

Marooned: An Empirical Investigation of Law School Graduates Who Fail the Bar Exam

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I. Introduction

This article attempts to answer a question that legal academia has been reluctant to even ask: What happens to law school graduates who fail the bar exam? What do they do and how do their lives differ from the lives of their lawyer-classmates? Would their careers have fared any better if they had not gone to law school?

There are probably on the order of 150,000 law school graduates in the United States who have taken but never passed a bar exam; this amounts to one in ten J.D.s and the risk falls disparately on black, Hispanic, and Asian law school graduates. The ranks only will increase if the upward trend in law school enrollment and the downward trend in bar passage continue, as they have over the last decade.¹ Despite the vast and growing literature on lawyers, research on those who fail the bar is virtually non-existent. We know astonishingly little about the law school graduates who experience the consequences of the licensing barrier, whatever they may be.

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1. See 1995 Statistics, *The Bar Examiner*, Vol. 65 No. 2 (May 1996), available at www.ncbex.org/uploads/user_docrepos/650296_1995_Statistics.pdf; 1998 Statistics, *The Bar Examiner*, Vol. 68 No. 2 (May 1999), available at www.ncbex.org/uploads/user_docrepos/680299_1998statistics.pdf; 2005 Statistics, *The Bar Examiner*, Vol. 75 No. 2 (May 2006), available at www.ncbex.org/uploads/user_docrepos/2005stats.pdf. The national bar passage rate slid steadily from 70 percent in 1995 to 64 percent in 2005. At the same time, minority enrollment during this period has increased. Black law school enrollment at ABA-accredited law schools has outpaced law school growth by a 3:1 ratio since 1980. ABA Statistics, available at <http://www.abanet.org/legaled/statistics/stats.html>. But note that between 2005 and 2008, national bar passages began to increase again, reaching 71 percent by 2008. 2008 Statistics, *The Bar Examiner*, Vol. 78 No. 2 (May 2009), available at www.ncbex.org/uploads/user_docrepos/2008_stats.pdf.

This void is understandable. Law school graduates who failed the bar are the invisible J.D.s. They are less likely to respond to law school alumni surveys, and state bars have little incentive to follow their careers. But these individuals are difficult to track for the same reasons we ought to make the effort: We do not know what became of them. More specifically, we do not know whether their experiences with the bar caused long-lasting detriment to their lives. This is the first serious attempt to understand the impact of failing the bar exam.

I have consulted a number of resources to make headway on these questions. I rely most heavily on the Census Bureau's 1993 National Survey of College Graduates dataset (the "NSCG").² I also used the 1991-1996 LSAC Bar Passage Study dataset (the "BPS"),³ the 2002-2004 NALP "After the J.D." ("AJD") data,⁴ the voluminous collection of statistical reports prepared by the State Bar of California, and new field research on nearly 200 law school graduates who failed a bar exam. Each of these resources have flaws or are limited in some important way, but in combination, they tell a story that is broadly consistent.

My findings are just a first step. They generate as many questions as answers, and I hope other scholars will add to them. They can be summarized as follows: Law school graduates who never pass a bar exam have a very difficult "first term." Five to ten-years out of law school, they lag well behind lawyers on every measure—earnings, employment stability, even marriage and divorce rates. Moreover, as a group, they fare worse than college graduates, despite their better-than-average undergraduate grades. But after an adjustment period, they spring back and out-perform the average college graduate in the latter half of their careers. Though they never catch up with their lawyer peers, the earnings of the median individual who fails the bar does catch up to the 25th percentile lawyer, which might have been about the center of their distribution, if the group had passed the bar exam. This could be as much an exhortation on the humble earnings of non-BigLaw lawyers as it is a testament to the resilience of those who fail the bar. But in any event, the consequences of bar failure appear to dissipate around age thirty-five.

One word of caution: While some of the hardships I describe in this article are directly related to failing a bar exam, not all of the disparity in outcomes can be attributed to the bar exam per se. One of the greatest difficulties in this research is dealing with the problem of endogeneity. Traits that contribute to bar failure—such as low motivation or lack of intellectual rigor—can also lead to other career troubles. In other words, the comparative advantage that lawyers seem to have in the labor market over their bar-failing peers might

2. The 1993 National Survey of College Graduates is available through the National Science Foundation at www.nsf.gov/statistics/sestat/.
3. The LSAC Bar Passage Study ("BPS") data and documentation are available at www.law.ucla.edu/sander/Systemic/Data.htm.
4. The "After the J.D." data and documentation are available by request from the American Bar Foundation, www.americanbarfoundation.org/publications/AftertheJD/AJD_Data_Access.html.

just be the product of the same motivation and high achievement levels that they capitalized on to do well in law school and pass the bar exam. With the limited data resources available, it is not always possible to distinguish between disparities in outcomes caused by bar exam failure (the “costs” of bar failure) and disparities that would exist even if the individuals who failed had passed the bar exam.

Let me also be clear that this article is not about the causes of bar examination failure, nor the soundness of licensing requirements. While these issues have relevance to the legal industry, I found it challenging enough to probe the limited topic of the consequences of failing the bar without further speculating about prescriptive policies in education and bar licensing. That said, I do hope that the ongoing debates in legal education and attorney licensing are made more productive by this study, and that interested organizations and individuals are inspired to collect more data on these lost law school graduates.⁵

This article is organized as follows: Part II provides a review of the relevant previous research. Part III describes the available datasets, all of which have limitations, but which are buttressed by one another. Part IV provides a terminology for different categories of those who pass and fail the bar and my study subjects (the never-passers), and provides a mini-study of those not studied (the eventual passers). In Part V, I work out an estimate of the number of never-passers, a task that is more difficult and speculative than one might think. In Part VI, I describe the never-passers, demographically and academically. Although it is not the main subject of this article, I take the time in Part VI to acquaint or remind the reader of the factors that lead to increased bar failure risk (credentials, school performance, socio-economic status, foreign origin, certain career interests), and the factors that don’t (race, and for the most part, gender). At long last, I get around to describing the life of a typical never-passer in Parts VII and VIII. Part VII describes the experience immediately after law school, when career expectations are readjusting. Part VIII describes the long-term prospects for those who fail the bar, including average salaries, employment stability, and family patterns. Part IX attempts to understand whether the experience of law school was a positive or negative treatment on the lives of those who fail the bar, regardless that they cannot practice law. Part X concludes with a call for more careful attention to this potentially vulnerable group of J.D.s.

5. An important motivation for this study was to provide some perspective on the debate surrounding research on mismatch effects. Mismatch research on bar passage gets a lot of traction from an affirmative action policy perspective because that particular boomerang effect is so unambiguously in opposition to the goals of law school affirmative action programs. To appreciate the problems posed by increased bar failure risk, we also must know the costs of bar failure. As Holzer and Neumark conclude in their critique of Richard Sander’s 2004 analysis of law school affirmative action, “More data on the educational trajectories and earnings of dropouts and of those failing the bar exam would be useful, then, in drawing comprehensive conclusions.” Harry J. Holzer & David Neumark. *Affirmative Action: What Do We Know?*, 25 *J. Policy Analysis and Mgmt.* 463 (2006).

II. The Absence of Literature Review

There is a significant literature on the validity and characteristics of bar exams as a gateway to the legal profession,⁶ the reasons bar applicants fail the exam, and the racial disparities in bar outcomes.⁷ Some articles have used the racially disparate bar passage rates as a springboard to argue for reform of the exam or consideration of its elimination altogether.⁸ But I could not find any work examining in any depth the characteristics of those who fail and what becomes of them.

“Leaving the Law: Occupational and Career Mobility of Law School Graduates,” by Joe Baker and Brian Jorgensen, comes closest to the topics addressed in this article.⁹ As the title suggests, Baker and Jorgensen focus on J.D.-holders who are not practicing law. The authors chiefly are interested in how personal choice and market forces steer lawyers away from the practice of law, and what becomes of such expatriate lawyers. They ask the same questions I do here, but of a different group.

They find evidence that J.D.s who leave legal practice do so to optimize their earnings potential and quality of life.¹⁰ But a significant subgroup, which the authors call “underutilized J.D.s,” had less rosy outcomes. This group includes law school graduates who involuntarily took a job unrelated to their

6. Andrea A. Curcio, *A Better Bar: Why and How the Existing Bar Exam Should Change*, 81 *Neb. L. Rev.* 363 (2002); Society of American Law Teachers Statement on the Bar Exam, 52 *J. Legal Educ.* 446 (2002); Lorenzo A. Trujillo, *The Relationship Between Law School and the Bar Exam: A Look at Assessment and Student Success*, 78 *U. Colo. L. Rev.* 69 (2007).
7. *See, e.g.*, Richard Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 *Stan. L. Rev.* 367 (2004); Jesse Rothstein & Albert Yoon, *Affirmative Action in Law School Admissions: What Do Racial Preferences Do?*, 75 *U. Chi. L. Rev.* 649 (2008); Ian Ayres & Richard Brooks, *Does Affirmative Action Reduce the Number of Black Lawyers?*, 57 *Stan. L. Rev.* 1807 (2005); Richard Sander, *A Reply to Critics*, 57 *Stan. L. Rev.* 1963 (2005). These articles represent literature rising out of the mismatch debate.
8. Deborah J. Merritt, Lowell L. Hargens & Barbara F. Reskin, *Raising the Bar: A Social Science Critique of Recent Increases to Passing Scores on the Bar Exam*, 69 *U. Cin. L. Rev.* 929, 965-67 (2001). The authors cite Stephen Klein & Roger Bolus, *The Size and Source of Differences in Bar Exam Passing Rates Among Racial and Ethnic Groups*, *The Bar Examiner*, Vol. 66 No. 4 (Nov. 1997), available at www.ncbex.org/uploads/user_docrepos/660497_Klein_Bolus.pdf, for the proposition that states with lower cut scores have smaller racial group disparities. But Klein and Bolus also explain that poor test reliability can cause racial disparities to drop (because, at the extreme, completely random outcomes would eliminate differences entirely). They do not advocate for lowering standards or test reliability. Moreover, a California Bar study performed by Stephen Klein found that if California lowered its cut score by small increments, the racial gap would enlarge rather than decrease; minorities would pass the bar at higher rates, but whites would pass the bar at much higher rates. Stephen Klein and Roger Bolus, *Comparisons of Eventual Passing Rates in the 1985 and 1986 Cohorts*, PR-88-6 (1988), available at www.seaphe.org/topic-pages/california-bar-lawsuit.php.
9. Joe Baker & Brian Jorgensen, *Leaving the Law: Occupational and Career Mobility of Law School Graduates*, 50 *J. Legal Educ.* 16 (2000).
10. *Id.* at 28-30.

law degree, were working part-time when they would rather work full-time, or were unemployed and preferred to work. This “underutilized” category has some compositional overlap with law school graduates who fail the bar but is not the same. Some “underutilized” J.D.s are licensed to practice law, and many of those who fail the bar work in the field (i.e. as paralegals), and would not meet Baker and Jorgensen’s definition. Still, the groups are similar and share important demographic characteristics. Baker and Jorgensen find that “underutilized” J.D.s had worse labor market outcomes than their peers. The authors don’t explore the relationship that licensure has to the underutilized J.D. group. In fact, they don’t make explicit use of the licensing question in any of their analyses. I’m indebted to them for identifying the 1993 National Survey of College Graduates as a useful tool for the study of law school graduates.¹¹ As I discuss below, that work is the best single source for tracking the long-term outcomes of those who fail the bar.

III. Description of Available Data Sources

While lawyers are studied intensively,¹² data on those who fail the bar is collected incidentally, if at all. In part, this is because the group is difficult to track. For example, designers of the massive “After the J.D.” project, which has been tracking several thousand young lawyers for nearly a decade, explicitly decided not to include law graduates who failed the bar because it could devise no method of identifying and finding them that would not be prohibitively expensive.¹³ For different reasons, the state bar studies that regularly go to some effort to understand the health of a state’s practicing attorneys never engage in follow-up with candidates who failed the licensing examination. Even law schools that attempt to track their alumni have trouble with survey response rates, especially among alums who failed the bar exam,¹⁴ though with creative incentives, this problem could probably be allayed.

11. In the course of performing my own research, I have verified many of Baker and Jorgensen’s results.
12. *See, e.g.*, After the J.D., The University of Michigan Law Alumni Data Set 1967–2000; Chicago Lawyers Survey, 1975; Chicago Lawyers Survey, 1994–1995; Survey of Lawyers in the Metropolitan New York Media Market, 1989; National Survey of Lawyers’ Career Satisfaction, 1984–1990. Many other databases and statistical studies are available on the American Bar Association website, <http://new.abanet.org/centers/diversity/Pages/statistics.aspx>.
13. Interview with Richard Sander on After the J.D. study design deliberations on this point.
14. For example, the Professional Development Survey, administered to 2,000 University of Michigan Law School graduates, sheds some light on how bar exam outcomes drive response rates for alumni follow-up surveys. Ninety-four percent of the survey respondents reported that they had passed a bar exam, but the true figure (based on data for similar schools and for UM data from later cohorts) should have been closer to 85 percent. Working backwards from the overall response rate reported in the survey and the bar passage rates of those respondents, only 20–25 percent never-passers appear to have responded to the professional survey (compared to a 60–65 percent response rate for bar-passers). The resulting selection

Consequently, much of the task in this article is to use second-best data sources and triangulate among them to create a rough picture of this group and their long-term outcomes. I rely principally on five resources: LSAC's 1994 Bar Passage Study dataset, the 1993 cohort of the National Survey of College Graduates dataset (used by Baker and Jorgensen), studies commissioned by various state bars (most of which were authored by Stephen Klein for the State Bar of California), the After the J.D. dataset, and the transcripts of roughly two hundred interviews our research staff conducted on law school graduates who failed the bar examination. A number of other sources play helpful supporting roles.

The Bar Passage Study. LSAC's Bar Passage Study dataset consists of LSDAS files, law school files, bar passage information, and entering surveys for more than 24,000 students entering law school in 1991. A portion of the sample was sent three follow-up surveys to track how career aspirations, expectations, and experiences changed between the time they entered school and six months after they graduated. The study has been an invaluable resource for legal educators and state bar authorities who want to understand what factors affect bar passage. The benefits of the study to this work are numerous—it allows me to identify those who fail the bar with certainty. It also is a good source for understanding the academic and demographic characteristics of ABA law students. But the dataset has drawbacks. The study tracks only short-term post-graduation outcomes (the last of the follow-up surveys collected salary and employment information six months out of law school), so it is not set up to say anything about life trajectories. Also, the sample was taken from disproportionately selective law schools, since unaccredited law schools—which tend to turn out graduates who fail the bar in droves, are not included. And because the historically black law schools *are* included, racial disparities in bar passage rates and post-graduation outcomes are exaggerated since the sample collects the weakest minority law students without collecting the weakest white students, who generally attend non-ABA schools. Finally, the study's bar outcome data is flawed because bar information for a portion of the sample was collected solely from pass lists, so successful bar attempts were reported while unsuccessful attempts were not reported. This biases the study's bar passage rates upward.¹⁵

bias calls into question research results that rely on this data as an accurate record of bar outcomes. *See, e.g.*, Richard O. Lempert, David L. Chambers & Terry K. Adams, Michigan's Minority Graduates in Practice: The River Runs Through Law School, 25 *Law & Soc. Inquiry* 395 (2000).

15. "A caution in these data is that the earliest pass information for 967 (approximately 4 percent) of these students was obtained only from public lists of passing applicants published by jurisdictions unwilling to provide bar passage information for this study. Public lists do not include names of failing examinees. Thus, including those 967 students in counts of those who passed the first time could slightly inflate the reported first-time pass rates." Linda F. Wightman, User's Guide: LSAC National Longitudinal Data File 10 (1999), *available at* www.law.ucla.edu/sander/Systemic/Data.htm.

The National Survey of College Graduates. My resource for long-term outcomes is the 1993 National Survey of College Graduates, a dataset that rose from a novel effort by the Census Bureau to research college graduates, generally, and graduates from science and technical programs, specifically. The study contains survey responses about the education, career, and family life of more than 130,000 American college graduates; those results were matched to demographic information collected in the 1990 Census. The sample includes 3,080 law school graduates, 2,072 of whom are lawyers, and 308 of whom seem to be graduates who were unable to pass a bar exam.¹⁶

The advantage of Census data like this is that it is truly comprehensive—non-participation rates vary between 2 percent and 5 percent—and its samples tend to be reliably descriptive of the entire population. The disadvantages, for my purposes anyway, are twofold: (1) Census data questions are generic, and usually fail to capture key nuances important in understanding individual fields and professions; and (2) the data is not longitudinal. It does, however, cover three points in time for each respondent by connecting the 1993 survey information to the 1990 Census data on career and earnings, and by asking survey respondents to reflect on a previous reference period (in 1988). Since much of the purpose of this work was to understand the professions chosen by American college graduates, the survey has specific questions about the timing of graduate school and the specific degrees secured (which allows us to know which respondents have a J.D.). It also asks about licensing, which in combination with questions about the reasons for taking a job out-of-field, helped us identify those who probably failed the bar.¹⁷ Identifying those likely to have failed the bar was still difficult, even though the survey asked about licensing and field of work. The challenge lies in distinguishing who failed the bar exam and ended up in a non-legal job from law school graduates who chose to opt out of the legal profession. Similarly, it is difficult to distinguish those who failed the bar and who stay in the legal profession (as non-attorneys, in contract document review positions, for example) from law professors or judges/law clerks.¹⁸ As a result, some amount of misclassification is inevitable.

16. Questions about post-secondary degrees, employment settings, and licensing allow us to identify law school graduates and practicing attorneys. The licensing question in combination with questions about the reasons for taking a job out-of-field helped us identify subjects who probably failed the bar.
17. The Census conducted a similar survey in 2003, but because the questions about licensing were dropped, I was not able to make use of this later cohort to create panel data.
18. The group of NSCG subjects that I have identified as unsuccessful bar applicants includes subjects who are:
 - Non-licensed law school graduates who reported their job as “lawyer/judge”;
 - Non-licensed law school graduates who ended up working outside of their field because suitable work wasn’t available in-field;
 - Non-licensed law school graduates working part time who would prefer to work full-time, but a “suitable job” is not available to them; or
 - Law school graduates who are unemployed and listed “suitable work not available” as a reason for their unemployment.

From this group, I then removed any subject who attained an MBA or a doctoral degree.

The final coding seems to do the best job possible of roping in subjects who have failed the bar without accidentally roping in those who opted for a career in which licensure was not a requirement. Nevertheless, the group probably suffers from both Type I and Type II error. Thus, while this dataset is a useful resource, it has major limitations. It only can draw a rough sketch. For the most part, I report group median outcomes since any more sophisticated or sensitive analyses would assume that the dataset is more reliable than it really is.

Bar Studies and Reports. I've also culled information from dozens of studies commissioned by state bars—most importantly the California State Bar. All but one of these studies were performed by Stephen Klein, a psychometrician formerly at RAND, and they vary in topics from standard test validation studies to more comprehensive demographic research and evaluations of the fairness of the entire legal education process.¹⁹ Some of the studies were longitudinal so that the state bar could assess bar scores and passage rates over successive attempts rather than simply comparing first-time and repeat takers. These reports provide valuable insight into the long-range bar passage rates of those who take the exam since the studies track examinees over several sittings of the exam. Also, the California Bar is atypical in that California has a disproportionate number of non-ABA law schools (including an entire class of law schools that are accredited by the state), and the bar exam is thought to be one of the hardest exams in the country (topping cut score lists even after controlling for the high proportion of non-ABA law school graduates).²⁰

After the J.D. I make brief use of the After the J.D. study, a study of a national sample of 5,000 attorneys in their first ten years of practice. The sample was surveyed in 2002, and follow-up surveys (not yet available to the public) were administered in 2007. Self-reported information about the number of bar attempts the attorneys took in the jurisdiction in which they practice can be used to study lawyers who had failed a bar exam at least once. But the study tracked the careers of practicing lawyers, so law school graduates who never passed a bar exam were left out of the study by design.

Interviews with Law School Graduates Who Failed the Bar. Finally, I rely on new qualitative research performed by Project SEAPHE, at UCLA School of Law. Over the last year, we have conducted nearly two hundred, 90-minute interviews with recent law school graduates²¹ who failed a bar exam. Some had gone on to pass during a subsequent administration. Most had not. The principal research question motivating the interview project was to understand

19. Stephen Klein's psychometric studies are available at <http://www.seaphe.org/topic-pages/california-bar-lawsuit.php>.

20. The bar passage rates for ABA law school graduates in California, New Hampshire, and the District of Columbia during the 2005 administration of the bar exams were 53-54 percent—significantly lower than the 69 percent national passage rate for ABA graduates that year. See 2005 Statistics, *The Bar Examiner*, *supra* note 1, at 25-26.

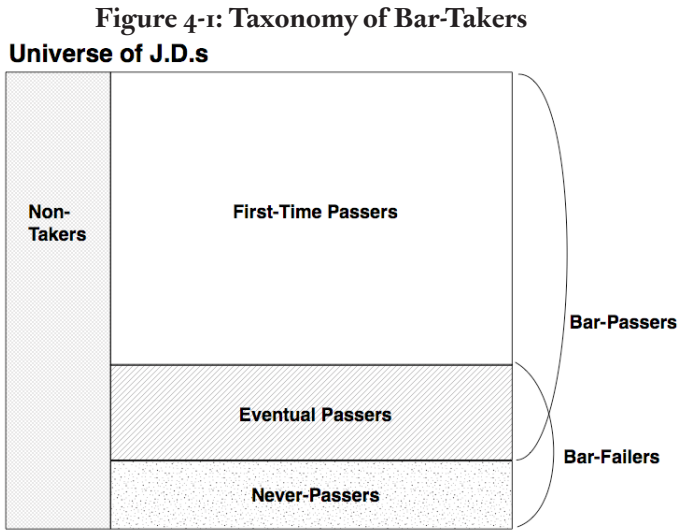
21. We restricted the sample to interviewees that had graduated law school in or after 2005. We used Craigslist posts around the country to recruit subjects.

the link between bar failure and law school experience, especially with respect to minority students. We oversampled minorities for this reason. But even this non-representative sample is helpful in understanding the most universal economic and psychological consequences of failing the bar exam.

IV. Who Are We Talking About?

There are several categories of graduates who took and failed a bar examination, so I've developed a nomenclature to avoid confusion. Law school graduates who passed the bar on their first attempt are *first-time passers*, while graduates who failed their first bar exam but passed on a subsequent attempt are called *eventual passers*. First-time passers and eventual passers collectively make up the group of *bar-passers*—in other words, they are graduates who have passed a bar exam at any point. Graduates who failed a bar exam at any point are referred to as *bar-failers*. This category consists of eventual passers as well as *never-passers*—that is, the bar-takers who never successfully pass an examination either because they fail subsequent examinations, or because they never try again (about 12.5 percent of those who fail make no later attempts to pass²²). Eventual passers are both bar-passers and bar-failers because, while they were admitted to a bar, by definition they also have failed at least one bar exam. Finally, not every law school graduate takes a bar exam; some graduates pursue legal careers that do not require admission to a bar (e.g., legal academia), and some opt to leave the profession altogether. Graduates who do not attempt a bar are neither bar-passers nor bar-failers.²³

22. Stephen Klein, A Comparison of Initial and Eventual Passing Rates on the California Bar Examination, PR-87-5 (1987), *available at* www.seaphe.org/topic-pages/california-bar-lawsuit.php. I am quoting the statistic from the 1977 cohort because this cohort had the opportunity to take the bar up to seven more times. The cohorts from later years had correspondingly fewer opportunities to retake the bar exam.
23. By my definitions, a law school graduate who passed his first bar exam and then later took a bar in another state and failed is still considered both a “bar-passer” and a “first-time passer.” This is probably the best classification for this small, unusual group of people since they are not barred from the profession and since they avoided the anxiety of a failed first attempt. In any case, this group is so small that we need not fret over their categorization for now, especially when accurate data on those who fail the bar are so lacking.



This article focuses on the never-passers, the group that bears the brunt of the consequences caused by the licensing requirement. This is the group wholly blocked from practicing law after a substantial investment of time, money, and effort. But eventual passers absorb important costs, too. The short-term costs discussed in Part VII are relevant since these costs visit the bar-failer when the never-passers and eventual-passers have not yet sorted themselves out. But the short-term costs to never-passers are not wholly applicable to eventual passers since the eventual-passers leave law school with better grades and more opportunities. So I discuss here the consequences of failing the bar exam to the graduates who do eventually pass.

Most eventual passers succeed on their second attempt (64 percent in California—and the proportion is much higher for graduates of ABA law schools). But that still leaves a substantial portion of eventual passers who take more than a year to pass the bar exam. Eighteen percent of eventual passers in California pass on their fourth attempt or later.

Table 4-1 reports the proportion of eventual-passers (as opposed to first-time-passers). The table shows large racial disparities, consistent across multiple sources. Twenty-three percent of black lawyers in the After the J.D. dataset self-reported that they took the bar exam more than once, compared with 16 percent of Hispanic lawyers and 8 percent of white lawyers. The Bar Passage Study data show similar patterns, though as I've already mentioned, it tends to exaggerate racial discrepancies of bar outcomes because of the skewed sample (including historically black law schools, and not including the unaccredited law schools from which academically weak white law students are likely to graduate.) But restricting the sample to law students with LSAT scores above a threshold score of 29 (on the old 49-point scale) reveals the

same pattern—15 percent of black lawyers passed the bar on their second or later attempt, compared to 12 percent of Hispanics and 4.5 percent of whites.

The causes of these racial disparities are discussed in more depth in Part VI. The primary reason for reporting bar outcomes by race for the purpose of this section is to provide a more accurate basis of comparison across sources, since bar passage rates are heavily influenced by the demographic make-up of the bar-takers in the sample.

Table 4-1: Proportion of Lawyers/Bar-Passers that Took the Bar More than Once, By Race

| | White (%) | Black (%) | Hispanic (%) | Asian (%) |
|-------------------------------|-----------|-----------|--------------|-----------|
| After the J.D. | 8.0 | 23.3 | 15.9 | 17.4 |
| LSAC BPS | 4.9 | 20.9 | 14.9 | 12.2 |
| California 1977 cohort | 21 | 53 | 46 | 39 |
| California 1985 cohort | 28 | 65 | 51 | 43 |
| California 1990 cohort | 16 | 49 | 31 | 29 |
| California 1997-2000 | 18 | 34 | 31 | 24 |

California Bar statistics come from various statistical reports authored by Stephen Klein and Roger Bolus for the California State Bar, available at www.seaphe.org/topic-pages/california-bar-lawsuit.php.

Tables 4-2 and 4-3 use the AJD data to examine whether the experience of having failed a bar exam has a detrimental effect on the earning capacity of eventual-passers. The tables suggests there might be some career costs, as eventual passers tend to earn less than first-time passers from the same tier of law school, or the same stratum of law school grades.²⁴ Much of the difference may be attributable to selection effects, due to the crudeness of the law school GPA bands and law school tier categories.

24. The counter-intuitive findings in the first row of Table 4-3 (showing that eventual passers from Tier 1 schools earn more than first-time passers) is most likely a product of the diversity programs at large law firms. Over three-quarters of the eventual passers from these top tier schools are minorities.

Table 4-2: Median Salaries for Eventual Passers and First-Time Passers, By Law School GPA

| | First-Time Passers | Eventual Passers |
|-----------------------|---------------------------|-------------------------|
| 3.75 and above | \$94,000 | \$85,000 |
| 3.5-3.74 | \$92,750 | \$63,000 |
| 3.25-3.49 | \$75,000 | \$62,000 |
| 3.0-3.24 | \$62,000 | \$60,250 |
| 2.75-2.99 | \$52,750 | \$52,000 |
| 2.5-2.74 | \$48,500 | \$54,500 |
| 2.25-2.49 | \$50,500 | \$48,500 |

Table 4-3: Median Salaries for Eventual Passers and First-Time Passers, By Law School Tier

| | First-Time Passers | Eventual Passers |
|---------------|---------------------------|-------------------------|
| Tier 1 | \$135,000 | \$145,000 |
| Tier 2 | \$104,500 | \$65,000 |
| Tier 3 | \$78,000 | \$61,000 |
| Tier 4 | \$70,000 | \$59,500 |
| Tier 5 | \$60,000 | \$50,000 |
| Tier 6 | \$60,000 | \$55,000 |

I found similar patterns in other measures of career success: Eventual passers are more likely to be unemployed, to be working part-time, and to be dissatisfied with their job than first-time passers.²⁵ Most of these effects aren't statistically significant in regressions that control for law school grades, suggesting that the event of bar-failure is not causing any additional harm above what the eventual passer's poor law school performance would have caused anyway. But the effect of first-time bar passage did retain a statistically significant \$7,300 premium in an OLS regression on income when controls for law school grades were included. Adding controls for law school tier caused the effect of first-time bar passage to shrink to just a few thousand dollars and lose significance.

While all law school graduates tend to rack up a significant amount of education debt, eventual-passers seem to leave school with a little more. The median education debt for eventual passers in the After the J.D. dataset is \$70,000, compared to \$60,000 for first-time passers.

25. 9.2 percent of eventual passers are underemployed (unemployed or working part-time) compared to 5.6 percent of first-time passers. 35.9 percent of the eventual passers are moderately or extremely dissatisfied with their compensation at work, though this figure is not too far off from the 30.4 percent of first-time passers. Likewise, eventual passers are more likely (but only slightly more likely) to be looking for another job than first-time passers—16 percent compared to 13 percent.

A theme that will re-emerge later in this paper is the possibility that the hardships of failing a bar exam might be minimized or masked by the slump over the last couple decades in the salaries of lawyers, particularly solo practitioners and attorneys at non-elite firms. And yet, despite the modest earnings and the substantial school debt, lawyers are extremely satisfied with their decision to go into the legal profession. Eventual passers keep step with first-time passers in this regard, with slightly more than 75 percent of both groups reporting extreme or moderate satisfaction with their decision to become a lawyer.

The post-graduation outcome measures in the BPS dataset are less reliable than the After the J.D. measures because the last of the surveys were mailed just four to six months after law school graduation, when bar outcomes and job prospects were tenuous or unknown. Some subjects were contacted by phone if they did not respond to the survey, which makes their responses more reliable but less directly comparable to the rest of the survey participants.²⁶ But the outcomes complement and corroborate the findings from the After the J.D. dataset. More than 60 percent of eventual passers reported starting salaries less than \$30,000, compared to just 32 percent of first-time passers. Less than a year out of law school, I would expect some amount of short-term financial trauma, as those who fail the bar might have to take time off of work to prepare for their second exam attempt. Job satisfaction, measured by expectations to remain in their current jobs and by reported satisfaction levels with their current employer, was significantly lower for eventual passers compared to first-time passers.²⁷ And just like the After the J.D., the BPS dataset suggests that eventual passers have slightly higher educational debt loads; 38 percent left law school with more than \$50,000 in debt compared to 30 percent of first-time passers.²⁸ The nexus between class and bar passage is discussed in Part VI.

V. How Many Never-Passers Are There?

The obvious starting place also is the first analytical question without a clear answer: How many law school graduates attempt but never pass a bar exam? I estimate the figure at about 150,000 with plenty of room reserved for error. Here's how I figure:

According to the most recent Census estimates (from 2007), about 1.2 million Americans in the workforce describe themselves as attorneys. The ABA, which gathers data on those licensed in jurisdictions around the country, reports a similar number—1,143,358. The population of law graduates in the United States is a good deal larger. A little over two-thirds of J.D.-holders are

26. LSAC National Longitudinal Bar Passage Study User Guide, at 4-5 (available upon request).

27. Wightman, User's Guide, *supra* note 15, at 4-5.

28. These figures are lower than those from the After the J.D. dataset because the BPS subjects were in law school earlier than those in the After the J.D. dataset. Both figures are unadjusted.

practicing law (see the 1993 NSCG statistics in Table 5-1). So if there are 2.1 million lawyers in the U.S., the number of J.D.-holders is about 1.7 million, or perhaps 1.65 million taking into account that the Census and ABA lawyer counts include immigrant lawyers who got their legal education abroad. The 500,000 difference between J.D.s and lawyers is made up of (a) graduates who never took a bar exam, (b) graduates who passed a bar exam and willingly chose to pursue a different career, and (c) the never-passers.

We can use the 1.65 million J.D. holders figure to estimate the number of never-passers. Ultimate rates of bar-failure are reported in Table 5-1, but before comparing the rates, it is important to recognize that they do not all report the same statistic. The Bar Passage Study dataset and the two NSCG statistics report the percentage of J.D.s who become never-passers, while statistics taken from the California State Bar's studies report the percentage of *bar-takers* who ultimately become never-passers. The rates vary across a seven point spread—from 5 percent to 12 percent—a perfect illustration of the sort of ambiguities and unknowns that make this research difficult. As I explained earlier, the BPS rate of 5 percent is almost surely an under-estimate because of its unrepresentatively strong sample of law students and compromised bar results. But the California statistics are over-estimates because they cannot account for law school graduates who chose not to take the bar exam. California's bar examinees also are disproportionately likely to graduate from non-ABA schools, and the California exam is harder than average. The 10 percent estimate from NSCG seems pretty sound, which gives us a final estimation of 165,000 never-passers.

**Table 5-1: Proportion of J.D.s (Bar-takers)
That Become Lawyers and Never-Passers**

| Source | Lawyers (%) | Never-Passers (%) |
|----------------------------|-------------|-------------------|
| Bar Passage Study (1994) | 88.2 | 4.8 |
| NSCG (1993) | 67.3 | 10.0 |
| NSCG youngest | 60.7 | 13.9 |
| California Bar (1977) | | 12 |
| California Bar (1985) | | 17 |
| California Bar (1990-1991) | | 9-11 |
| California Bar (1997) | | 12 |

Working from a different direction, I've identified 308 never-passers in the NSCG's national sample of 136,731 college graduates. Thus, approximately 0.23 percent of college graduates end up becoming never-passers. The proportion is a little higher—0.27 percent—among college graduates with bachelor's degrees or higher. (A sizable portion of the NSCG is made up of holders of two-year associates degrees.) In 2007, there were about 43 million employed college

graduates in the United States,²⁹ or about 50 million to adjust for the non-working and unemployed. So 0.27 percent of 50 million bachelor's-holders gives us an estimated 135,000 never-passers. I've split the difference between these two estimates to arrive at the 150,000 estimate.³⁰ Though the upper- and lower-bound estimates leave a 30,000 person-wide berth, even the lower-bound estimate is an alarmingly large figure for this potentially vulnerable group.

The age distributions of J.D.-holders and those who fail the bar in the 1993 NSCG hint that the bar passage problems might be getting worse over time. The youngest cohort of J.D.s is more likely to be identified as never-passers than the J.D.s in older cohorts. This might be a product of my methodology for identifying those who fail the bar, since older never-passers, who long ago moved on to another field of work, could be less likely to answer the survey questions about licensure and out-of-field work in a manner that would allow for easy identification. But the age skew might be tracking a genuine increase in the risk of bar failure due to tougher bar exam requirements.³¹

29. U.S. Census Report Table 599, *available at* www.census.gov/compendia/statab/tables/09s0599.pdf.
30. The ABA provides a precise number of J.D. degrees awarded by ABA-accredited schools between 1981 and 2007. Using the first of the methods described here, there are about 100,000 never-passers younger than age fifty (that constitutes 10 percent of the 1.03 million J.D.s awarded in the period). J.D. and LL.B. Degrees Awarded 1981-2006, *available at* www.abanet.org/legaled/statistics/stats.html.
31. While the California studies of eventual passage rates suggest the bar passage rates in that state are on the rise, national bar passage rates seem to be decreasing. See 1995 Statistics, The Bar Examiner, *supra* note 1, at 23, 26; 1998 Statistics, The Bar Examiner, *supra* note 1, at 6, 8. In 1996 and 1997, the nationwide passing rate held steady at 70 percent. See 1996 Statistics, The Bar Examiner, Vol. 66 No.2 at 15, 17 (May 1997), *available at* www.ncbex.org/uploads/user_docrepos/660297_statistics1996.pdf; 1997 Statistics, The Bar Examiner, Vol. 67 No.2 at 17, 19 (May 1998), *available at* www.ncbex.org/uploads/user_docrepos/670298_1997statistics.pdf. The Bar Examiner does not report eventual bar-passage rate, so if bar-takers are becoming more persistent and making more attempts, these two trends might not actually be in conflict.

Table 5-2: Sample Sizes by Age Group
Age groups are determined using the age from the 1990 census NSCG 1993

| | <30 (%) | 30-39 (%) | 40-49 (%) | 50-59 (%) | Total <60 (%) |
|----------------------|-------------------|------------------|------------------|------------------|------------------|
| College | 22,122* (20.8) | 39,980 (37.5) | 30,566 (28.7) | 13,965 (13.1) | 107,721 (100) |
| J.D.s | 519 (18.0) | 1,120 (38.8) | 882 (30.6) | 363 (12.6) | 2,884 (100) |
| Lawyers | 344 (17.6) | 790 (40.5) | 598 (30.7) | 219 (11.2) | 1,951 (100) |
| Never-Passers | 76 (26.5) | 95 (33.1) | 76 (26.5) | 40 (13.9) | 287 (100) |

*College graduates restricted to 1990 Census ages twenty-three and older. The age distributions of college graduates and J.D.s in the youngest age band are similar; fewer than 5 percent of college graduates were removed using this restriction.

Of course, most law school graduates *do* go on to practice law. But notice that the youngest cohort of law school graduates is a little less likely to be practicing law than the other cohorts. Table 5-3 explores lawyering rates by degree cohort (instead of age) and the pattern gets stronger. Newer J.D.s are less likely to practice law. The 2003 NSCG corroborates this—the sample of J.D.s in the 2003 study had a lower proportion of practicing attorneys than the 1993 sample of J.D.s. The decrease in lawyering rates could be a sign that the J.D. degree has broadened its applicability to other fields, giving law graduates more choice in their career paths. A less optimistic (and, regrettably, more plausible) explanation, borne out by the layoffs and hiring patterns in the legal market today, is that the legal profession was shrinking during a period that legal education continued to expand.

Table 5-3: Lawyering Rate By Degree Cohort

| | Percent Lawyers |
|-------------------------|-----------------|
| 5 years or fewer | 59.6 |
| 6-15 years | 68.9 |
| 16-25 years | 72.4 |
| 26-35 years | 65.2 |

Cohorts created by amount of time elapsed since receiving the law degree.

VI. Who Are the Never-Passers?

The most striking difference between J.D.-holders and those who never pass the bar is the disproportionate number of minority never-passers. I've already alluded to the racial disparities in bar-outcomes, but the problem merits special attention and exposition.

Table 6-1 reports the chances that a bar-taker will fail the bar on her first attempt. This statistic is the chance that a bar-taker will fail (whether eventually passing or never doing so). Consequently, black and Hispanic law school graduates are at least twice as likely as white graduates to become a never-passer. Table 6.2 reports the chance that a law student or bar-taker of a given race has failed a bar exam and has never gone on to pass it. While the racial gaps in the Bar Passage Study dataset are inflated because of sample bias (including historically black institutions but excluding non-ABA law schools), the disparities in the California Bar and NSCG samples confirm that a nationwide racial imbalance in bar outcomes exists and it is not just a product of sample selection.

Table 6-1: Risk of Failing the Bar on the First Attempt, by Race, Comparing Multiple Sources

| | White (%) | Black (%) | Hispanic (%) | Asian (%) |
|-----------------------------|-----------|-----------|--------------|-----------|
| LSAC BPS | 8 | 38 | 25 | 19 |
| California-1977 cohort | 29 | 70 | 57 | 52 |
| California-1985 cohort | 38 | 81 | 66 | 57 |
| California-1990 cohort | 22 | 65 | 41 | 40 |
| California-1997-2000 cohort | 27 | 58 | 44 | 35 |
| Colorado-1990-1997 | 14 | 46 | 29 | 20 |
| New Jersey-1988-1989 | 17 | 47 | | |
| New Mexico-1976-1980 | 14 | | 48 | |
| Texas Bar Study (2004) | 15 | 47 | 31 | 20 |

Source for Colorado, New Jersey, and New Mexico statistics: Stephen Klein & Roger Bolus, The Size and Source of Differences in Bar Exam Passing Rates Among Racial and Ethnic Groups, *supra* note 8 at 9. Source for Texas statistics: Stephen Klein & Roger Bolus, Analysis of July 2004 Texas Bar Exam Results by Gender and Racial/Ethnic Group, *infra* note 32.

**Table 6-2: Never-Passer Rates Broken Down By Race,
From a Range of Sources**

| | NSCG (J.D. %) | Bar Passage Study (J.D. %) | Bar Passage Study (Bar-takers %) | California Bar 1990-1991 cohort (Bar-takers %) | California Bar 1985 cohort (Bar-takers %) |
|--------------------------|------------------|----------------------------------|--|---|--|
| White | 8.1 | 3.1 | 3.3 | 7-8 | 14 |
| Black | 17.1 | 20.1 | 22.1 | 30-31 | 45 |
| Hispanic/ Latino | 17.1 | 11.4 | 12.1 | 13-15 | 33 |
| Asian | 16.0 | 7.1 | 7.8 | 15-17 | 24 |
| Black- White Ratio | 2.1:1 | 5.9:1 | 6.7:1 | 3.9:1 | 3.2:1 |
| Hispanic- White Ratio | 2.1:1 | 3.5:1 | 3.7:1 | 1.9:1 | 2.4:1 |
| Asian- White Ratio | 2.0:1 | 2.3:1 | 2.4:1 | 2.1:1 | 1.7:1 |

Sources for California figures: Stephen P. Klein & Roger Bolus, Comparisons of Eventual Passing Rates in the 1990 and 1991 Cohorts, PR-94-03 (1994); Stephen P. Klein & Roger Bolus, Comparisons of Eventual Passing Rates in the 1985 and 1986 Cohorts, PR-88-6 (1988).

I include this demographic data for purely descriptive purposes, not to suggest that race has a causal relationship with failing the bar examination. In fact, the bar passage study data confirms what bar exam validation studies had found before: that race does not play a statistically significant role in bar passage when LSAT scores, undergraduate GPA, and law school GPA are controlled.³² Table 6-3 provides complete regression results. In other words, minority J.D.s are not more likely to become never-passers *because* they're minorities; rather, they are more likely to become never-passers because their LSAT, undergraduate GPA, and law school grades are lower on average than those of white law school graduates.

While the disparity between white and black/Latino bar passage rates are widely acknowledged and studied, the low figures for Asian lawyers, and the high ones for those of Asian descent failing the bar, might come as a surprise. The explanatory factor seems to be national origin: a third of the Asian J.D.s

32. Stephen Klein & Roger Bolus, The Size and Source of Differences in Bar Exam Passing Rates Among Racial and Ethnic Groups, *supra* note 8, at 12; Stephen Klein, An Analysis of the Relationships Between Bar Examination Scores and an Applicant's Law School, Admissions Test Scores, Grades, Sex, and Racial/Ethnic Group, 79-1P (1979) (showing in Table 4 Regressions that adding race and gender to the set of controls do not improve the explanatory models as long as LGPA, LSAT, and school tier are included); Stephen Klein & Roger Bolus, Analysis of July 2004 Texas Bar Exam Results by Gender and Racial/Ethnic Group (2004), available at http://www.ble.state.tx.us/one/analysis_0704tbe.htm [hereinafter Texas Bar Study].

in the youngest cohort of the NSCG were born outside the United States, and the proportion is much higher for Asian J.D.s in older cohorts. More than half of the Asian never-passers in the youngest cohort are foreign-born, nearly 90 percent for Asian bar-failers in the next age cohort. In fact, for all races except Hispanic, foreign-born J.D.s were more likely to end up as bar-failers than the U.S.-born, suggesting that foreign culture and language barriers might cause a real disadvantage in the licensure process (though we cannot know this for sure, since foreign origin might correlate to other factors like socio-economic status or low test scores). These demographics are consistent with a 2006 study of the New York bar exam,³³ which reported that foreign-educated candidates generally had much lower pass rates than domestic-educated bar-takers (46.3 percent passing, compared to 84.4 percent for domestic-educated takers). The Bar Passage Study dataset does not contain information about foreign origin, but the regression reported above analyzed a similar variable for subjects that grew up in a household speaking a language other than English. This ESL variable has a small but significant effect on first time bar attempts. The effect shrinks and loses significance on eventual bar passage rates, so ESL subjects might be able to overcome the language or cultural barriers that affected their first attempts.

33. Andrew Mroch et al., Impact of the Increase in the Passing Score on the New York Bar Examination: February 2006 Bar Administration at 81 (2006), *available at* www.nybarexam.org/press/press.htm [hereinafter New York Bar Study].

Table 6-3: Logistic Regression Results from the Bar Passage Study

| Predictor | First Time Bar Passage | Eventual Bar Passage |
|-------------------------------|------------------------|----------------------|
| Male | 0.19*** (0.05) | 0.17* (0.07) |
| Hispanic | -0.22 (0.33) | -0.12 (0.40) |
| Asian | -0.17 (0.11) | -0.11 (0.16) |
| Black | 0.01 (0.08) | -0.07 (0.11) |
| Other | -0.09 (0.20) | -0.11 (0.26) |
| Law School GPA (standardized) | 1.38*** (0.04) | 1.36*** (0.05) |
| UGPA | 0.46*** (0.07) | 0.52*** (0.09) |
| LSAT | 0.10*** (0.01) | 0.09*** (0.01) |
| Tier | 0.18*** (0.03) | 0.24*** (0.04) |
| Family Income | 0.04 (0.03) | 0.13** (0.04) |
| English as a Second Language | -0.17* (0.07) | -0.05 (0.10) |

*Sample includes only law school graduates that attempted the bar exam. For first time bar passage, 1= took and passed the bar the first time. For eventual bar passage, 1= took and passed the bar either the first time or on a subsequent attempt. Significance levels: * = $p < 0.05$, ** = $p < 0.01$, *** = $p < 0.001$.

Gender

Gender seems to play a minor role in bar passage rates. A few studies have found that men slightly out-perform women on the multistate bar exam, but women regain most of the ground on the essay questions.³⁴ Table 6-3 shows a significant gender effect in bar passage using the Bar Passage Study dataset, even after controlling for credentials and law school grades. But the effect is

34. *Id.* at 47; Stephen Klein, Research on the California Bar Examination: A Ten Year Retrospective, PR 82-5 (1982), available at www.seaphe.org/topic-pages/california-bar-lawsuit.php. After controlling for admissions credentials, the differences were minor; women performed better on the essays and worse on the multistate bar exams.

small—equivalent to two LSAT points, or an eighth of a point of law school GPA. In California, females consistently had higher initial and eventual bar passage rates than their male peers, and they were also more likely to make subsequent bar attempts when they did fail.³⁵

Table 6-4: Chance that a J.D. is a Never-Passer, By Gender

| | Male (%) | Female (%) |
|-------------------------------|----------|------------|
| NSCG | 9.6 | 10.9 |
| NSCG—young | 12.6 | 15.6 |
| LSAC Bar Passage Study | 4.0 | 4.8 |
| LSAC BPS—bar-takers only | 4.7 | 5.6 |
| California (1977 cohort) | 13 | 9 |
| California (1997-2000 cohort) | 15 | 13 |

Socio-Economic Status and Foreign Origin

Socio-economic background of law school graduates has an appreciable relationship to bar passage. Table 6-5 shows the average parent educational index score for NSCG subjects.³⁶ The index reports a sort of educational percentile—it describes the percentage of the national population around the same age as the subject’s parents that have the same education or less. For example, if a subject’s father had an index score of 75, it means that 75 percent of Americans the father’s age were as educated, or less educated, than the father, and 25 percent were more educated. The index was constructed using Public Use Microdata Samples information and the index score for both of the subject’s parents were averaged, and then readjusted to correct for regression to the mean.³⁷

35. Stephen Klein, *An Analysis of the Relationship Between Initial Score and Eventual Pass/Fail Status on the California Bar Examination*, 81-9PR (1982), *available at* www.seaphe.org/topic-pages/california-bar-lawsuit.php (finding that 4 percent of males made no subsequent attempt at passing a bar after failing once, compared to 2 percent of females).
36. Parental education is the only variable tracking socio-economic status in the survey.
37. While the NSCG survey collected information about both father’s and mother’s education, it did not collect the age of the parents. For the purposes of creating the education level index, I estimated the age of the parents by adding twenty years to the age of the respondent.

**Table 6-5: Average Educational Index of Parents
in the NSCG (on a scale of 0-low to 100-high)**

| | White | Black | Hispanic | Asian |
|---------------|-------|-------|----------|-------|
| College | 75.1 | 58.7 | 62.5 | 72.9 |
| J.D.s | 83.2 | 70.5 | 65.7 | 76.7 |
| Lawyers | 83.3 | 72.8 | 67.2 | 75.3 |
| Never-Passers | 78.9 | 70.5 | 60.5 | 72.8 |

The socio-economic background of law school graduates is strikingly elite. Minorities bring some socio-economic diversity to higher education and to the legal field, but they, too, come from relatively well-educated families (on average).

Across the board, never-passers have lower average indexes than the J.D.s that become lawyers. Socio-economic status is correlated with other determinants of success on the bar exam (like pre-admissions credentials and law school quality), but socio-economic status also seems to be *causally* related to bar performance.

The bar passage study regressions reported in Table 6-3 examined whether socio-economic status, in the form of parental income, has an effect on bar passage that operates independently from the usual predictors (LSAT, undergraduate GPA, and law school performance). The results of logistic regressions for first time and eventual bar passage rates suggest that for the first bar attempt, socio-economic background does not affect bar passage, but it *does* have a statistically significant impact on eventual bar passage. In other words, a low socio-economic status law school graduate is just as likely to pass his first bar exam as a graduate from the elite class, all other things being equal. But if he doesn't pass the first time, then socio-economic status will affect the chances that he'll become a never-passer. This makes some intuitive sense: while law graduates from higher socio-economic backgrounds might have the support or financial security to adequately prepare for multiple sittings of the bar exam, graduates without a financial safety net might have to juggle a job. Law school graduates with fewer financial resources also might not be able to afford a second BarBri course, though enrollment in a BarBri course doesn't seem to be a significant predictor of bar outcomes.³⁸

38. A study of the Texas bar examination found that essentially all of the bar applicants had taken a commercial bar review course. The course itself was not a predictor of success. But some of the activities applicants did within the context of the bar review course (e.g., attend lectures every day, use Internet lessons) had statistically significant benefits. Our field research with those who fail the bar mirrors this finding. Apparently everybody shovels out the money for at least one BarBri-like course. Bar courses are as ubiquitous among those who fail as those who pass. See Texas Bar Study, *supra* note 32.

Expectations/Aspirations during Law School

Because the Bar Passage Study dataset tracked law students longitudinally through school, it provides a rare opportunity to learn the expectations and attitudes that never-passers had in law school before they experienced bar exam failure. Never-passers entered law school wanting the same things, more or less, that bar-passers wanted. About one in seven wanted to work in a large private law firm, and just under a tenth hoped to get a judicial clerkship. Never-passers were more interested in government and public interest work than were bar-passers, but by and large, the aspirations of the two groups were similar.

**Table 6-6: Job Aspirations at the Time of Enrollment
(Entering Survey Questionnaire from the BPS)
“Setting in which you would most like to work once you graduate”**

| | Bar-Passers (%) | Never-Passers (%) |
|---|-----------------|-------------------|
| Judicial Clerkship | 13.2 | 9.1 |
| Academic | 2.7 | 3.6 |
| Prosecutor | 8.5 | 9.2 |
| Large Private Firm | 15.5 | 14.3 |
| Mid-size or Small Firm | 28.4 | 22.9 |
| Solo Practice | 2.2 | 4.6 |
| Government Agency or Public Interest Group | 13.7 | 17.9 |

Curiously, law students who expressed an initial interest in government agency or public interest jobs were more likely to fail the bar exam on their first attempt, *even after controlling for entering credentials and law school tier*. For those most interested in careers in public interest, the negative effect persisted after adding a control for law school GPA as well. The size of the effect was about the same as losing three LSAT points, or half of an undergraduate GPA point. Since the effect persisted even after law school GPA was included as a control, three explanations seem plausible: (1) graduates who anticipate working in public interest put less effort or attention into bar exam preparation; (2) aspirations for these types of careers is tracking some unobserved academic weakness, like closed-mindedness or lower motivation; and/or (3) the course load of students pursuing careers in government or public interest was easier, and grade-

inflated. None of the other career interests had statistically significant effects, and the “public interest” effect shrunk and lost significance when looking at ultimate bar passage.

Table 6-7: Logistic Regression on Bar Passage Using the Bar Passage Study Dataset

| Predictor | Model 1 (without LGPA) | Model 2 (with LGPA) |
|-------------------------------|------------------------|---------------------|
| UGPA | 1.0*** (0.06) | 0.44*** (0.07) |
| LSAT | 0.17*** (0.00) | 0.11*** (0.01) |
| Tier | -0.11*** (0.02) | 0.15*** (0.03) |
| Public Interest aspiration | -0.32*** (0.09) | -0.29** (0.10) |
| Government aspiration | -0.30** (0.11) | -0.22 (0.13) |
| Law School GPA (standardized) | | 1.39*** (0.04) |
| Controls for other interests | Included | Included |

Sample includes only law school graduates that attempted the bar exam. For the first time bar passage outcome, 1= took and passed the bar the first time. Significance levels: * = $p < 0.05$, ** = $p < 0.01$, *** = $p < 0.001$.

Career aspirations shift after the students complete their first year of law school and have more information about the legal industry and, most importantly, their grades.

**Table 6-8: Career Aspirations Following the Second Year of Law School
(From the Second Follow-Up Questionnaire in the BPS)
“Setting in which you would most like to work once you graduate”**

| | Passers (%) | Never-Passers (%) |
|---|-------------|-------------------|
| Judicial Clerkship | Not asked | Not asked |
| Academic | 2.7 | 1.7 |
| Prosecutor | 8.5 | 8.0 |
| Large Private Firm | 15.5 | 1.7 |
| Mid-size or Small Firm | 28.4 | 29.5 |
| Solo Practice | 2.2 | 4.6 |
| Government Agency or Public Interest Group | 13.7 | 17.9 |

The never-passers dramatically changed their career expectations; less than 2 percent aspired to have a career at a large private firm, presumably because their grades and their experience getting summer work signaled that would not be a realistic option. Still, 44 percent anticipated practicing law, either at a firm or as a solo practitioner or prosecutor.³⁹

VII. What Happens in the Short-Term?

I’ve described the characteristics of law school graduates who become never-passers, but I haven’t yet said a thing about what happens to them. Now we enter truly uncharted waters.

The final survey administered in the Bar Passage Study collected post-graduation information about six months after law school graduation, so it provides a glimpse into the lives of never-passers just after receiving results

39. Again, students aiming to work at a government agency or in public interest suffered a statistically significant hit to first-time bar passage, even after controlling for entering credentials and law school tier. When law school GPA was introduced as a control, government agency remained significant but public interest did not (a switch from the findings from the earlier questionnaire). It is hard to tell exactly what is going on, but the weaker public interest students from the first survey may have migrated to interests in government agencies between the surveys. The effects of career aspirations lost significance when eventual bar passage was used as the dependent variable.

from their first unsuccessful bar attempt.⁴⁰ Naturally, never-passers start off their careers in much weaker positions than their peers who pass the exam. Only 19.6 percent of never-passers had a job lined up for themselves before the end of law school:⁴¹ 11.6 percent of that group had tentative job offers that presumably were revoked when the student failed the bar the first time. Eight of the 19.6 percent were unconditional job offers (which may have eventually expired.) By way of comparison, ultimate bar-passers were more likely to have a job lined up (33 percent), and most of the offers were unconditional (25 percent) rather than conditional. These statistics illustrate the endogeneity problem I described earlier—it’s easy to forget that the characteristics that cause somebody to fail the bar are also some of the most important factors for having career success, as a lawyer or otherwise. Since this information was collected before the bar passage study subjects had even graduated from law school, the disparity in job prospects could not have been directly related to bar exam outcomes. So while the bar exam serves as an important barrier to entry, it is not the sole hindrance to the career success of never-passers.

At the time of the third (final) follow-up survey, 52 percent of bar-failers were working full-time compared to 74 percent of first-time passers. More than a third were unemployed, and those who worked were more likely than first-time passers to be dissatisfied with their work assignments. Results from a logistic regression indicate that failing the bar exam has an independent effect on full-time employment, even when controls for law school grades and other measures of ability are included. This is not surprising, as we would expect the bar exam to serve as some real impediment to finding a job, at least in the short term.

Table 7-1: Employment Six Months After Graduation

| | 1 st time Passers (%) | Never-passers (%) |
|---------------------|----------------------------------|-------------------|
| Full Time | 73.7 | 52.0 |
| Part Time | 6.7 | 14.5 |
| Not Employed | 19.6 | 33.5 |

The field research with recent law school graduates who failed a bar exam echo the sentiment that never-passers face a frustrating start to their careers. Of those who had jobs, most found contract work that kept them in a law firm environment, but others had taken temp jobs and positions in retail. They reported feeling “stuck,” and as if they were in “career purgatory.”

40. Subjects in the bar passage study who did not return their surveys were contacted by phone later. It would be helpful to distinguish between survey- and phone-respondents, since the two reflect different amounts of post-graduation experience, but the public version of the database does not allow for it.
41. This information was collected in the Second Follow-up Questionnaire of the BPS.

Table 7-2 reports the income brackets of never-passers and, for comparison, first-time-passers. Predictably, first-time passers were much more likely than never-passers to earn more than \$50,000 a year, and never-passers were more likely to be making less than \$20,000.⁴² Regression results not reported here find that failing the bar doesn't have a statistically significant impact on income when grades and credentials are controlled.⁴³

**Table 7-2: Annual Salary,
Six Months After Law School Graduation**

| | 1st time Passers (%) | Never-passers (%) |
|---------------------------|----------------------|-------------------|
| Less than \$20,000 | 9.6 | 28.8 |
| More than \$50,000 | 26.4 | 8.1 |
| More than \$80,000 | 4.8 | 0.0 |

Table 7-3 reports the responses to a survey question about starting salary expectations. A majority of law students (and not just those that fail the bar exam) had expected the legal profession to be more lucrative than it really is. Movies and television shows, law school brochures, and widely held public misconceptions probably contribute to the cognitive dissonance and thwarted expectations.

**Table 7-3: Answers to the question
“Is your starting salary consistent with your expectations?”**

| | 1st time Passers (%) | Never-passers (%) |
|--|----------------------|-------------------|
| It is less than I had expected | 52.8 | 68.4 |
| It is about what I had expected when I began law school | 36.4 | 27.5 |
| It is more than I had expected | 10.8 | 4.2 |

42. The Bar Passage Study survey collected salary information in wide bands.

43. While a dummy variable for never-passers had a negative but insignificant coefficient in the estimated income regression equation, the dummy for eventual passers was negative and *significant*. One plausible explanation is that the eventual passers were more likely to take time off of work to study for the second bar attempt. It is possible that taking time off of work actually improved the chances for a one-time failer in the Bar Passage Study to eventually pass. This is consistent with the discussion of socio-economic status in Part VI. In any event, the After the J.D. study results from Part IV suggest the income detriment suffered by eventual passers six months out of law school goes away very quickly.

The starting salaries of both first-time passers and never-passers are stretched even thinner by the activation of law school loan repayment schedules. It has become standard practice to take on large education debts to pay for law school. About 30 percent of never-passers in the Bar Passage Study ended up with more than \$50,000 in law school debt,⁴⁴ and debt loads have increased since the study was conducted. Nearly every law school graduate we interviewed in our qualitative research had left school with \$100,000 or more in student loans. The debt added more insecurity to a stressful financial situation. There is an outside chance education debt could be its own impediment to practice, too. Recently, the State Bar of New York opted to deny a bar applicant's admission to the Bar because he had racked up too much education debt.⁴⁵

Interviewees in the qualitative research project provided descriptions of their careers that are so uniform they sound like a single response fed through a thesaurus. "Unemployed," "limited," "my life is on hold," "stuck in a rut," "stuck," "career purgatory," "it's just killing me"....⁴⁶ The emotional response to bar failure was strong and homogenous across the interview pool. The toll to mental health is probably commensurate with the fear that drives bar-takers to spend three months studying in the first place. At least in the short term, bar failure seems to be the nightmare come true. "First of all then there is like the whole depression okay this is reality and now what do I do with my life?"; "I had never failed anything, and it's kind of embarrassing to have people know you aren't a lawyer because you couldn't pass the bar." "It feels like this weight is on my shoulder, even if I never practice. Because after the first time, it's like, 'damn!'; after the third time, 'damn, are you dumb?'; "you felt you worked so hard and nothing was good enough."

VIII. What Are the Long-term Trajectories of Never-Passers?

The lone resource to study the long-term prospects of law school graduates who fail the bar (so far as I know) is the National Survey of College Graduates. So despite its shortcomings, described in Part III, this dataset is the only source that can answer the most important questions on career and life satisfaction.

44. About the same proportion of first-time passers left law school with more than \$50,000 in debt.
45. Jonathan D. Glater, *Aspiring Lawyer Finds Debt is Bigger Hurdle Than Bar Exam*, N.Y. Times, July 2, 2009, available at <http://www.nytimes.com/2009/07/02/business/02lawyer.html>. This is no doubt an anomalous case. The bar applicant has more than \$400,000 in education loans. Perhaps the Bar had some reason to believe the bar applicant would be at a heightened risk for commingling his client's funds with his own, or had some other reason to believe the risks to clients were unacceptably high in this case. Still, since much of the debt seems to have accumulated while the bar applicant studied for multiple sittings of the bar examination, the state did play a role in the creation of this conundrum.
46. Interviewees were one to three years out of law school at the time of the interview. The pool of interviewees could very well be a worse-off-than-usual sample of law school graduates because the majority of them self-selected into the pool after reading a Craigslist recruitment advertisement in the legal help-wanted section. It is unsurprising that the bar-failers we spoke to are looking for work since they were looking for work when they found us.

There is a striking consistency across all of the outcomes I examine; never-passers are hit with an early career paralysis. But after a protracted adjustment period (spanning ten years or more), never-passers seem to bounce back. Though they never catch up with lawyers, the average never-passer surpasses the trajectory of average college graduates their age. The recovery is encouraging news. After all, the average bar-failer would not necessarily live the life of an average lawyer if he *had* passed the bar exam, so the partial closing of the gap during the mid-career years suggests that the short-term costs of bar failure are much heftier than the long-term ones. But evidence that bar-failers are resilient is not the same as evidence that they avoided significant costs. Law students come from the ranks of the nation's strongest college graduates. Any period of time spent struggling in the labor market warrants concern.

Employment Setting

The careers of law school graduates who never pass the bar still hug the law, with 49 percent of them holding non-attorney legal jobs. Of course, this could be purely a product of my algorithm for identifying never-passers; unlicensed law school graduates who listed “lawyer/judge” for their occupation are automatically counted as bar-failers. But it comports with common sense that those who fail the bar still might choose to use their knowledge of law to the extent they can. The Bar Passage Study sample also has high levels of in-field work (73 percent of never-passers were working in legal settings). The next most common job categories are:⁴⁷

- Managers and executives (12 percent)
- Accountants, auditors, HR, and other management-related occupations (8 percent)
- “Other” (6 percent)
- Marketing and sales (6 percent)
- Clerical work (5 percent)
- Non-health service occupations (2 percent)
- Salary and Income Growth

Never-passers earn less than lawyers, of course, but how much less? Tables 8-1 and 8-2 compare the incomes of never-passers to their law school graduate peers. The regression, run on all law school graduates in the NSCG sample, suggests never-passers earn about \$17,000 less than J.D.-holders the same age and gender, and about \$20,000 less than similar lawyers.⁴⁸

47. I was surprised that teaching did not make the list. A number of the law school graduates we interviewed have ended up in various sorts of teaching jobs.
48. Note that the gender-based disparity is probably illusory—I have not included controls for voluntary part-time work or family obligations. The salary differentials should not be interpreted to indicate wage discrimination.

Table 8-1: Median Salaries (and 25th-75th percentile)

| | Total |
|----------------------|-------------------------------|
| Lawyers | \$68,000 (\$45,000-\$100,000) |
| Never-Passers | \$48,000 (\$30,000-\$69,000) |

Table 8-2: OLS Regression on Salary for JDs in the 1993 NSCG

| | Model 1 | Model 2 |
|--|----------------|----------------|
| Intercept (average J.D. at age 30) | \$57,715 | \$47,104 |
| Bar Failer | -\$17,307 | -\$7,041 |
| Practicing Lawyer | | \$12,812 |
| Age (marginal effect for each year) | \$634 | \$689 |
| Male | \$14,284 | \$14,011 |

*All coefficients significant at the 1 percent level.

Table 8-3 and Figure 8-1 compare the salaries of bar-failers, lawyers, and college graduates in the same age bands. Figure 8-1 presents moving averages of log salaries. The college graduate line lagged by three years so that lawyers and bar-failers can be compared to college graduates with the same number of years of work experience.⁴⁹ The NSCG dataset is not as ideal as panel data that tracks the same subjects longitudinally through the years, but it does allow us to compare never-passers at certain points in their lives to other groups at the same point in their lives. Young never-passers can be seen to struggle immensely. Their salaries fall well below lawyers, and more surprisingly, they lag behind the median college graduate's salary.⁵⁰ This indicates a significant life shock because law school graduates—even never-passers—tend to come from the most motivated and able ranks of college graduates. The undergraduate GPAs of never-passers are higher than those of college graduates generally,⁵¹ and law students probably come from disproportionately selective colleges.

49. Salaries were transformed to log salaries before taking running means in order to avoid bias caused by the skew in salary distributions.

50. The medians reported in Table 8-3 do not change in any meaningful way when comparing degree cohorts (i.e. number of years since law school) instead of age cohorts.

51. I have compared the college GPA of never-passers in the bar passage study sample to the college GPAs of four-year college goers in the Department of Education's High School and Beyond study, a national longitudinal study of high school students who graduated from college around 1992, available at <http://nces.ed.gov/surveys/hsb/>. See also Stephen Cole & Elinor Barber, *Increasing Faculty Diversity* 120 (2003).

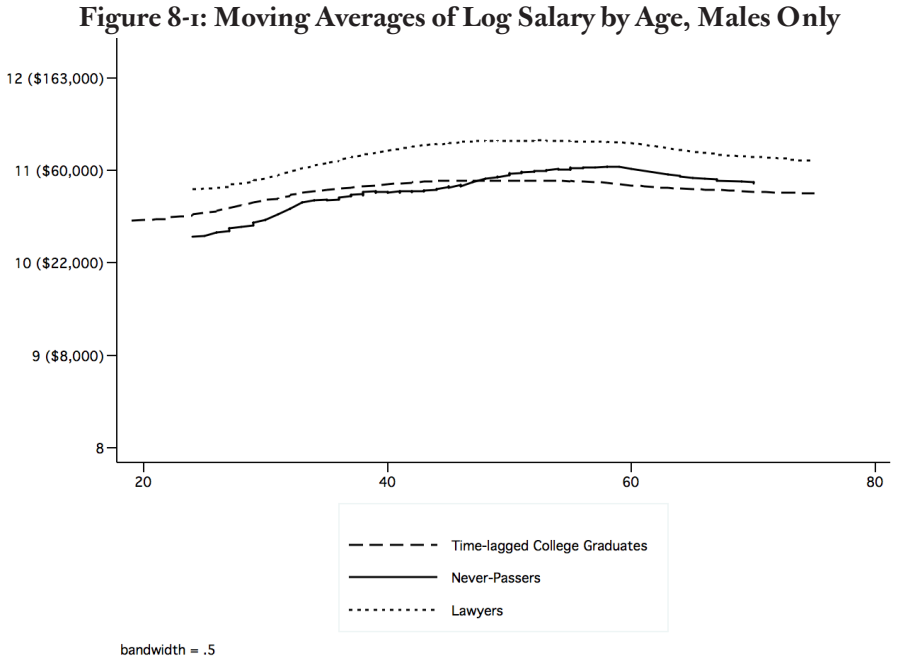
Keep in mind that never-passers also have education loan repayments. (The average never-passer in the bar passage study forks out roughly \$4,500 a year in loan repayments.⁵²) Add to this that the pool of college graduates has a much higher proportion of females than the group of never-passers, and the fate of never-passers looks all the worse. But sometime in their late thirties, the never-passers spring back and surpass the median college graduate's annual salary. Taking education loan repayments into account, those who fail the bar typically will not make a full recovery from the costs of law school until well into their forties. After that point, never-passers are seen to earn a premium over the average college graduate's salary.

Table 8-3: Median Salaries Broken Down by Age

| WHOLE SAMPLE | | | | |
|----------------------|---------------|--------------|--------------|--------------|
| | <30 | 30-39 | 40-49 | 50-59 |
| College Grads | \$35,600* | \$42,000 | \$46,250 | \$48,416 |
| Lawyers | \$48,000 | \$64,000 | \$83,600 | \$86,400 |
| Never-Passers | \$32,000 | \$48,000 | \$54,000 | \$62,849 |
| MALES ONLY | | | | |
| College Grads | \$40,000* | \$49,920 | \$54,000 | \$55,200 |
| Lawyers | \$48,000 | \$72,000 | \$87,750 | \$90,000 |
| Never-Passers | \$32,250 | \$49,500 | \$60,000 | \$74,670 |

*College graduates restricted to census ages twenty-three and older. The age distributions of college graduates and J.D.s in the youngest age band are extremely similar.

52. The Bar Passage Study asked for the size of monthly loan repayments in \$100 intervals. The median never-passer fell at the end of the \$301-\$400 category.



The early career prospects for never-passers look less bleak if we compare their earnings to those of the 25th percentile lawyer. This comparison might be more meaningful than a comparison to median lawyers because never-passers are more similar to a 25th percentile lawyer in terms of law school performance. It is unclear whether this is cause for celebration for those who fail the bar or cause for anxiety for even the law school graduates who *do* pass the bar.

Table 8-4: Median Salaries Broken Down by Age

| | <30 | 30-39 | 40-49 | 50-59 |
|----------------------|-----------|----------|----------|----------|
| College Grads | \$35,600* | \$42,000 | \$46,250 | \$48,416 |
| Lawyers | \$48,000 | \$64,000 | \$83,600 | \$86,400 |
| Bar Failers | \$32,000 | \$48,000 | \$54,000 | \$62,849 |
| P25 lawyers** | \$35,000 | \$48,000 | \$56,350 | \$60,000 |

* College graduates restricted to census ages 23 and older. The age distributions of college graduates and J.D.s in the youngest age band are extremely similar. **25th percentile of lawyers working full-time.

Table 8-5: Median Salaries Broken Down by Degree Cohort

| | 5 yrs or less | 6-15 | 16-25 | 26-35 |
|----------------------|---------------|----------|----------|----------|
| Lawyers | \$45,000 | \$64,899 | \$89,000 | \$98,800 |
| Never-Passers | \$31,027 | \$52,000 | \$54,000 | \$66,040 |
| P25 lawyers** | \$34,500 | \$48,000 | \$60,000 | \$68,000 |

**25th percentile of lawyers working full-time.

Occupational Stability and Employer Loyalty

The 1993 NSCG survey asks subjects to reflect on a reference period five years prior to the administration of the survey. Subjects who were unemployed during the reference period or who were employed but got laid off or terminated between the reference period and the survey period were counted in Table 8-6 as having “employment instability.”⁵³

Lawyers have remarkable career stability. Never-passers and college graduates do not come close to matching it. Never-passers generally keep pace with college graduates. The oldest never-passers appear to have heightened instability (18.4 percent), but this proportion is likely biased upward because of the methods used to identify bar-failers.⁵⁴

Table 8-6: Proportion Experiencing Employment Instability, By Age Bands

| | <30 (%) | 30-39 (%) | 40-49 (%) | 50-59 (%) |
|----------------------|---------|-----------|-----------|-----------|
| College Grads | 12.7* | 13.8 | 12.1 | 11.7 |
| Lawyers | 5.5 | 5.3 | 4.7 | 4.7 |
| Never-Passers | 36.4 | 13.6 | 9.0 | 18.4 |

Subjects who were in school in 1988 or later were removed. *College graduates limited to ages twenty-six & above.

Employment loyalty (on both the employers’ and employees’ parts) is measured by the likelihood that a subject in each sub-group had the same employer in both the pre-survey reference period and at the time of the survey. Loyalty can serve as a rough measure of job satisfaction. Table 8-7 shows that even mid-career never-passers trail lawyers and college graduates on this measure. This makes some intuitive sense; never-passers probably make more career moves as they get their bearings and adjust to a new professional path.

53. Subjects who were in school at the time of or after the reference period were removed.

54. Since older never-passers are likely to answer the licensure question and the in-field work questions differently twenty or more years out of law school, the older working never-passers are easier to miss than the older unemployed never-passers. Thus unemployed never-passers are over-represented in the oldest cohort.

Table 8-7: Proportion of Sample with Employer Loyalty, By Career Age Bands

| | <30 (%) | 30-39 (%) | 40-49 (%) | 50-59 (%) |
|----------------------|---------|-----------|-----------|-----------|
| College Grads | 39.3* | 53.8 | 66.0 | 68.5 |
| Lawyers | 39.6 | 62.7 | 75.1 | 81.2 |
| Never-Passers | 36.4 | 30.3 | 64.2 | 50.0 |

Subjects who were in school in 1988 or later were removed. *College graduates limited to ages twenty-six and older.

Family Life

The NSCG study collected marital status at two points in time: the time of the survey, and during the 1990 Census. At both points, the study collected information on whether the subject was *currently* married, divorced, separated, widowed, or still single. We do not know how many times the subject got married, so we have no way of knowing whether a subject who is married in the 1993 survey is also a divorcee unless the subject was not yet remarried at the time of the 1990 Census. So these are noisy measures of marriage histories, which are themselves noisy measures of domestic tranquility and security.

I have limited many of these tables to males for a couple reasons. First, it avoids confounding caused by typical age gaps in marriages (marriage and divorce will happen at an earlier age for women), and second, while men's family outcomes have fairly consistent and obvious implications for their career and well-being on the whole, the same cannot be said for women. Marriage and child-rearing are more likely to cause career interruptions among women. Baker and Jorgensen find that labor force participation is greater for single female J.D.s than it is for married female J.D.s, and much greater for single mothers than for married mothers.⁵⁵ Married women are more likely to work if they don't have children than if they do.⁵⁶ All of these behavior patterns make intuitive sense, but they interact in a way that prevents me from drawing meaningful inferences about security and life stability from marriage and child-rearing outcomes. So I will focus on males, for whom the relationship between career and family is more straightforward—for men, family is an unqualified good thing.⁵⁷

55. Baker & Jorgensen, *supra* note 9, at 23 (Table 3).

56. *Id.*

57. Married men are more likely to be working, as are men with children (regardless of marital status.) *Id.* My own regressions on the salaries of male lawyers in the NSCG sample find that marriage provides a \$9,580 lift, and having children in the home adds over \$12,000, controlling for age. Unfortunately, the NSCG did not inquire about survey participants' sexual orientation, so gay men are likely to be counted as permanently single/never married.

Lawyers enjoy very high “currently married” rates once their careers get going, though they do not differ substantially from the rates of an average college graduate. This is the first outcome I have discussed in which never-passers start off (characteristically) weak and are never able to make a complete recovery (to the rates of college graduates).

Table 8-8: Marriage Rates by Age Group Males only

| | <30 (%) | 30-39 (%) | 40-49 (%) | 50-59 (%) |
|----------------------|---------|-----------|-----------|-----------|
| College Grads | 56.0* | 78.1 | 82.9 | 87.3 |
| Lawyers | 44.4 | 80.1 | 83.1 | 85.1 |
| Never-Passers | 38.1 | 72.6 | 69.6 | 81.8 |

*College graduates limited to ages twenty-six and older.

The divorce indicator measure uses information from both time periods (1990 and 1993) to identify divorces and separations in either period (and, to the limited extent possible, to catch survey “liars” who claimed to be single-and-never-married despite having been married during the 1990 Census). But the divorce indicator is merely a snapshot of divorce because it misses all divorces that predated the 1990 Census and were obscured from detection by a second marriage. It gauges each group’s exposure to divorce and separation.

Divorce is the one setback that affects lawyers more than college graduates. It is the one outcome where a never-passer position that splits the difference between lawyers and college graduates would give never-passers an *advantage* over lawyers. Instead, never-passers’ rates are even worse than lawyers.

Table 8-9: Divorce Indicator Males only

| | <30 (%) | 30-39 (%) | 40-49 (%) | 50-59 (%) |
|----------------------|---------|-----------|-----------|-----------|
| College Grads | 4.3* | 9.5 | 12.4 | 10.9 |
| Lawyers | 7.7 | 8.5 | 14.4 | 15.4 |
| Never-Passers | 7.1 | 14.5 | 23.2 | 15.2 |

*College graduates limited to ages twenty-six and older.

Child-rearing, which is another sign of financial security and a fulfilling family life, matches the marriage patterns almost exactly. Lawyers catch up and keep pace with college graduates once their careers are on track, and never-passers lag. The NSCG survey asks whether a child or children live in the subject’s household at least half the time, so keep in mind these statistics are lower than fertility rates.⁵⁸

58. The 1990 Census’s fertility information is incomplete, so most J.D.s did not have data for 1990 that could be compared to the 1993 survey. But of those who did, 7 percent reported

Table 8-10: Children in the Home Males only

| | <30 (%) | 30-39 (%) | 40-49 (%) | 50-59 (%) |
|----------------------|---------|-----------|-----------|-----------|
| College Grads | 31.1* | 66.3 | 69.3 | 41.1 |
| Lawyers | 22.7 | 68.0 | 71.7 | 41.5 |
| Never-Passers | 16.7 | 50.0 | 57.1 | 42.4 |

*College graduates limited to ages twenty-six and older.

In tandem, the outcomes reported here—salary, stability, employer loyalty, and family outcomes—support the conclusion that bar failure causes real detriment to the long-term success of law school graduates, especially at the outset of their careers.

IX. Opportunity Costs

Never-passers do not have the stable and upwardly mobile life track of their lawyer peers. But did they benefit from having gone to law school? Do the never-passers' outcomes, hovering around and slightly above the outcomes for average college graduates, suggest that never-passers gained something from the extra education, or would we expect bar-failers to out-perform college graduates by more than they do? In this section, I attempt to project never-passers' outcomes in the counter-factual situation in which they had not attended law school. The task requires a certain amount of hand waving.

Since bar-failers tend to be the weakest of the law school graduates, the persistent gap between never-passers and lawyers is unremarkable. But in previous sections, I have expressed surprise that the never-passers perform worse than the average college graduate in the early and middle parts of their careers. My concern is that law school graduates, bar-failers included, leave college with stronger-than-average college GPAs.

The median college GPA for never-passers in the bar passage study was 3.0. While this is quite a bit lower than the median GPA for first-time passers (3.3), it nevertheless is higher than the national average college GPA around that time—2.87.⁵⁹ So we might expect even the weakest group of law school

children in the 1990 Census and reported not living with their children in the NSCG survey. This is most likely explained by separation or divorce, or by adult children leaving the home.

59. This is the average college GPA of subjects in the 1988 High School and Beyond Study, a large longitudinal study commissioned by the National Center of Education Statistics. That study tracked a national sample of students from their sophomore year of high school (in 1980) to a post-college follow-up in 1992, about five or six years after college graduation. While the study surveyed more than 30,000 individuals, only a fraction of those attended four-year colleges (about 7,000), and a smaller portion still actually completed their degrees. Comparisons to the never-passers in the bar passage study sample suffer from two biases, running in opposite directions. The bar study includes only matriculants at ABA-approved law schools, so the undergraduate GPA estimate of never-passers is unrepresentative of never-passers as a whole. On one hand, it is stronger, because the graduates of unaccredited schools are not included; on the other hand, it might be weaker because it effectively oversamples students from historically black law schools.

graduates (the never-passers) to outperform the average college graduate in the labor market, no matter what they end up doing. The NSCG results reported in the previous section run against this expectation.

Crude regressions of the 1992 earnings of the High School and Beyond dataset suggest that a point in college GPA yields about a 6 percent increase in earnings. An earlier longitudinal dataset called the National Longitudinal Study shows that wages increase by about 12 percent for a gain of one GPA point. This is in line with other researchers' findings.⁶⁰ Since never-passers leave college with GPAs more than a tenth of a point higher than the average college graduate, we might expect the earnings in the early part of their careers (at age twenty-eight) to be about 1 percent higher than that of the average college graduate. Instead, the under-thirty age cohort of the NSCG finds that never-passers are earning 19 percent less.⁶¹ The earnings gap disappears before age forty and reverses (so that never-passers are earning more) by age fifty, but it is difficult to know how college graduates who were similarly-situated to the never-passers when they left college would be doing by those ages. It is possible the 1 percent earnings advantage predicted at age twenty-eight would have grown larger by ages forty and fifty.

In sum, the available information suggests that, if law school bestowed a benefit to the lives of never-passers at all, it didn't begin to pay dividends until the later half of their careers, and likely couldn't "pay back" the harms that the law school experience seemed to have caused during the first half.

The decision to attend law school also prevented never-passers from pursuing other graduate degrees. 50.4 percent of the BPS data subjects who never passed the bar had considered applying to a different graduate program, and 23 percent of them actually did apply. Of the subjects who applied, 88 percent were accepted. In other words, 10 percent of the never-passers had applied to and had been accepted to a graduate program other than law.

X. Conclusion

The collection of analyses in this study roughly sketches the contours of the lives of those who fail the bar. Further research and data collection is needed to fill the rest of the picture. I hope the work here motivates proactive efforts, already under way at some law schools, to assess the value they are adding to the lives of law students, and to ensure the well-being of their graduates.⁶²

60. Linda Loury & David Garman, *College Selectivity and Earnings*, 13 *J. Labor Econ.* 289, 297 (1995). Loury and Garman focused on differential labor market outcomes for black and white college graduates, and found that an additional GPA point raised earnings by about 9.5 percent for whites, and by about 25 percent for blacks.

61. From Table 8-3, above.

62. Many law schools are successfully redesigning curricula to improve bar passage rates. For example, the Comprehensive Curriculum Program at New York Law School is at least partly responsible for raising that school's pass rate from 72 percent to 94 percent. See http://www.nyls.edu/news_and_events/releases/bar_pass_rate. Other law schools and legal educators are using quantifiable measures of improvements in learning and post-graduation success

Legal education may be a disservice for the significant group of students who never pass a bar exam. The results of this study suggest that, for the first halves of their careers, law school graduates who fail the bar exam suffer from earnings depressions and debt accumulations that keep them in worse financial shape than they would have been if they had they not gone to law school. If law school confers any benefit to these individuals, it is a benefit that accrues slowly. Law schools owe it to their most at-risk prospective students to provide candid information about the probability and costs of failing the bar examination.

This information might not alter behavior; after all, more than a quarter of never-passers in the bar passage study reported they had a *burning desire* to go to law school. (Curiously, this is higher than the 23.4 percent of first-time passers who reported a burning desire.) Moreover, all law school graduates (bar-passers and failers alike) are satisfied with their law school experience when they first leave law school.⁶³ At least in the short term, most bar-failers have no regrets. But accurate information on the long-term outcomes of never-passers might eventually lead to an appropriate adjustment in the demand for legal education, especially at the bottom of the selectivity spectrum. And the dissemination of accurate information is an end in and of itself, serving the purpose of making legal education a more transparent and accountable industry.

to assess their law schools. *See, e.g.*, the Law School Survey of Student Engagement, *available at* http://lsse.iub.edu/html/about_lsse.cfm; William Henderson, Measuring Outcomes: Post-Graduation Measures of Success in the U.S. *News & World Report Law Schools Rankings*, 83 *Ind. L. J.* 791 (2008).

63. About 54 percent of bar passage study subjects stated that they were “satisfied” or “very satisfied” with their law school experience. Never-passers were much more likely to state that they were “dissatisfied” or “very dissatisfied” than were first time passers (12.2 percent versus 4.4 percent), but the average never-passers were pleased with their legal education. In fact, never-passers had no regrets, six months out of law school, about their decision to attend. Nearly 84 percent were “satisfied” or “very satisfied” with the decision to attend law school.