The ABA’s New 75% Bar Passage Rule

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The issue of ABA law school accreditation and the passage rates achieved by law schools is obviously quite volatile. The arguments pro and con the proposed ABA rule on accreditation and the need for law schools to achieve a 75% bar passage rate over a two year period contain hidden agendas that involve preset political positions and the self interest of a variety of groups, including the ABA, HBCU’s and law teachers who are already threatened by sharply falling enrollments.

I have tried to stay away from this issue for several reasons, one of which is that I am working away on a book on Artificial Intelligence/robotics (AI/robotics), job destruction and the resulting harm to the remnants of our “democracy” caused by having a very large number of chronically unemployed people who must somehow be supported in a system that has massive and growing governmental debt issues. As I write that book it has become increasingly apparent that job loss on all levels, including law, promises to be considerably more significant and rapid than we might think.

Serious analysts project up to fifty percent of jobs disappearing to AI/robotics systems in five-to fifteen years in a sweeping transformation of work as we know it—including banking, finance, medicine and law—not to mention the low-level menial or repetitive labor tasks we automatically think of when considering the impacts of Artificial Intelligence and robotics. Nor, as I have written elsewhere, should we take comfort in thinking that we are simply experiencing an innovative phase of a Schumpeterian cycle of “creative destruction” with a new burst of creative replacement production on the other side of the transformation. What we are faced with is a permanent replacement by AI/robotics of all kinds of work in very significant numbers all the way up and down the hierarchy of work.

This AI/robotics transformation has significant implications for the issue the ABA is attempting to address because, as I have tried to explain to people in the law school world, what the legal profession is going through is not a simple economic cycle in which at some point in the near future things will go back to a semblance of historical normalcy. The law schools as we have known them for fifty years will not successfully buffer the “storm” of declining enrollments and disappearing law jobs and “the clouds will not part, and the sun will not shine” with everything going back to being as it was. There is no “rainbow” at the end of the turmoil. But even after the disastrous decline in law school attendance, applicant numbers and applicant quality that has occurred over the past seven years—and that should have started much earlier—many in the law school world are still in denial about what is happening. Legal education as it has existed for the past fifty years since the mid-1960s is an overripe fruit that is beginning to decay.

The reality is that no Renaissance for traditional legal education is going to happen. The majority of law schools will continue to shrink as will the availability of jobs in the traditional legal profession. The ABA’s new rule on bar passage will aid that shrinkage and if the incoming Trump administration stiffens the terms and/or availability of graduate student loans then the predicted failure of half the nation’s law schools could come to pass.
with alacrity. As to "education in law" versus "education of lawyers" there may well be other types of work in which different varieties of legal knowledge and skill can be advantageous but it is unlikely that educating people for such activity will require being educated in the existing dominant model of legal education. Nor is it inevitable or necessary that existing law schools are the most effective mechanisms for delivering the kinds of "law knowledge" beneficial to non-traditional users and contexts.

At this point I really don't care about what happens with US law schools. At something like 250 in total when we include the 200 plus institutions accredited by the American Bar Association and those accredited solely by the State Bar of California, and add the “for profit” law schools that have sprung up over the past twenty years and the few on-line law schools, there are far too many. The US will be able to get along quite well if more than half of the law schools closed down. They aren't going to do so willingly, however, because of the latent prestige often mediocre universities obtain from the linkage to a graduate/professional school and because law school faculties and administrations will fight aggressively to retain their jobs using, for example, increasingly empty rhetoric such as "diversity", "commitment to educational quality", "creation of opportunity", "social justice" and the like. These rhetorical ploys are balanced by the legal profession and ABA rhetoric concerning improving legal education, educating “practice ready” graduates, increasing “experiential learning” opportunities and educating law students to pass the bar examination.

Some of these professional and social justice concerns have an element of legitimacy if understood with some specificity as opposed to being used as preemptive strikes to silence or shame anyone who might question the advocates' assertions. But this struggle about bar passage has very little to do with what its pro-and-con advocates say as opposed to agendas that can be described as: 1. Protecting very pleasant law teaching jobs for people who are under pressure and who at this point have no real employment alternatives in what has become a very harsh market for legal employment, and 2. Sending the message to law schools that they had better admit fewer students and stop trying to "stop their financial bleeding" by dipping very far down into the declining “pot” of law school applicants and accepting applicants who only a few years ago the same law schools would have felt embarrassed to accept.

The ABA and state bars seldom bothered to question law schools about their inner workings as long as there were jobs available for nearly anyone who wanted to be a lawyer. But as the law schools irresponsibly “pumped” very large numbers of new graduates into a system that had reached saturation and then beyond to a state of super-saturation, lawyers and the organized legal profession in various states decided that something needed to be done. But since many within legal academia didn't really care much about the kinds of things practicing lawyers were concerned about, the law schools just kept merrily admitting large numbers of applicants and sending them on their way a few years later but only after raking in very large amounts of federally funded tuition revenues that resulted in their graduates essentially being “indentured servants” for several decades following graduation. Then as has been noted, the law school “bubble” burst, and it is going to take a
long time to recreate a stable environment for both law schools and the legal profession. Any new stability that results will be quite different from what existed previously.

Having argued the above points I will try to say something about the new 75% bar passage Rule itself.

- First of all, from a substantive point of view I don't think it is a good idea. But from the perspective of the ABA sending law schools the message that your survival in any form is dependent on not admitting students who are highly unlikely to pass the bar exam after incurring over $100,000 or more in debt the Rule has a useful function. Certainly the reality of law schools is that they are not very good at listening unless you “hit them over the head” with something involving faculty self interest and financial wellbeing so something external was needed to force the issue.

- As applied, the 75% Rule would only apply at the margins because there are enough internal adjustments allowed a law school in collecting data that it probably only would affect the most significant offenders in terms of the proportion of admitted students who fit into the highest risk categories. Plus, some law schools might even increase their flunk out/attrition rates and deal with the problem of the ABA Rule by initially admitting and then eliminating lesser performing students after receiving half to two-thirds of those students’ tuition.

- I am uncertain about how this system would handle the differential and acknowledged bar pass rates of different states. If a law school in a “hard” state such as California only achieves a 65% two-year pass rate versus one in an “easy” bar exam state, it strikes me that the Rule could be challenged legally unless some weighting formula is worked out.

- There is a very serious issue about law schools’ admissions criteria that relates directly to some concerns voiced by advocates on both sides of the Rule. Since the Rule is aimed at law schools’ decisions to admit and graduate students based in large part on the applicants’ LSAT scores with the assumption being made that as a general rule the score is a reasonably reliable predictor of the probability that an individual has the ability to successfully pass a bar exam, then it makes sense to look at what is occurring with the applicant pool relative to the LSAT.

- IF the LSAT actually predicts the ability to pass a bar exam and IF bar exam passage is directly related to the ability to practice law effectively [remember Emotional Quotient (EQ) issues as being integral elements of much of law practice] then one issue is at what score point is the LSAT a legitimate predictor?

- One issue that troubles me is whether we are supposed to be looking at someone’s ability to function effectively as a lawyer or simply the ability to pass a bar examination. The assumption is that those two things are connected when the reality may be that they are only tenuously “touching” each other. I really do think that if a law school is doing what it is supposed to do then bar passage probably is just an “add on” that could be done away with.

- The new Rule is actually a condemnation of the admissions and educational quality of law schools and while I have often questioned the process and content of US legal
education the requirement of a bar exam seems questionable at this point particularly since almost everyone passes by the third try. BUT since I am convinced the approval of the new ABA Rule is mainly intended to send a message to law schools to clean up their declining admissions criteria in their own survival interests I will not quibble about the Rule because law schools clearly are dipping too far down into a questionable pool of applicants in the schools’ self-interest and saying “to hell with the sub-marginal students we are admitting, with the quality of the legal profession, and with the quality of representation that will be offered to future clients by lawyers who should not even have been admitted to law school.”

- I do want to say that unlike many law professors I have done a very significant amount of law practice. In that domain I have faced or worked with quite a few good to excellent lawyers. But I have also dealt with numerous hacks who have been able to pass a bar exam but were very poor, unprofessional, or unethical lawyers who did not provide their clients with competent representation. These lawyers may have been capable “test takers” but that doesn’t matter if you don’t prepare, do the kinds of things needed to understand and present your client’s position, or just “work” the case until the client’s funds are exhausted and then get rid of it.

- I do this with some hesitation but presumably the people who oppose the new 75% ABA bar passage Rule would not want applicants admitted to law schools in the name of diversity and opportunity if it is highly likely they will be unable to pass the examination required to the right to practice law or, even if successfully passing the bar somewhere, they go on to provide poor service to clients. There are already enough bad and underperforming lawyers around. For me, the key issues in that regard are, 1. Does the LSAT actually serve as a useful predictor of someone’s ability to pass the bar exam, and 2. Does the bar exam serve as a legitimate method of screening a law graduate prior to having the right to practice law conferred or is it primarily a “rite of passage” device that no longer serves a valid purpose but protects the economic interests of lawyers and also provides significant profits to the bar preparation companies that feed off law students and law graduates?

- The logic in the prior paragraph is that if the ABA has performed appropriately in its accreditation and standards role and if law schools who confer degrees on students after three or four years of study have done their educational jobs properly, then it is fair to question the utility of the bar exam as a measure of the ability to practice law. The problem I have is that in my experience law schools have ignored key issues of educational mission and quality aimed at educating law students to be highly effective lawyers. Only now, when they are under severe financial pressure and criticism and are “running scared” are they firing rhetorical volleys in which they proclaim dedication to issues that were obvious but ignored decades ago. The sincerity—versus desperation and self-interest--of those engaged in the defense of law schools must be questioned.