

**ENDANGERED: HISTORICALLY BLACK LAW SCHOOLS?**  
by Gary S. Rosin

Submitted to Standards Review Committee, March 28, 2011

**1. Introduction**

I am a Professor Law at South Texas College of Law, Houston, Texas. I have studied Bar passage since 1995. I have written articles on that topic,<sup>1</sup> and submitted comments to the Standards Review Committee at the time of its initial consideration of ABA Interpretation 301–6.<sup>2</sup>

Interpretation 301–6 provides that a law school must meet minimum Bar-passage requirements to comply with Standard 301(a) regarding the quality of its educational program. As currently in force, a law school can meet the requirements based on either

1. first-time Bar passage rates no more than 15 percentage points below the blended average Bar passage rate for persons who graduated from ABA-accredited law schools, or
2. overall ultimate Bar passage rates (cumulative over several attempts) of at least 75%.

The Subcommittee on Bar Passage has proposed to raise the minimum Bar-passage requirements to (i) no more than **10%** below the average (first-time) or (ii) at least **80%** (ultimate).

The proposed revision of the Bar-passage benchmarks is in fact a *reversion* to benchmarks that were applied by the Accreditation Committee before the adoption of Interpretation 301–6. Moreover, the proposed benchmarks were proposed in May 2007, and ultimately were rejected. Thus, the Subcommittee on Bar Passage would take accreditation “Back to the Future.”

More importantly, the evidence suggests that those pre-Interpretation 301–6 Bar benchmarks resulted in a sharp reduction of the share of Black/African-American students at Historically Black Law Schools (HBLs). At a majority of HBLs, Black/African-American students are not the predominant racial or ethnic group, but at best a plurality. In one HBL, students are now predominately White/Caucasian.

At a time of declining interest in attending law school, and decreasing state funding of higher education, 10%/80% benchmarks risk pressuring Historically Black Law Schools to reduce Black/African-American enrollment even further.

**2. The Importance of Historically Black Law Schools**

Despite the Supreme Court’s decision in *Grutter v. Bollinger*, 539 U.S. 306 (2003), Historically Black Law Schools still play an important role in the education of Black/African American law students. According to the ABA’s statistics, the percentage of entering law students who were Black/African American peaked in 1998, at 8.1%, and then fell to 6.5% in 2005. Since then, that percentage increased to 7.3% in 2009.

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<sup>1</sup> See Gary S. Rosin, *Unpacking the Bar: Of Cut Scores and Competence*, 32 J. LEGAL PROF. 67 (2008) (submission version available on SSRN at <<http://ssrn.com/abstract=988429>>)(“*Unpacking the Bar*”); Gary S. Rosin, *Benchmarking the Bar: No Unity in Difference Scores* (2007) (available on SRN at <http://ssrn.com/abstract=1017996>).

<sup>2</sup> See, Gary S. Rosin, *Reports and Comments on Proposed ABA Interpretation 301–6* (2008) (available on SSRN, at <http://ssrn.com/abstract=1080480>)

Because those statistics include students enrolled in Historically Black Law Schools, they do not show the level of minority enrollment in law schools in which a majority of the students are White/Caucasian—the bulk of U.S. law schools.

**Table 1**  
**Fall 2006 through Fall 2009**  
**Minority First-Year Enrollment by Ethnicity**  
**Majority White/Caucasian Law Schools**

	<b>Overall</b>
Black/African American	6.4%
Asian Pacific Islander	8.0%
Hispanic	6.7%
Native American	0.9%
<b>Total Minority</b>	<b>22.0%</b>

As shown in Table 1, for the Fall 2006 through Fall 2009 entering classes, Black/African-American enrollment in majority White/Caucasian law schools has averaged 6.4%, lower than the shares of both Asian/Pacific Islander, and Hispanic, entering students:

Arguably, seven ABA-accredited law schools are Historically Black Law Schools: Howard University and the University of the District of Columbia (DC); Florida A&M (FL); Atlanta’s John Marshall<sup>3</sup> (GA), Southern University (LA), North Carolina Central University (NC), and Texas Southern University (TX). As shown in Table 2, these seven schools are vital to the opportunity of Black/African-American students to enroll in law school.

**Table 2**  
**Historically Black Law Schools**  
**Fall 2005 through Fall 2009 Entering Classes (Combined)**  
**Share of Total and Black/African-American Students by Jurisdiction**

<b>School</b>	<b>Jurisdiction</b>	<b>Total</b>	<b>Black/ African- American</b>
<b>Howard &amp; District of Columbia</b>	DC	12.4%	49.0%
<b>Florida A&amp;M</b>	FL	6.4%	25.9%
<b>Atlanta’s John Marshall</b>	GA	17.1%	25.3%
<b>Southern</b>	LA	21.0%	63.6%
<b>NC Central</b>	NC	20.3%	61.5%
<b>Texas Southern</b>	TX	7.4%	43.8%
	<b>US</b>	2.7%	16.3%

From Fall 2005 through Fall 2009, even though students at the seven HBLs represented only an average of 2.7% of entering classes, those students represented 16.3% of Black/African-American entering students. Within the jurisdictions in which they are located, HBLs represented a much greater portion of Black/African-American law students—from 25.3% to 63.6% of students entering law schools in each jurisdiction.

If the ABA is serious about increasing the diversity of the legal profession, especially in increasing the number Black/African American lawyers, it needs Historically Black Law Schools.

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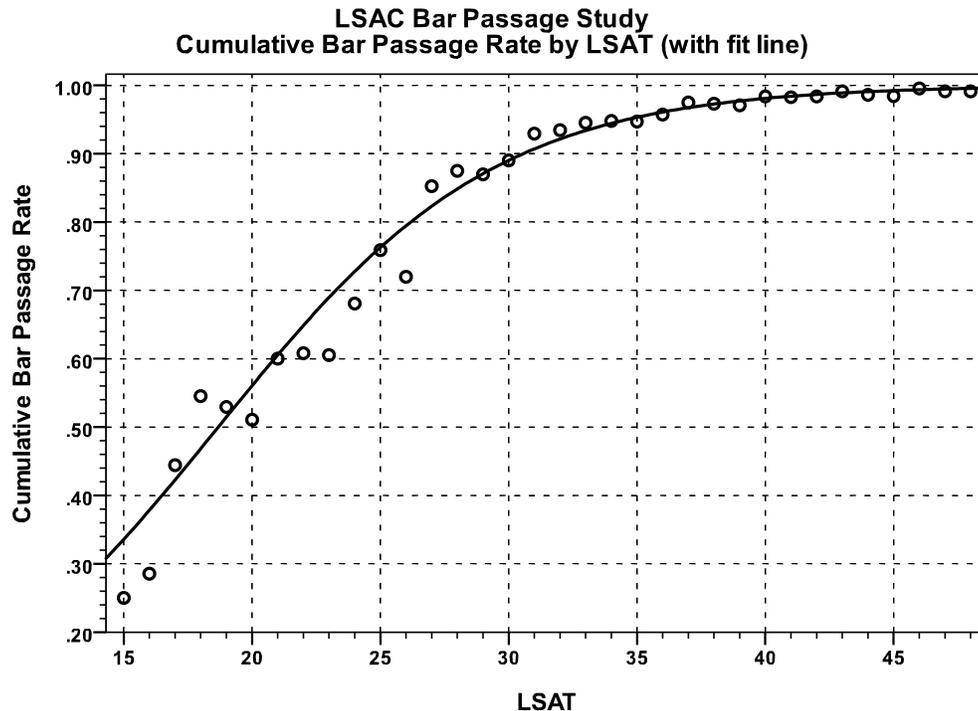
<sup>3</sup> See section 5, *infra*, for a discussion of the recent history of Atlanta’s John Marshall.

### 3. The LSAT and Cumulative Bar Passage Rates

In recent years, there has been great concern about law schools relying too heavily on LSAT scores in admissions. The argument is that LSAT scores are at best an imperfect predictor of the academic success of *individual* law students, as measured by first-year GPAs. Moreover, academic success is an even more imperfect predictor of success as a practicing lawyer. That said, the LSAT is more reliable when it comes to the predicting the success of *groups*, including group Bar passage rates.<sup>4</sup>

Using the LSAC National Longitudinal Data file, which includes data used in the LSAC Bar Passage Study,<sup>5</sup> I calculated the cumulative Bar passage rates of persons with *the same LSAT score*. Chart 1 shows the results:

Chart 1<sup>6</sup>



Source: Author's analysis of LSAC National Longitudinal Data file (BPS).

Perhaps the most notable feature of the curve shown in Chart 1 is that a one-unit difference in LSAT (e.g., 35 vs. 36) has a larger effect on cumulative Bar passage as LSAT drops—the curve is much steeper at an LSAT of 19 than it is at an LSAT of 40. This phenomenon is important in crafting an entering class, which will include persons with a range of different LSATs. The ramifications of the phenomenon loom especially large for law schools with lower LSAT 25<sup>th</sup> percentiles.

<sup>4</sup> See, e.g., Rosin, *Unpacking the Bar*, note 1, *supra*.

<sup>5</sup> Linda F. Wightman, LSAC NATIONAL LONGITUDINAL BAR PASSAGE STUDY (1998) (“BAR PASSAGE STUDY”)

<sup>6</sup> At the time of the LSAC Bar Passage Study, the entering class of Fall 1991, LSAT scores were reported on a scale that ranged from 10 to 48. BAR PASSAGE STUDY at 6.

And there's the rub: many of Historically Black Law Schools have entering-student LSAT scores at or near the bottom of those of all law schools in the continental United States.<sup>7</sup> For example, over the Fall 2006 through Fall 2009 entering classes, the LSAT 25<sup>th</sup> percentiles for all law schools averaged 154.7, with a standard deviation of 5.68. The bottom four ABA law schools were Florida A&M, Southern, North Carolina Central and Texas Southern, while District of Columbia, Atlanta's John Marshall and Howard were grouped around the 15<sup>th</sup> percentile.

**Table 3**  
**Historically Black Law Schools**  
**Average of LSAT 25<sup>th</sup> Percentiles**  
**and Percentile Ranking among ABA Law Schools**  
**Fall 2006 through Fall 2009 Entering Classes**

<b>School</b>	<b>Average LSAT 25<sup>th</sup> Percentile</b>	<b>Percentile Ranking</b>
Florida A&M	142.50	05.0 <sup>th</sup>
Southern	142.75	01.0 <sup>th</sup>
NC Central	143.50	01.5 <sup>th</sup>
Texas Southern	145.00	02.0 <sup>th</sup>
U. D.C.	148.75	13.6 <sup>th</sup>
John Marshall (Atl.)	149.00	14.6 <sup>th</sup>
Howard	149.25	16.2 <sup>th</sup>

While each school is required to report recent cumulative Bar passage rates to the ABA, that information is neither published in the *ABA-LSAC Official Guide to ABA-Approved Law Schools* (as of the 2011 edition), nor distributed to all ABA law schools via the annual "ABA take-offs." As a result, there is no data from which to perform a study along the line of that reported in my article, *Unpacking the Bar: Of Cut Scores and Competence*, 32 J. LEGAL PROF. 67 (2008), for first-time Bar passage rates. While the shape of the resulting logistic "S" curve in such a study is unknown, the effect of a one-point change in law-school LSAT on law-school cumulative Bar passage rates will be much larger at law schools with LSATs at the low end than for law schools with LSATs at the high end. As a result, Historically Black Law Schools will be at much greater risk of being affected by raising the minimum "ultimate" (cumulative) standard in 301-6 from 75% to 80%.<sup>8</sup>

#### **4. Cumulative Bar Passage Rates and HBLSS**

The Standards Review Committee based the original 75% cumulative benchmark on (i) the LSAC Bar Passage Study (students entering law school in 1991<sup>9</sup>), (ii) a study commissioned by Texas (students taking the Texas Bar exam for the first time in July 2004), and (iii) a study commissioned by the State of New York (students taking the New York Bar exam for the first time in July 2005). In those studies, cumulative Bar passage rates for *all* Black/African-American students ranged from 75% to 78%. Neither the LSAC, Texas nor New York studies discussed cumulative Bar passage rates of Historically Black Law Schools.

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<sup>7</sup> The LSAC Bar Passage Study included only ABA-accredited law schools located in the continental United States. BAR PASSAGE STUDY at 5-6.

<sup>8</sup> It goes without saying that the same is also true for increase in the first-time standard to 10% below: Historically Black Law Schools will be at much greater risk.

<sup>9</sup> *Id.* at 6.

Neither the LSAC Bar Passage Study nor the underlying LSAC National Longitudinal Data file identify by name the law schools attended by students participating in the study. The Bar Passage Study organized law schools into six “clusters” based on varying attributes of the law schools included in the study of Fall 1991 entering classes.<sup>10</sup> As a result, the LSAC National Longitudinal Data File offers an imperfect, but distorted look at cumulative Bar passage rates at Historically Black Law Schools.

**Table 4**  
**Description of Law School Clusters<sup>11</sup>**  
**LSAC Bar Passage Study**

Cluster	Description	Group
1	Among least expensive. Slightly below average in size. Slightly above average in selectivity, UGPAs and LSATs. Mostly public schools. (50 schools)	3
2	The least selective, below average in cost, and smaller. Lowest proportion of minority students. Lower UGPAs and LSATs. (18 schools)	5
3	Larger, more expensive, less selective, and lower UGPAs and LSATs than Cluster 1. Mostly private. (50 schools)	4
4	Highly selective, with UGPAs and LSATs among highest in country, but below Cluster 5. Among the more expensive of the law schools. Average size is significantly larger than any other group. (14 schools)	2
5	Most selective and most expensive. Highest UGPAs and LSATs. Much smaller than Cluster 4 schools and much larger than Cluster 6 schools. (16 schools)	1
6	Among the smallest and the least expensive. High proportion of minority students. (7 schools)	6

*The “Group” numbers in Table 4 are the LSAC BPS clusters, in the reverse order of their LSAT means, from high (Cluster 5) to low (Cluster 6).*

It is likely that Group 6 included at least the four public (and thus less expensive) Historically Black Law Schools that were ABA-accredited in 1991: University of District of Columbia (accredited in 1991), North Carolina Central, Southern, and Texas Southern. It is unknown whether it also included Howard, which is private. That means that Group 6 included two, or possibly three, other law schools, the student bodies of all of which were at least plurality, if not majority, White/Caucasian.

As shown in Table 5, the cumulative Bar passage rate for students in Group 6 was 78.2%, or close to that of Black/African-American students in *all* Groups from the LSAC Bar Passage Study. In Group 6, only White/Caucasian students had cumulative Bar passage rates above the current 75% benchmark in Interpretation 301–6. Given that the Historically Black Law Schools law schools in Group 6 fewer White Caucasian students than the other two or three schools in

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<sup>10</sup> *Id.* at 8-9.

<sup>11</sup> The descriptions of the six clusters are syntheses of those found in the USER’S GUIDE, LSAC NATIONAL LONGITUDINAL DATA FILE, at 16.

Group 6, it is likely than the cumulative Bar passage rate of each of those schools was lower, perhaps much lower, than the 78.2% passage rate for Group 6 overall.

**Table 5**  
**Group 6 from LSAC Bar Passage Study**  
**Racial and Ethnic Distribution, Average LSATs,**  
**First-time and Cumulative Bar Passage Rates**

	Percentage	Average LSAT	First-Time Bar Passage	Cumulative Bar Passage
Native American	01.1%	27.7	33.3%	66.7%
Asian/Pacific Islander	02.6%	28.4	31.3%	62.5%
Black/African American	42.9%	25.8	56.5%	69.5%
Hispanic	10.6%	26.3	61.5%	73.8%
White/Caucasian	42.7%	32.0	78.3%	87.6%
<b>Overall</b>		28.6	66.3%	78.2%

### 5. Changing Demographics of HBLs

Florida A&M,<sup>12</sup> Howard University, North Carolina Central, Southern, and Texas Southern were all formed, as early as 1869 (Howard), but largely in the 1940's, with the primary mission of educating Black/African American lawyers. With those roots, one might expect that their student bodies would still be predominately Black/African American. But, as Bob Dylan once sang, "the times they are a changin'."

**Table 6**  
**Historically Black Law Schools**  
**Average Ethnic Distribution by School,**  
**Fall 2007 through 2009 Entering Classes**

	Atlanta's John Marshall	District of Columbia	Florida A&M	Howard	N.C. Central	Southern	Texas Southern
<b>Asian/Pacific Islander</b>	4.0%	5.9%	4.6%	3.4%	2.5%	0.4%	7.2%
<b>Black/African American</b>	21.6%	30.2%	41.2%	78.4%	50.6%	62.5%	49.0%
<b>All Hispanic</b>	3.3%	11.7%	15.4%	3.4%	2.6%	1.2%	22.8%
<b>White/Caucasian</b>	64.5%	44.8%	36.1%	5.6%	39.7%	35.1%	18.2%

As shown in Table 6, over the three most recent academic years for which information has been published in the Official Guide, at Atlanta's John Marshall, White/Caucasian students predominate, with Black/African-American students composing just over a fifth of the class. At the University of the District of Columbia, White/Caucasian students were a plurality of the entering classes. At the three of the remaining schools, Florida A&M, North Carolina Central,

<sup>12</sup> The law school at Florida A&M was closed in 1968, and then reopened in 2002.  
<http://law.famu.edu/go.cfm/do/Page.View/pid/5> (last visited March 28, 2011).

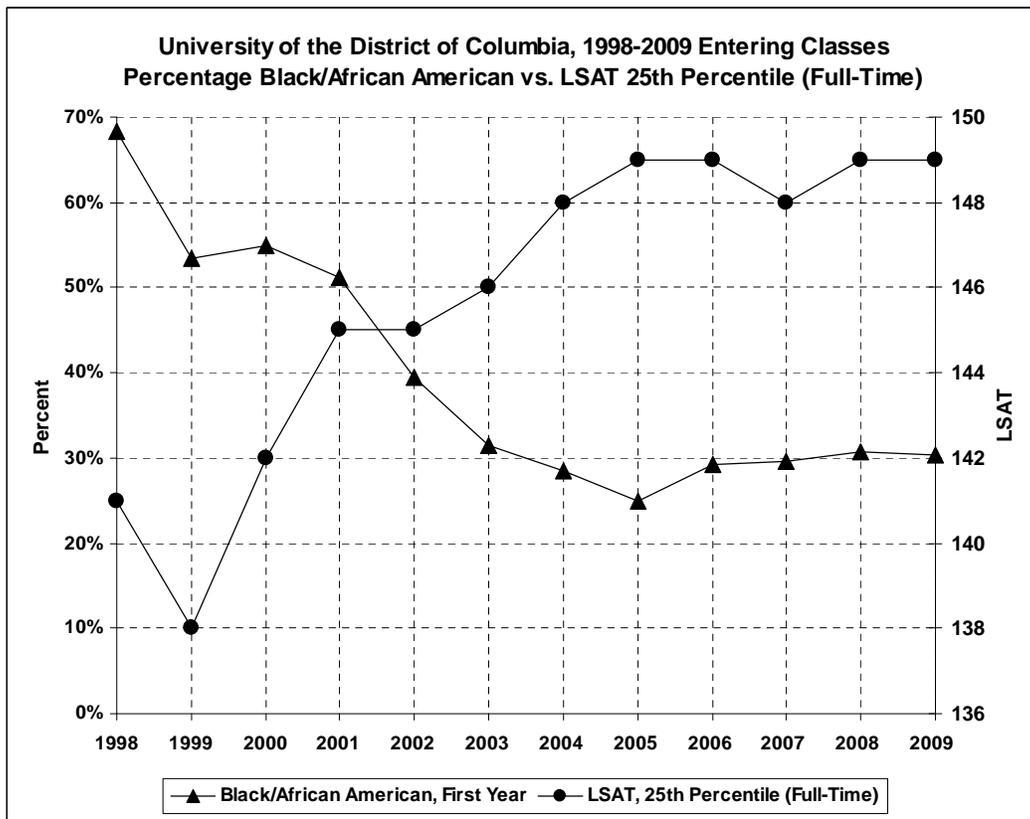
and Texas Southern, Black/African-American students constituted at least a plurality of entering students, with the last two hovering near 50% of the class. Only Howard and Southern remain strongly Black/African American institutions.

For the Fall 2007 through Fall 2009 entering classes, at five of the schools, White/Caucasian students had a substantial presence—at least 35%. At Texas Southern, the second-largest component of entering classes was Hispanic students. Only at Howard remained had no strong presence of any racial or ethnic group, other than Black/African Americans.

*University of the District of Columbia*

As recently as 1998, Black/African-American students made up 68.3% of the entering class at the University of the District of Columbia (DC). Beginning with the next entering class, the Black/African-American share of the class began falling, and reached a low of 25.0% for the 2005 class. What happened after 1998? According to the *Official Guide*, DC was accredited in 1991, so it would have been due for a sabbatical inspection around 1998.

**Chart 2**



Professor John Nussbaumer argues that the ABA uses its initial and periodic accreditation reviews to pressure law schools to raise the LSAT scores of the low end of their entering classes, and thus exclude Black/African Americans.<sup>13</sup> As shown in Chart 2, decreases in the

<sup>13</sup> John Nussbaumer, *The Disturbing Correlation between ABA Accreditation Review and Declining African-American Law School Enrollment*, 80 ST. JOHN'S L. REV. 991 (2006) (“*Disturbing Correlation*”); John Nussbaumer, *Misuse of the Law School Admissions Test, Racial Discrimination, and the De*

Black/African-American share of entering classes have been mirrored by increases in the 25<sup>th</sup> percentile of the LSAT scores of the entering classes.

*Atlanta's John Marshall*

Although the ABA began including in the *Official Guide* data on entering classes of Atlanta's John Marshall as of its Fall 2007 class, it is likely that John Marshall is the "School X" described in "Case Study One" discussed by Professor Nussbaumer in *Disturbing Trend*.<sup>14</sup> First, it "is located in a major metropolitan area with a large minority and African-American population."<sup>15</sup> Second, it "seeks to provide nontraditional students with access to the legal profession."<sup>16</sup> Third, Prof. Nussbaumer says that School X was "recently" given full ABA approval.<sup>17</sup> *Disturbing Trends* was published in 2006, in the first issue of volume 80; Atlanta's John Marshall was fully accredited in 2005.

In any event, School X also underwent a radical demographic transformation. Between 1999 and 2004, it raised the LSAT 25<sup>th</sup> percentile of entering classes from 138 to 148. Concurrently with that increase, total minority enrollment fell from 74% to 46% (*i.e.*, it became a majority White/Caucasian school), and Black/African-American enrollment fell from 62% to 32%.<sup>18</sup>

*Florida A&M*

By the time the law school at Florida A&M was reorganized after a hiatus of over thirty years,<sup>19</sup> and the ABA began publishing information on its entering classes, it was already only a plurality Black/African-American institution.

## **6. Accreditation Standards before Interpretation 301–6, Bar Passage and Past Law-School LSAT Increases**

While the ABA may not have a so-called "floor" on the LSAT scores of admitted applicants, the ABA has used Bar passage rates to measure not only compliance with Standard 301 (adequacy of program of legal education), but also Standard 501:

A law school shall not admit applicants who do not appear capable of satisfactorily completing its educational program *and being admitted to the bar*.

2010-2011 Standards and Rules of Procedure for Approval of Law Schools, Standard 501(b) (emphasis added). Before the adoption of Interpretation 301–6, the ABA's Accreditation Committee had been using a standard for first-time Bar passage of below 70% *and more than 10 points below the state average* for ABA-accredited schools. Bar passage standards no being proposed are the standards that the ABA had been using.<sup>20</sup>

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*Facto Quota System for Restricting African-American Access to the Legal Profession*, 80 ST. JOHN'S L. REV. 167, 178-79 (2006) ("*Restricting Access*").

<sup>14</sup> 80 ST. JOHN'S L. REV. at 178.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 178 & 181-F, tbl. 9.

<sup>19</sup> History of Florida A&M, <http://law.famu.edu/go.cfm/do/Page.View/pid/5> (last visited March 28, 2011).

<sup>20</sup> See, e.g., Memorandum from Catherine Carpenter, Chair Subcommittee on Bar Passage—301–6 to Standards Review Committee, *Reexamination of Current Bar Passage Requirements*, at 1 (November 2, 2010) ("*Subcommittee November Memorandum*") (copy on file with the author); Memorandum from Greg

The Murphy Memorandum also indicates that the Accreditation Committee also relied, where possible, on cumulative (ultimate) Bar passage rates, but does not indicate the minimum used by that committee.<sup>21</sup> However, when the Standards Review Committee first proposed the use of both the difference from state average first-time Bar passage rates and cumulative Bar passage rates, it proposed a 10% below and an 80% cumulative Bar passage rates.<sup>22</sup> Given that the 10% difference score was the standard being used by the Accreditation Committee, it suggests that the 80% cumulative rate may also have been the standard that that committee was then using.

Given the links between both first-time and cumulative Bar passage rates and group LSAT scores,<sup>23</sup> quickly increasing a law school's Bar passage rates means increasing the LSAT scores of its entering classes. The widespread increases in the LSAT 25<sup>th</sup> percentiles at Historically Black Law Schools, and the associated decreases in the share of Black/African-enrollment, are probably associated with the use of the very Bar passage standards which are again being proposed.

## 7. Conclusion

According to the Bar Passage Subcommittee:

In attempting to provide a bright line rule on bar passage that also fits a range of circumstances (including geographical diversity of bar examination rigor, missions of law schools, and treatment of provisionally accredited law schools) Interpretation 301-6 broadened considerably the 70/10 rule. It is seen by many as providing an extremely low threshold for bar passage compliance, and consequently, a less than meaningful compliance requirement.<sup>24</sup>

The Subcommittee is also concerned that the previous 10% below rule was rejected too hastily: "it is unclear whether there was sufficient vetting of that rule to discount it as a viable option."<sup>25</sup>

The evidence suggests that the 10% below rule had a major adverse impact on Black/African American enrollment in general, and at Historically Black Law Schools. The 75% cumulative (ultimate) rate is based on overall performance by Black/African Americans. It is likely that the cumulative Bar passage rates of graduates of HBLs very probably was lower than the overall 75% passage rate.

The evidence also suggests that, if a more "meaningful compliance requirement," such as the 10% below/80% benchmarks proposed by the Subcommittee on Bar Passage, the burden would fall most heavily on schools with the lowest LSAT scores of incoming graduates, many of which are Historically Black Law Schools. The result would be HBLs further de-emphasizing their historical mission to educate Black/African American lawyers.

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Murphy, Chair, Accreditation Committee, to Richard Morgan, Chair, Standards Review Committee, *On Interpretation 301-6*, at 1 (May 2, 2007) ("Murphy Memorandum")(copy on file with author).

<sup>21</sup> Murphy Memorandum, at 2.

<sup>22</sup> Memorandum from Richard L. Morgan, Chair and Hulett H. Askew, Consultant, to Standards Review Committee, *Wednesday, May 17, 2007 Hearing and Meeting* (May 16, 2007) (copy on file with author).

<sup>23</sup> See discussion in section 3, *supra*.

<sup>24</sup> Subcommittee November Memorandum, at 2.

<sup>25</sup> Memorandum from Subcommittee on Bar Passage and Interpretation 301-6 to Standards Review Committee, *Reexamination of Current Bar Passage Requirements: A Progress Report*, at 3 (December 20, 2010).