last visited Nov. 22, 2009).

professional development.⁷ Legal scholars who have theorized about the “tournaments” that drive large law firm dynamics and decisions likewise posed questions about the viability of traditional large law firm practices, even before the depths of the current recession.⁸ Law students may need to understand the dynamics of tournaments in their own lives, for they will face choices quite different from those past generations of students have anticipated. There is growing evidence that law firms will substantially reduce initial salaries and bonuses, encourage students to enroll in firm-based “apprenticeship programs” in which additional training will be provided, transform billing practices away from “billable hours,” and respond to major corporate clients that no longer wish to pay for or rely upon uninformed novice advice.⁹

2. Structural Changes

However unnerving these changes may be, they may not capture more fundamental changes in the structure of the legal profession and its operation. Professor Harry Arthurs, a thoughtful scholar, posed particularly challenging questions to Canadian law firms in a recent article.¹⁰ Arthurs traces changes in political economy, demographics, specialization, and stratification within the legal profession. He posits very limited mobility between those in major sectors of the legal profession (elite firms, general practice, and government/other areas), and notes that the growing concentration of capital in a few urban centers has linked the fates of large firms to further developments as capital moves to distant locales around the globe. Specialization may be aided by technological advancement, making access to legal services less dependent on a client’s or provider’s geographical location. Arthurs further anticipates

7. National Association for Law Placement, *Industry Leaders Discuss the Future of Lawyer Hiring, Development, and Advancement*, http://www.nalp.org/future_pressrelease (reflecting June 2009 round table comments) (last visited Nov. 22, 2009).
8. See Marc Galanter & William Henderson, *The Elastic Tournament: The Second Transformation of the BigLaw Firm*, 60 *Stan. L. Rev.* 1867 (2008) (suggesting that the end is coming for traditional law firm practices of hiring students from the best law schools and grooming them to become partners, in light of moves to lateral hiring, changes in partnership structures, changing systems of associate compensation, and more evolving expectations and relationships with corporate clients). See also William Henderson & Leonard Bierman, *An Empirical Analysis of Lateral Lawyer Trends from 2000 to 2007: The Emerging Equilibrium for Corporate Law Firms*, 22 *Geo. J. of Leg. Ethics* 1249 (2009) (discussing trends and implications of increased lateral hiring).
9. See, e.g., Julie Triedman, *Associate Pay Cuts Here to Stay Say Firms, Analysts*, *Law.com*, Dec. 14, 2009, <http://www.law.com/jsp/PubArticle.jsp?id=1202436313459> (last visited Dec. 15, 2009) (citing numerous large firms that have cut associate pay rates by \$15,000–\$30,000 or 10–20 percent, noting that changes are unlikely to be reversed soon, noting reduction in billable hours in some instances, and changes in “lockstep” compensation patterns); Lynne Marek, *What to Expect in the Decade Ahead*, *Nat’l L.J.*, Nov. 9, 2009, at S10 (discussing predictions that associate salaries will remain under pressure, more firms will move toward fixed rate billing, apprenticeship models will become more common, and greater efficiency will be required).
10. Harry Arthurs, *Will the Law Society of Alberta Celebrate its Bicentenary?* 45 *Alberta Law Rev.* 15 (2008).

“unbundling” of legal services, cross-professional clusters, and different sorts of professional associations among lawyers as well as divergence in professional regulation.

A recent “future trends” study by the consulting firm Altman Weil¹¹ echoed a number of Arthurs’s observations while offering additional insights about trends and uncertainties. Agreeing on the likelihood of specialization, globalization, technological delivery systems, unbundling, and professional bifurcation, Altman Weil also predicts that firms will continue to pay attention to diversity, the changing expectations of younger professionals, a larger role for corporate management in determining the extent of legal services purchased, and the possibility of greater government regulation. Based on trends and uncertainties, Altman Weil posited four possible scenarios worth considering by corporate counsel and major law firms: “Blue-Chip Mega-Mania” (a world in which consolidation of legal services continues on an even larger scale); “Expertopia” (a world in which small “niche” law firms provide services using advanced technology to complement the services provided by giant providers); an “E-Marketplace” (a world in which there has been massive deregulation of the profession and jurisdictional barriers have fallen away); and “Technolaw” (a world at peace in which technological outsourcing rules and fewer students choose law school).

Demographic considerations also suggest that greater changes are in the offing, although perhaps not quite yet. A decade ago, Professor Marc Galanter highlighted differences in age cohorts from the 1970s through projections for the 2020s.¹² According to his analysis, the proportion of younger lawyers (in their 30s) compared to older lawyers (in their 50s and 60s) changed markedly when law school enrollments rose, peaking in the mid-1980s (when there were 284 younger lawyers in their 30s for every 100 older lawyers in their 50s).¹³ By 2020, Galanter predicted, the number of lawyers in their 30s and their 50s would be roughly the same.¹⁴ Notably the age structures of smaller firms and larger firms differed, with the largest firms having proportionally fewer partners aged 55 and older.¹⁵ More recent data drawn from the American Bar Association’s *Lawyer Statistical Report* found that in 2000, 28 percent of lawyers were aged 45–54, 13 percent were 55–64, and 12 percent were 65 or older.¹⁶

11. See Altman Weil, *Legal Transformation Study (2008)*, discussed in Report to Legal Management. *The Legal Market in 2020 (July-Aug. 2008)*, available at http://www.altmanweil.com/dir_docs/resource/a4f6b409-0607-4d2b-88a2-3207a6b1566d_document.pdf (last visited Dec. 15, 2009).
12. Marc Galanter, “Old and in the Way”: The Coming Demographic Transformation of the Legal Profession and Its Implications for the Provision of Legal Services, 1999 *Wis. L. Rev.* 1081 (1999).
13. *Id.* at 1085.
14. *Id.*
15. *Id.* at 1098.
16. *Lawyer Demographics*, available at ABA Section of Legal Education & Admissions to the Bar <http://www.abanet.org/legaled/statistics/stats.htm> (last visited Nov. 26, 2009).

Major dislocations associated with the current recession have undoubtedly shaken up employment patterns throughout the profession, most visibly as a result of layoffs and deferred starting dates in large firms. Nonetheless, the exceptionally large cohort of lawyers in the senior ranks will at some point give rise to retirements and place the onus on younger lawyers to face the rapid changes in organizational structure and forms of legal service delivery described above.

While drastic changes such as these may be some years in the future, those who desire to change legal education so as to address current economic pressures need to take into account the larger landscape as well as short-term changes in the profession and employment opportunities. While law schools and their faculties tend to move on a much slower clock in dealing with large environmental changes like these, current law students and those who for the moment are flocking to follow them,¹⁷ find it much harder to take the long view.

B. Precursors

1. Debt Load

There can be little doubt that students are, with reason, worried about the mismatch between income (job opportunities and pay levels) and future expenses (anticipated living costs and debt repayment obligations). The ABA reports that for students who graduated in 2008, the average debt load for those who attended private schools was \$91,506, while those who attended public law schools on average accumulated \$59,324 in debt.¹⁸ These figures are substantially higher than those of even five years earlier, when debt loads were \$72,893 for 2003 graduates of private schools and \$45,763 for those from public schools. Current monthly repayment levels thus approach the amount required to carry a house mortgage for those who graduated a few years before.

These numbers are daunting enough on their face, but the implications of law student debt loads are even more significant. A monograph on law graduates' debt load was completed in 2007 as part of the *After the J.D.* longitudinal study of those admitted to the bar in 2000.¹⁹ This study reported

17. Contrary to the expectations of at least some observers, the number of LSAT takers rose significantly for 2008–2009. See Law School Admissions Council data <http://members.lsac.org/Public/MainPage.aspx?ReturnUrl=%2fPrivate%2fMainPage2.aspx> (fall 2009 ABA applicants rose 5.0 percent from 2008 to 86,100; ABA applications were up 6.5 percent to 565,000 compared to fall 2008) (last visited Jan. 23, 2010). It remains to be seen whether this pattern will last, and whether it reflects applications to some types of law schools rather than others (for example, to elite private schools, to public schools with lower tuition for residents, or to schools with more intensive skills-related curricula).

18. ABA statistics on debt loads, available at <http://www.abanet.org/legaled/statistics/stats.html> (last visited Nov. 22, 2009).

19. Gita Wilder, Law School Debt Among New Lawyers: An After the J.D. Monograph (Nat'l Assn. for Law Placement 2007), available at http://www.americanbarfoundation.org/publications/AftertheJD/AJD_Publications.html (last visited Nov. 22, 2009).

that of 30,042 respondents, 16 percent had no debt when graduating from law school, with substantial disparities evident by ethnic group (those without debt were 19 percent white, 14 percent Asian, 14 percent American Indian, 17 percent “other,” but only 6 percent were African-American and 5 percent Hispanic). Those graduating from “top 10” law schools (predominantly private) had more debt (a median amount of \$80,000 as compared to \$70,000 at schools ranked 11 to 25 and those ranked below 25). This median debt amount was approximately half the median salary for those graduating from “top 10” law schools, while for those graduating from the next tier of schools, their debt was about two-thirds their salary, and for those below the top 25 law schools, their debt exceeded their salary. When salaries were compared to debt based on practice areas, it was evident that those in “BigLaw” firms with more than 251 lawyers had salaries double their debt, with those in firms between 100 and 250, those between 21 and 100, and those in business each having salaries that exceeded debt. Those in solo or smaller firms, government, education, legal services or public defender offices, public interest, and nonprofit sectors all had debt exceeding their yearly salaries.

These statistics raise many questions about cause and effect. It may well be that those attending elite schools have greater access to and impetus to join elite “BigLaw” firms, making larger debt loads more tolerable for these students. It may be that many students attending such law schools have family or other support if needed in dealing with debt obligations. Those who pursue jobs in larger private law firm settings are disproportionately drawn from elite law schools while those in smaller firms and public sector settings are more likely to come from public law schools (whose lower tuition generally results in lower debt loads upon graduation) and from less elite private schools (whose graduates generally lack access to elite private large firm opportunities). The *After the J.D.* study reported statistically significant differences in priorities for those seeking private versus public employment, including a statistically significant greater interest in earning potential for those in the private sector (ranked second in importance versus eighth in importance for those entering the public sector), and a parallel difference between concern for engaging in “socially responsible work” (ranked third by those in public sector employment and eighth for those in the private sector).

For those who enter law school hoping for an economic return on their educational investment, these realities may be a deterrent. In a recent paper, Professor Herwig Schlunk suggested that “mothers should not let their children grow up to be lawyers,”²⁰ in light of the differing economic realities facing what he calls “Hot Prospects,” “Solid Performers,” and “Also Ran” students attending private law schools. He encouraged law students to assess their prospects before applying to law school, assuming maximum economic returns if they join a “BigLaw” firm. These assumptions are limiting, however,

20. See Herwig Schlunk, *Mamas, Don't Let Your Babies Grow Up to Be...Lawyers*, Vanderbilt Law and Economics Working Paper 09-29, SSRN http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1497044 (last visited Nov. 22, 2009).

since many prospective law students do not engage solely in economic analysis before determining whether to apply. Rather, college graduates are increasingly interested in law school enrollment either as a port in the economic storm or as a point of access to desired career opportunities, since the number of LSAT takers in October 2009 increased by more than 10,000 compared to LSAT takers in October 2008.²¹

2. Educational Costs

Educational costs are inevitably a major driver of increased debt loads. Law school costs have risen substantially in the last few years.²² To the extent that such costs drive student debt loads, career choices, and future professional roles, they need to receive careful attention by those committed to educational reform. A recent report by the U.S. Governmental Accountability Office (GAO),²³ tracking tuition and fee hikes at American law schools since 1994, noted that debt loads at graduation have risen most sharply since 2001. The study concluded that the principal drivers of increased costs have been “hands-on,” resource-intensive instruction and efforts to compete in national rankings. Increases in instructional costs were described as stemming from expanded clinical and skills offerings, small advanced electives in such fields as international and environmental law, and enhanced academic support, career services, and similar activities. The study also indicated that competition for high *U.S. News & World Report* rankings has fueled increased expenditures, for example, in raising per-student expenditures, lowering student-faculty ratios, and improving library resources. Efforts to lure talented students through expanded clinical offerings and attempts to lure top faculty members with higher salaries have also contributed to rising costs. ABA accreditation requirements were, surprisingly, not viewed as significantly increasing costs among legal educators (who were much more focused on the effects of the *U.S. News* rankings). Notwithstanding these conclusions, it should be noted that these dynamics are in fact related to ABA activities. For instance, ABA accreditation requirements have increasingly demanded hands-on instruction in lawyering skills and academic support programs to foster retention and

21. See Big Law, We Have a Problem, MostStronglySupported.com, Nov. 16, 2009, <http://moststronglysupported.com/blog/law-school-admissions/big-law-we-have-a-problem> (last visited Nov. 22, 2009) (contrasting October 2008 LSAT takers, numbering 50,721, with October 2009 LSAT takers, numbering 60,746, the highest number in history and an increase of 19.8 percent compared to the prior year).
22. The ABA provides information on increases in tuition from 1985 to 2008 at <http://www.abanet.org/legaled/statistics/charts/stats%20-%205.pdf> (last visited Dec. 15, 2009) (average tuition and fees more than doubled from 1998 to 2008, increasing from \$6,943 to \$16,836). For an update on more recent tuition trends, see Karen Sloan, At Public Law Schools, Tuition Jumps Sharply, *Nat'l L.J.*, Aug. 3, 2009, at 1, (discussing increases in public law schools for the 2009–2010 academic year).
23. U.S. Government Accountability Office, Issues Relating to Law School Cost and Access, GAO 10–20 (Oct. 2009), available at <http://www.gao.gov/new.items/d1020.pdf> (last visited Dec. 15, 2009).

improve bar passage rates. At the same time, ABA reporting requirements have devalued contributions by non-tenure-track faculty (such as adjuncts from practice and some clinical and legal writing faculty members).²⁴ Moreover, ABA data demands from law schools are the reason that the *U.S. News & World Report* has much of the extensive data on law school expenditures that it uses to compile its yearly rankings.

3. Student Expectations

While one critical question concerns how law schools allocate expenditures in the hope of increasing their *U.S. News* rankings, an equally important question concerns how students are influenced by those rankings in deciding among potential law schools. To the extent that law schools commit their funds to gain stature in the *U.S. News* ratings, they often do so to entice law students to enroll in their programs, thereby boosting their standing even further. To the extent that prospective students follow those rankings in selecting law schools, they may drive law schools' decisions to expend scarce dollars to enhance rankings, whether or not such steps benefit students or graduates in their future careers.

Studies of the impact of rankings on law students and law schools have provided useful insights.²⁵ Deans have reported that rankings give rise to greater emphasis on LSATs in admissions decisions, merit rather than need-based scholarships, and expenditures on marketing materials.²⁶ Critics contend that rankings do a poor job in representing the characteristics of quality in law schools, distort quality by choice of proxy measures, rely on flawed statistical analysis, and distort the purported significance of changes in tier and rank.²⁷ Empirical analysis of the impact of law school rankings suggests that higher rankings contribute to increases in applications, and enhance the proportion of high-score LSAT applications (even when comparing schools with relatively similar ranks, those with higher ranks have higher-score LSAT applicants).²⁸ Even though law schools do not change tier frequently, the *U.S.*

24. See American Bar Association Standards on Accreditation, at <http://www.abanet.org/legaled/standards/2009-2010%20StandardsWebContent/Chapter4.pdf> (last visited Jan. 23, 2010), interpretation 402-1 (clinicians and legal writing instructors not on tenure-track to be treated as .7 FTE, adjuncts, emeriti, law librarians, administrators to be treated as .2 FTE).

25. See Michael Sauder & Wendy Espeland, *Fear of Falling: The Effects of U.S. News & World Report Rankings on U.S. Law Schools*, Law School Admissions Council Grants Report 07-02 (2007) (hereinafter "Sauder & Espeland"); Michael Sauder & Ryon Lancaster, *Do Rankings Matter? The Effects of U.S. News & World Report Rankings on the Admissions Process of Law Schools*, 40 *Law & Soc'y Rev.* 105 (2006) (hereinafter "Sauder & Lancaster"); Jeffrey Stake, *The Interplay Between Law School Rankings, Reputations, and Resource Allocation: Ways Rankings Mislead*, 81 *Ind. L.J.* 229 (2006) (hereinafter "Stake").

26. Sauder & Espeland, *supra* note 25, at 10-13.

27. Stake, *supra* note 25, at 244-260.

28. See Sauder & Lancaster, *supra* note 25, at 130-132; William Henderson & Andrew Morriss, *Student Quality as Measured by LSAT Scores: Migration Patterns in the U.S. News Rankings Era*, 81 *Ind. L. Rev.* 163 (2006) (proposing a model for relation between choices by students with high LSATs and U.S. News rankings).

News rankings serve as signals that affect the number of student applications, applicants' LSAT scores, and the percentage of applicants who accept offers and matriculate at given law schools.²⁹ Researchers have concluded that the rankings misrepresent the quality of law schools by creating "rigid and fine-grained distinctions" between schools that are not grounded in reality.³⁰ The effects of such purported differences are compounded by their impact on related decisions within law schools with spiraling effects that push schools to emulate others within the "tier" to which they are assigned.³¹

These dynamics have significant implications. It appears that students who have strong academic indicators pay special attention to the *U.S. News* rankings and choose "higher ranked" (and typically more expensive) private schools.³² Law schools in turn compete for such students to improve their relative rank. Because high scores often correlate with higher socio-economic status, highly-ranked law schools tend to draw students with relatively high socio-economic status and attract employers interested in higher-status students.³³ Unsurprisingly, then, students from higher socio-economic status, and those who pay more for their legal education, are especially concerned about whether, following graduation, they will secure employment in high-status "BigLaw" firms with clients linked to those in higher socio-economic classes. Research to date on the impact of the *U.S. News* rankings on undergraduate populations appears to confirm many of these tendencies.³⁴

29. See Sauder & Lancaster, *supra* note 25, at 108-117.

30. *Id.* at 131.

31. *Id.* at 122-132.

32. Sauder & Espeland, *supra* note 25, at 28-31.

33. See Ronit Dinovitzer, Bryant Garth, Richard Sander, Joyce Sterling & Gita Wilder, *After the J.D.: First Results of a National Study of Legal Careers at 20* (Amer. Bar Foundation 2004), available at <http://www.americanbarfoundation.org/uploads/cms/documents/ajd.pdf> (last visited Dec. 15, 2009); Ronit Dinovitzer & Bryant Garth, *Lawyer Satisfaction in the Structuring of Legal Careers*, 41 *Law & Soc. Rev.* 1, 1, 11 (2007) (presenting data on the correlation between law school rank and the extent to which graduates are employed in large firms). Researchers using *After the J.D.* data have concluded that elite "BigLaw" firms have in recent years expanded their hiring to include at least some candidates from less elite law schools, and suggest that young associates with that profile may be hungrier than their counterparts from elite law schools, and thus more willing to remain at "BigLaw" firms for extended apprenticeships. See Bryant Garth & Joyce Sterling, *Exploring Inequality in the Corporate Law Firm Apprenticeship: Doing the Time, Finding the Love*, 22 *Geo. J. Legal Ethics* 1361, 1362, 1394 (2009) (hereinafter cited as "Garth & Sterling").

34. For studies of the impact of the U.S. News rankings on undergraduates and undergraduate programs, see, e.g., Marc Meredith, *Why Do Universities Compete in the Ratings Game? An Empirical Analysis of the Effects of the U.S. News & World Report College Rankings*, 45 *Res. in High. Educ.* 443 (Aug. 2004) (discussing differential impacts of rankings on different types of institutions, location in the rankings, public or private status, and student socioeconomic and racial demographics); Ronald Ehrenberg, *Method or Madness? Inside the U.S. News & World Report College Rankings*, *J. of College Admission* 29 (Fall 2005) (providing incisive overview of higher education trends and impacts of U.S. News rankings, including the interplay of increasing competition for higher educational opportunities at

C. Conclusion

Many current law students feel they are looking into a deep abyss. The “BigLaw” job market has shrunk at the very time that educational costs and debt loads have risen, leaving great uncertainty about what the future will bring. The discussion in this section suggests, however, that the root problems are more complicated than we might initially think. “BigLaw” firms must increasingly confront the reality that their corporate clients have recognized the flaws in the “billable hour” model, including disincentives to keep legal costs down and to bill for only the work of associates with appropriate levels of experience to contribute to needed work. Law students must increasingly face the reality that starting salaries in “BigLaw” firms have been highly inflated, and that assumptions about ease of access to highly-paid “BigLaw” jobs following graduation have blunted their attention to the realities of educational costs and debt.

Can law schools continue their traditional aloof stance, treating the exigencies of the legal job market and the growing level of law student debt

prestige institutions, the problems resulting from aggregating various factors into a single index score that obscures issues such as student fit within institutional character and programs, the devaluing of public higher educational institutions committed to access, and the multiple implications of recruiting students for high scores in order to enhance selectivity scores); Iliia Dichev, *News or Noise? Estimating the Noise in the U.S. News University Rankings*, 42 *Res. in High. Educ.* 237 (2001) (arguing that changes in U.S. News rankings of national universities and liberal arts colleges are transitory and reversible at a level of 70 to 80 percent, reflecting “noise” most likely due to measurement estimation and information processing efforts); Gary R. Pike, *Measuring Quality: A Comparison of U.S. News Rankings and NSSE Benchmarks*, 45 *Res. in High. Educ.* 193 (2004) (in a comparative study of rankings and scores on the National Survey of Student Engagement for fourteen AAU public research universities, finding that criteria used for U.S. News rankings have little to do with the quality of education students receive as measured by NSSE); Patricia M. McDonough, Anthony Lising Antonio, Mary Beth Walpole & Leonor Xóchitl Pérez, *College Rankings: Democratized College Knowledge for Whom?* 39 *Res. in High. Educ.* 513 (1998) (discussing college freshmen’s use of U.S. News rankings in 1998, and finding that approximately 40 percent of applicants used this information; those using this information tended to be students with higher socio-economic status who also had alternative access to college advising; questioning the impartiality of rankings; and expressing concern that the rankings phenomenon reflects a giving over of advising functions to the for-profit sector); Amanda Griffith & Kevin Rask, *The Influence of the U.S. News Collegiate Rankings on the Matriculation Decisions of High Ability Students, 1995-2003*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=595223 (2004) (based on a decade of data from Colgate University’s admitted student questionnaires, concluding that the more highly ranked the school, the more students are responsive to changes in ranking); Nicholas A. Bowman & Michael N. Bastedo, *Getting on the Front Page: Organizational Reputation, Status Signals, and the Impact of the U.S. News & World Report on Student Decisions*, 50 *Res. in High. Educ.* 415 (2009) (considering implications of U.S. News rankings for different types of colleges and universities using data from 1998-2005, concluding that ranking in the top cohort in U.S. News significantly affects applications for all institutions, that moving up or down within the top tier had a strong impact on top twenty-five national universities, but that admissions outcomes of liberal arts colleges in the lower half of the top tier were more strongly influenced by institutional prices).

as outside their province and their responsibility? Thies suggests that law schools need to take responsibility for the dilemmas facing students in these difficult times, arguing that law schools should reduce costs related to faculty scholarship, provide greater “consumer information,” and employ more adjunct faculty to teach students practical skills. If law schools are unwilling to embark on these challenges, Thies urges the ABA’s accreditors to force them to do so. The next section considers these contentions and offers a different solution, one that implicates the bar exam.

II. Potential Solutions

This section briefly comments on Thies’s major proposals, suggests alternative criteria for developing solutions to the current economic dilemmas, and proposes one strategy that might help.

A. Thies’s Proposals

Thies has offered several important recommendations for action by law schools and regulators in the face of the current economic downturn. While his ideas suggest considerable thought and research on his part, in my experience these proposals fail to hit the mark.

1. Information

Thies urges that students be given additional information to assist them in the process of selecting among potential law schools prior to enrollment. He further suggests that accrediting authorities should be tasked to police the accuracy of information that law schools provide.

Providing students with accurate “consumer information” is important. Indeed, U.S. Department of Education regulations³⁵ and the American Bar Association³⁶ already require law schools to provide such information. Requiring different information or enhanced oversight is, in my view, unlikely to solve the dilemmas portrayed by Thies because, at root, many prospective students are likely to remain relatively unsophisticated consumers of that information.

The Law School Admissions Council and generations of law school deans have long described the many factors that students need to take into account in such important decisions,³⁷ but often students don’t take that advice to heart.

35. See Information to be Disclosed Under the Higher Education Act of 1965, available at <http://nces.ed.gov/pubs2010/201083rev.pdf> (last visited Dec. 15, 2009).

36. See 2009–2010 ABA Standards for Approval of Law Schools, Standard 509: “Basic Consumer Information” (“A law school shall publish basic consumer information. The information shall be published in a fair and accurate manner reflective of actual practice.”) and related interpretations (which require, among other things, information on placement rates), available at <http://www.americanbarfoundation.org/uploads/cms/documents/ajd.pdf> (last visited Dec. 15, 2009).

37. See Dear Law School Applicant, LSAC, <http://www.lsac.org/choosing/deans-speak-out-rankings.asp> (last visited Dec. 15, 2009) (suggesting that law students consider breadth and

In recent years, many students have tended to choose law schools based on perceptions of prestige, and those perceptions have in turn been fueled by the *U.S. News* rankings. Unfortunately for all, prospective law students often do not critically review the methodology employed by that publication. For example, the *U.S. News* system gives positive weight to schools with larger budgets and greater costs, positioning private schools ahead of most public schools that offer an excellent education often at lower cost because of state-subsidized tuition. The rankings also rely on “coaches’ polls” whose respondents typically lack meaningful in-depth information about the schools they purport to judge, making such ratings ripe for “gaming.”³⁸ The rankings are also statistically suspect since they purport to treat minimal differences between schools as enough to justify substantial differences in the “rank ordering” process, even though many American law schools tend to cluster much more closely on such variables as student-faculty ratios, student body characteristics, facilities and course offerings than the rankings would suggest.

To the extent that further information might be thought to provide information on future prospects, students should bear in mind that life holds few guarantees. At this time in history, the legal profession is under significant pressure and undergoing great change. It is thus inevitable that students feel unsure about their futures.

Under circumstances such as these, students are best advised to carefully examine their own goals more deeply against the characteristics of the schools they are considering. Prospective law students can learn a good deal from talking with currently enrolled students and “alumni ambassadors” at their candidate schools who know the school and its programs, as well as the career paths often followed by its graduates.

2. Professional Skills and Job Competition

This also urges law schools to incorporate more professional skills training as a means of helping students to become more competitive in the legal job market. Many law schools, particularly those that tend to place their students in small practice settings, have already moved ahead to address this concern. Several studies over the years have also advocated for enhanced integration of professional skills-related education, both to more effectively prepare students

support by the alumni network, breadth of curriculum, clinical programs, opportunities for collaborative research with faculty, commitment to innovative technology, cost, externship options, faculty accessibility, intensity of writing instruction, interdisciplinary programs, international programming, law library strengths and services, loan repayment assistance for low-income lawyers, location, part-time enrollment options, public interest programs, teaching quality, racial and gender diversity within the faculty and student body, religious affiliation, size of first-year classes, skills instruction, and specialized areas of faculty expertise).

38. For an example of alleged gaming to influence the U.S. News rankings of undergraduate institutions, see Doug Lederman, “Manipulating,” *Er*, “Influencing” U.S. News Rankings, available at <http://www.insidehighered.com/news/2009/06/03/rankings> (discussing allegations concerning Clemson University) (last visited Dec. 15, 2009).

to represent future clients, and to enhance the effectiveness of the educational enterprise by providing more integrated and progressive education across law school's three years.³⁹

Once again, Thies may have a point, but experience and current events suggest the picture is more complicated than the sketch he provides. "BigLaw" law firms have historically preferred to provide intensive in-house training to beginning lawyers so that neophytes learn the firm's specific culture and expectations, whether or not new hires have had been prepared with coursework exposing them to particular skills.⁴⁰ It appears, moreover, that in the face of the current downturn, clients of "BigLaw" firms are hesitant to accept services performed by beginning lawyers, notwithstanding their educational preparation.⁴¹ Many "BigLaw" firms have responded by establishing "apprenticeship" programs through which new hires will be prepared to fit the firm's needs and given tailored "skills" training, while the new hires receive lower compensation based on the realities of billing practices acceptable to clients and costs assumed by the firms.⁴²

It remains unclear how other sectors of the legal job market will respond in assessing law students' credentials and experiences at the time of hiring. Important recent research by Professors Marjorie Shultz and Sheldon Zedeck at the University of California, Berkeley, has identified "lawyer effectiveness factors" based on in-depth interviews with senior lawyers, judges, and clients, among others.⁴³ The researchers' most recent report reflects insights from

39. See ABA Section on Legal Education and Admission to the Bar, *Legal Education and Professional Development: An Educational Continuum*, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap, (July 1992) (the "McCrate Commission Report"); *Educating Lawyers*, *supra* note 1; Roy Stuckey and Others, *Best Practices for Legal Education* (Clinical Legal Educ. Assn. 2007), *available at* <http://www.cleaweb.org/resources/bp.html> (last visited Dec. 15, 2009).
40. For discussion of apprenticeship practices, see Garth & Sterling, *supra* note 33, at 1369-1388; William Henderson & David Zaring, *Young Associates in Trouble*, 105 *Mich. L. Rev.* 1087, 1096-1105 (2007) (providing empirical data on working conditions).
41. See, e.g., Brenda Sapino Jeffreys, *Gardere Reduces First-Year Associate Salaries and Billable Hours*, *Texas Lawyer*, Dec. 14, 2009, *available at* <http://www.law.com/jsp/article.jsp?id=1202436291790> (last visited Dec. 16, 2009) (describing clients' refusal to accept work by first-year associates on legal matters).
42. For a discussion of new forms of law firm "apprenticeship programs" built on the assumption that junior lawyers will receive lower starting salaries and work fewer billable hours, see Jeff Jeffrey, *For Some Firms, an Extra Step for the Newest Recruits*, *Nat'l Law J.*, June 29, 2009 (discussing firms' expectations of junior associates). For a general discussion of new realities affecting firms' approach to the apprenticeship period of junior associates, see Dan DiPietro, Lisa Keyes, & Laura Saklad, *The Shifting Associate Paradigm*, *Amer. Lawyer*, Nov. 17, 2009, *available at* <http://amlawdaily.typepad.com/amlawdaily/2009/11/the-shifting-associate-paradigm.html> (last visited Dec. 16, 2009).
43. See Marjorie M. Shultz & Sheldon Zedeck, *Final Report—Identification, Development and Validation of Predictors for Successful Lawyering* (Jan. 30, 2009), *available at* <http://ssrn.com/abstract=1353554> (hereinafter cited as "Shultz & Zedeck Final Report"); Marjorie M Shultz & Sheldon Zedeck, *Predicting Lawyer Effectiveness: A New Assessment for Use*

reviews of Boalt Hall and Hastings Law graduates' educational profiles and practice performance (as assessed by their supervisors). Significantly, effectiveness in practice does not necessarily reflect law school rank or law review membership.⁴⁴ At the same time, it is unclear whether effectiveness in practice correlates with course work (including skills-related courses and clinical participation).⁴⁵ Whether "BigLaw" or other employers will take stock of these findings in making future hiring decisions remains to be seen.

in Law School Admission Decisions, CELS 2009 4th Annual Conference on Empirical Legal Studies Paper (July 31, 2009), available at <http://ssrn.com/abstract=1442118>. The 26 lawyer effectiveness factors included the following: (1) intellectual and cognitive factors (analysis and reasoning; creativity/innovation; problem solving; practical judgment); (2) research and information gathering factors (researching the law; fact finding; questioning and interviewing); (3) communications factors (influencing and advocating; writing; speaking; listening); (4) planning and organizing (strategic planning; organizing and managing one's own work; organizing and managing others [staff/colleagues]); (5) conflict resolution (negotiation skills; ability to see the world through the eyes of others); (6) client and business relationships and entrepreneurship (networking and business development; providing advice and counsel and building relationships with clients); (7) working with others (developing relationships within the legal profession; evaluation, development, and mentoring); (8) character (passion and engagement; diligence; integrity/honesty; stress management; community involvement and service; self-development). Shultz & Zedeck, Final Report, at 26-27. These factors were derived through multiple rounds of interviews and focus groups with UC Berkeley alumni, faculty, students, judges, and clients, representing a wide range of practice settings and specialties.

44. *Id.* at 53-55. Shultz and Zedeck found that LSAT scores affirmatively correlated with only a few of the 26 effectiveness factors (analysis and reasoning; researching the law; writing) and that high LSAT scores correlated negatively with networking and community service. They found that undergraduate GPA correlated most highly with writing, managing one's own work, and diligence. The researchers developed testing tools to assess effectiveness factors using a variety of scales. They found that "learning approach" correlated positively with first-year law school grade point average, and that scale scores related to adjustment, ambition, sociability, and interpersonal sensitivity correlated negatively with first-year law school grade point average. *Id.* at 63 (noting, as well, the extent of correlation differed as between Berkeley and Hastings Law graduates). The researchers also explored the relationship between undergraduate grade point average and rating on lawyer effectiveness factors and found positive correlations with regard to analysis and reasoning, and writing, but negative correlations in many cases (negative correlations indicating relatively poor performance were found with regard to practical judgment, questioning and interviewing, developing relationships, integrity, and community service).
45. For a discussion of the difficulties associated with assessing the effect of clinical experience on law students' subsequent work as lawyers, see Rebecca Sandefur & Jeffrey Selbin, *The Clinical Effect*, 16 *Clin. L. Rev.* 57 (2009), available at <http://ssrn.com/abstract=1498844>. These authors relied on data from Wave I of the After the J.D. study, *supra* note 33, to try to determine the extent to which new lawyers believed that their experiences with legal employment during law school, various experiential activities (clinical, outplacement, pro bono work, and legal writing), and other aspects of law school (first year courses, legal ethics, upper division courses, and concentrations) proved "helpful" during their transition to practice (Scores of 1 were defined as "not at all helpful" and those of 7 were defined as "extremely helpful."). The authors concluded that they faced substantial analytical problems in dealing with available data because clinical programs vary in their design and characteristics (information not collected by the After the J.D. study). In addition, despite an option to rate particular experiences as "not applicable," 84 percent of respondents

3. Law School Cost Containment

Thies's final recommendations relate to ways to cut law school costs. He focuses on two particular suggestions, urging law schools to employ more adjunct faculty drawn from practice (and stating that the ABA should relax accreditation standards to allow such developments), and arguing that law schools should cut back on expectations for faculty research (contending that faculty should forego such efforts to teach more).

Once again, these suggestions may seem appealing to some at first blush, but are more problematic when explored in greater depth. Current requirements regarding the use of full-time faculty members⁴⁶ are designed to assure that students are taught from individuals knowledgeable about the law as well as skilled in teaching. Just as those who spend the bulk of their time teaching may not be ready for prime time service as trial litigators, so, too, skilled lawyers may have little expertise as teachers or may not be well-grounded both in underlying theory and in practice-related techniques. ABA requirements are designed to permit some use of adjuncts in contexts where they can add specialized expertise not otherwise available on a law faculty, but to maintain a reasonable balance between such strategies for augmenting

addressed the "helpfulness" of clinical experiences even though only about only about one-third of law students enroll in traditional types of live-client clinics and only approximately two-thirds enroll in clinics plus externships or similar activities. Of the 84 percent rating clinical experiences, 62 percent found such experiences as "helpful" to "extremely helpful," while legal internships were rated by 60 percent of the respondents, and 58 percent of this group regarded internships as "helpful" to "extremely helpful." Clinical work was rated fourth (after summer employment, school-year employment, and internships) as "very helpful," by respondents. Slightly less than 30 percent of respondents across all "tiers" of law schools regarded clinical programs as "extremely helpful." The authors also sought to determine the correlation between participation in clinical programs and subsequent work and pro bono participation. They found no statistically significant correlation between participation in pro bono work and participation in clinical programs during law school. Among all new lawyers, there was a statistically significant difference between those who had participated in clinical programs and found them "helpful" (20 percent), compared to those who had purportedly participated and not found them "helpful" (11 percent) and those who had not participated (9 percent).

46. The American Bar Association's Standards for Approval of Law Schools include extensive requirements regarding faculty staffing patterns and responsibilities. See Ch. 4, and particularly Standards 401 and 402 and related interpretations (*available at* <http://www.abanet.org/legaled/standards/2009-2010%20StandardsWebContent/Chapter4.pdf>) (last visited Dec. 19, 2009) (addressing size of faculty with an eye to student-faculty ratio, capping proportion of non-full-time faculty considered toward student-faculty ratio at 20 percent, and directing that fractional full time equivalents be used for non-tenure-track personnel or tenured faculty involved in substantial administrative responsibilities; the effect of these requirements is to establish presumptions used in ABA reaccreditation reviews as well as to influence U.S. News & World Report rankings that rely upon ABA data submissions for their analysis of "faculty resources"). The Association of American Law Schools (AALS) specifies that participating schools have faculties composed primarily of full-time teacher/scholars, and that member schools rely on full-time faculty to teach at least two-thirds of the units required for a J.D. degree) See AALS Bylaw 6.1(b)(i), and Executive Committee Regulation 6-4.1, *available at* http://www.aals.org/about_handbook_requirements.php (last visited Dec. 19, 2009).

the core curriculum and assuring a core of full-time teachers who can serve a number of functions including advising and quality assurance for the curriculum as a whole. Research in other settings suggests that undue reliance on part-time “contingent” faculty undercuts educational quality. ABA rules calling for strategic, limited use of adjuncts are thus designed to assure that students receive the quality of education that they have bargained for. Calls for instruction by adjuncts are more likely to result in adding additional sections of skills-related courses taught by adjuncts (resulting in additional costs to law schools and their students) rather than substitution of adjuncts for core faculty (seemingly reducing staffing costs).

Faculty scholarship is also important, in ways that may not always be apparent to those outside the academy.⁴⁷ Scholarly work by faculty is generally subject to peer review (pre-tenure and to some extent post-tenure) to assure knowledge and competence within the field. Most universities expect faculty members to engage in meaningful efforts to probe the current limits of their fields and to push the process of inquiry forward so that faculty members are well-positioned to prepare their students for future challenges. Because the ethic of inquiry and discovery is so deeply rooted in the academy, strong law schools cannot expect to be taken seriously within their universities, and are unlikely to be able to attract top-flight faculty members without hewing to these significant norms.

B. Alternative Strategies

This has definitely identified critical problems facing law schools, legal educators, law students, and the legal profession. Although, as discussed above, his proposed solutions may not be perfect, it is incumbent on legal educators to suggest more effective strategies for addressing the concerns he has raised. This section endeavors to do so.

1. Criteria for Evaluation

Having challenged Thies’s proposals, I believe it is important to frame criteria for evaluating these and other responses to the current economic downturn against a set of meaningful criteria. In my view, five major criteria are particularly important: student choices, educational quality, quality of service to clients and the public, cost containment, and meaningful accountability. While several of these criteria resonate with Thies’s analysis (which emphasizes

47. See Ed Rubin, *Should Law Schools Support Faculty Research?*, 17 *J. Contemp. Legal Issues* 139 (2008) (discussing “cross-subsidization” of faculty research by virtue of student tuition payments; arguing that there is a close correlation between faculty research, law school reputation, and law student employment in elite settings; contending that increases in law school tuition correlate most significantly with increases in junior lawyers’ starting salaries; arguing that legal scholarship is different from scholarship in other fields and that such scholarship directly and indirectly benefits participants in the legal system; and urging that scholarship and teaching can be more closely integrated).

certain student choices, cost containment, and accountability through the ABA accreditation process), an ideal solution would consider wider-ranging and more responsive options.

Student choices occur at several junctures: when students decide whether to pursue legal education, when they choose among law schools, when they choose to continue in law school throughout the three years to a degree, and when they face career choices within the law. A meaningful solution should address one or more of these considerations.

Educational quality is an important criterion that students may be ill-situated to assess. Proxies for educational quality may include student retention and graduation rates, and performance on the bar examination. However, law schools need to do a better job of assessing the effectiveness of their educational efforts throughout the course of legal education in order to candidly respond to this consideration.⁴⁸

Cost containment. Cost containment is important as a means of assuring access to legal education for those of limited means, fostering meaningful choices for law graduates in terms of future career paths that ring true to their values and goals, and assuring that the cost of legal services remains affordable for clients.

Effective service to clients and the public. Thies reasonably focuses his analysis on the plight of law students. Nonetheless, it is important to bear in mind that law schools also bear a responsibility to lawyers' future clients and the public at large to shape their educational ventures in ways that enhance the quality of professional services provided by graduates and to limit associated costs to the extent feasible. Efforts to reduce the cost of legal education should take these concerns into account. While reducing the costs of legal education may help reduce law graduates' debt loads and potentially the charges they levy on future clients, attention should also be paid to the risks of lowering the quality of services to clients (for example, by relying upon continuing legal education to remedy short-comings in legal education if graduates are not adequately prepared).

Meaningful accountability. Solutions are only viable if there is accountability to assure that they are effectively and efficiently employed. One approach may

48. For a general discussion of law school assessment practices, see Gregory S. Munro, Outcomes Assessment for Law Schools (Institute for Law School Teaching 2000), available at <http://lawteaching.org/publications/books/outcomesassessment/munro-gregory-outcomesassessment2000.pdf> (last visited December 19, 2009). The ABA is currently intensifying efforts to force law schools to attend to "learning outcomes" and assessment. See Amer. Bar Assn., Section of Legal Education and Admissions to the Bar, Report of the Outcome Measures Committee (2008), available at <http://www.abanet.org/legaled/committees/subcomm/Outcome%20Measures%20Final%20Report.pdf> (last visited Dec. 19, 2009). Updated drafts of ABA proposals relating to learning outcomes are available at <http://www.abanet.org/legaled/committees/comstandards.html> (last visited Dec. 19, 2009). The University of Denver, Sturm College of Law, hosted a major national conference on assessment in September 2009, entitled, Legal Education at the Crossroads v. 3: Conference on Assessment, with materials available at <http://www.law.du.edu/index.php/assessment-conference/program> (last visited Dec. 19, 2009).

be to enhance regulatory oversight, but others may be to provide meaningful incentives to law schools to more effectively prepare their graduates, and to encourage law students to develop greater professional competence earlier in their educational and professional careers.

2. Bifurcating the Bar Exam

An alternative approach to dealing with law students' expectations, the costs of legal education, and uncertainty about future career paths would consider how these concerns are related to each other. There is a more holistic approach that can assist law students to make sound choices, foster high-quality legal education responsive to their needs, address cost considerations, meet the needs of future clients, and create a meaningful framework for accountability. That approach would involve bifurcating the bar examination so that students would have the option of taking part I (covering first-year courses and legal analysis) following their first year of legal education, and part II (covering more advanced instruction and selected professional skills) at the end of their three years of law school.

A. DESIGN

Legal education and law licensure authorities should take a lesson from colleagues in medical education. Medical educators and licensing agencies require students to be assessed at multiple points in the course of their educational journey.⁴⁹ After two years of medical school, students take national examinations to determine their mastery of fundamental scientific knowledge. Medical students are later examined again, to determine whether they possess requisite clinical knowledge and skills. Before receiving a medical license, medical school graduates must pass a third examination involving multiple choice questions and case-based simulations (situated in the contexts of initial care, continuing care, and emergency medicine, and recommended for administration after one year of additional post-graduate study), to determine whether they are qualified to engage in unsupervised medical practice. In contrast, legal education and professional licensure relies primarily upon a single examination at the end of law school, with supplemental "specialization" examinations occurring at least five years later, following substantial professional experience. Changes in the current regime could prove helpful in addressing concerns that Thies has raised.

Imagine that law students could opt to take part I of the bar examination at the end of their first year of legal education. They would be tested, using national multi-state, multiple-choice, and essay examinations on first-year subjects including civil procedure, constitutional law, contracts, criminal law, torts, and property, with the benefit that these subjects would still be fresh in the students' minds.

49. For information regarding the process of medical licensure in the United States, see United States Medical Examination, *available at* <http://www.usmle.org/> (last visited Dec. 15, 2009).

The National Conference of Bar Examiners has recently advocated for use of a “uniform” standard bar examination for jurisdictions across the country, touting its ability to test on these and other standard subjects.⁵⁰ It should therefore be very feasible to craft forms of multiple choice and essay questions on first-year subjects for administration on the first day of standard summer bar exams, whether or not a given jurisdiction chooses to proceed with the full “uniform” package for all subjects, as the National Conference has urged.

Students would receive scores in a timely fashion if uniform tests on first-year subjects were used. They could also be informed of the cut-off score levels required by individual states to determine whether they had done well enough to carry their scores forward to count toward ultimate bar passage. If students did not achieve at the requisite level, they would have additional opportunities to re-take phase I of the bar exam, either in the summer following their second year of law school or at the time of graduation. They would also have several more immediate choices.

Students who did not do well on phase I of the bar exam would be more motivated to participate in intensive academic support programs in their second year of law school to help them achieve mastery in their remaining course work. Alternatively, students might take time out from law school to pursue paralegal-level clerkships with law firms to earn more money to cover their last two years of law school tuition, or test their ultimate interests in pursuing legal careers before going deeper in debt.

Meanwhile, law schools could re-examine their curricula, and shape second- and third-year offerings in ways that take into account the analytical capabilities of students following the first year. Ideally, second- and third-year courses could then assume a level of analytical ability and case-analysis capacity among law students, and instead emphasize other dimensions of requisite learning including content knowledge, professional skill enhancement, professional values, and integration of knowledge/skills/values at a higher level of expertise.

B. RATIONALE FOR CHANGE

The proposal to bifurcate the bar examination addresses at least three problems with the current system of legal education and licensure. First, law students and law schools currently have little incentive to identify and address shortcomings in student development at an early stage in the educational process. Second, law schools can maintain the fiction that legal analysis is the fundamental skill that should be taught throughout the three years, without taking responsibility at an earlier point for assuring that students have gained a basic level of competence in this arena and then moving onward to provide students with more comprehensive education that addresses a broader range

50. For discussion of the proposed “uniform bar examination,” see *Essays on a Uniform Bar Examination*, 78 *The Bar Examiner* 6 (Feb. 2009), available at http://www.ncbex.org/uploads/user_docrepos/780109_UBEEssays_01.pdf (last visited Dec. 15, 2009).

of professional development. Third, the current system does little to guide students seeking a national benchmark for basic legal education preparation, given the differences in bar passage rates at the end of three years.⁵¹

The proposal to bifurcate the bar examination also addresses the full range of criteria for reform identified in the discussion above. It allows students to make an initial choice of law school, but gives them additional information about their success and future possibilities at the end of the first year, before they take on additional debt. It also allows them to understand where they stand at the end of the first year of law school and gives them an opportunity to “stop out” and earn more money before taking on more educational debt. This approach gives students the ability, as consumers, to determine whether their education is serving their interests. Like the California “Baby Bar,”⁵² an examination after the end of the first year of law school allows law students to determine whether they are getting the education they expect and need.

Bifurcating the bar examination would likewise provide law schools with an incentive to strengthen legal education beyond the first year. By providing meaningful feedback about how well students entering the second year have mastered basic legal thinking and analysis, schools would be freed to approach instruction in the second and third years using alternative designs and pedagogy. Students could be expected to progress to higher levels of analytical work, and schools could adopt more sophisticated learning strategies that more closely emulate law practice.

As a further benefit, bifurcating the bar examination has real potential to reduce socio-economic and racial disparities in ultimate bar passage rates for those disadvantaged by the dynamics of high-stakes examinations and stereotype threat.⁵³ High-stakes dynamics would be reduced by the fact that

51. The National Conference of Bar Examiners compiles data on bar passage by licensing jurisdiction, *available at* http://www.ncbex.org/fileadmin/mediafiles/downloads/Bar_Admissions/2008_Stats.pdf (last visited Dec. 19, 2009). The July 2008 bar pass rates ranged from those states below 70 percent (Alaska, District of Columbia, California, Louisiana, Nevada) to those where 90 percent or more passed (Maine, Montana, New Hampshire, Oklahoma, South Dakota, Wisconsin).
52. California requires that students who attend unaccredited law schools register for and take the “Baby Bar,” an examination covering torts, contracts, and criminal law, following their first year of law school. Students can take the “Baby Bar” up to three times to demonstrate that their academic credits to date should apply toward admission in California. *See* California Business and Professions Code Section 6060(h); California Admission to Practice Law Rule 4.55; *see also* California State Bar Admissions Rules on Unaccredited Law Schools, *available at* http://calbar.ca.gov/calbar/pdfs/rules/Rules_Title4_Div3-UnAcc-Law-Sch.pdf (last visited Dec. 19, 2009); rules for admission to the California bar, Title IV, Rule 4.26(c), *available at* http://calbar.ca.gov/calbar/pdfs/rules/Rules_Title4_Div1-Adm-Prac-Law.pdf (last visited Dec. 19, 2009).
53. For an accessible introduction to the theory of “stereotype threat,” see Claude M. Steele, *Thin Ice: Stereotype Threat and Black College Students*, *The Atlantic Monthly*, Aug. 1999, *available at* <http://www.theatlantic.com/past/issues/99aug/9908stereotype.htm> (last visited Dec. 30, 2009) (discussing premises of “stereotype threat” theory; stereotype threat

students taking part I of the bar exam would be eligible for academic support and financial aid while doing so, would have opportunities to re-take part I before graduation if need be, and would generally take part II of the bar examination after having achieved success on part I. Stereotype threat would be reduced because racial disparities in the ultimate bar passage rate would have been addressed before they occurred.

Bifurcating the bar examination finally places accountability where it should be. Law schools and their graduates are ultimately responsible to the state supreme courts of the jurisdictions in which they are located. Bar examinations are one tool used by the supreme courts to assure accountability at the point graduates enter practice. This proposal re-imagines the bar examination as a tool to provide students with better choices, create more powerful incentives and support for learning, open the way for more imaginative, professionally-oriented educational offerings beyond the first year, and enhance the likelihood that those traditionally underrepresented in the legal profession would successfully gain access to professional roles. Creating a meaningful form of assessment through which there is a closer alignment of the interests of students, legal educators, state courts, and members of the public is likely to prove a more effective means of addressing Thies's underlying concerns with accountability than relying on the ABA to exercise increased oversight.

Conclusion

Thies's article has thoughtfully explored critical areas of student concern during this period of economic downturn and changing professional opportunities. I agree with his premise that reform is needed, but disagree that his proposals—more information for students, more practical skills instruction, heavier reliance on adjunct faculty, and less attention to law schools' scholarly missions—provide the necessary solution. Instead, this essay suggests that meaningful solutions involve enhancing student choices, fostering educational quality and the ultimate quality of service to clients and the public, and establishing meaningful systems of accountability at appropriate points. This

theory is based on implications of inadvertently "triggering" relevant stereotypes among students, causing students to consciously or unconsciously devote physiological resources, time and energy to disproving truth of stereotypes (e.g. if the stereotype is "women can't do math" or "white men can't jump," talented students will endeavor to disprove such assumptions)). For the seminal article on stereotype threat, see Claude M. Steele & Joshua Aaronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 *J. of Personality & Soc. Psych.* 797 (1995) (defining "stereotype threat" as "being at risk of confirming, as self-characteristic, a negative stereotype about one's group," and discussing the vulnerability of African-Americans on high-stakes tests). For a recent review of the literature on stereotype threat, see Toni Schmader, Michael Johns, & Chad Forbes, *An Integrated Model of Stereotype Threat Effect on Performance*, 115 *Psych. Rev.* 336 (2008) (discussing the ways in which triggering of stereotype threats affect physiological stress, self-regulation, and the brain's "executive function" that controls other abilities and functions).

essay therefore urges that serious consideration be given to bifurcating bar examinations so that law students could take part I at the end of their first year (and on multiple occasions if needed) using nationally uniform questions, and part II at graduation. For the reasons suggested above, this approach is more likely to meet the solution criteria listed, for the benefit of students as well as the public at large.