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Testing Privilege: Coaching Bar Takers Towards "Minimum Competency" During the 2020 Pandemic

Benjamin Afton Cavanaugh
St. Mary's University School of Law

ARTICLES

TESTING PRIVILEGE: COACHING BAR TAKERS TOWARDS "MINIMUM COMPETENCY"[1] DURING THE 2020 PANDEMIC

BENJAMIN AFTON CAVANAUGH*

1. *See* Donna Saadati-Soto et al., *Does the Bar Exam Measure Competence? The Answer: We Have No Idea*, JURIST (Apr. 21, 2020, 10:44 PM), https://www.jurist.org/commentary/2020/04/saadati-soto-escontrias-sarkar-bar-exam/ [https://perma.cc/YM42-PA4W] (positing there is very little evidence that the bar exam measures the minimum competency of one's ability to practice law); *see also* Stephanie Francis Ward, *A Better Bar Exam? Law Profs Weigh in on Whether Test Accurately Measures Skills Required for Law Practice*, AM BAR ASS'N J. (Jan. 8, 2020, 10:09 AM), https://www.abajournal.com/web/article/building-a-better-bar-exam [https://perma.cc/YFF3-96G9] (analyzing some of the issues with the bar exam as a measure of competency and discussing whether changes should be made). As an attorney, my experience was that the bar exam had little direct connection to my first years of law practice. Perhaps the MPT was the most relevant component of the bar exam to legal practice but was done under such intense time pressure as to make my response unrealistic to what I would produce in practice. Further, the vast volumes of law that I memorized for the bar exam were quickly forgotten within months of taking the bar exam with the exception of my field of practice. Now, as someone that has spent five years studying the bar exam and preparing law graduates to take it, I can attest that there are some who lack the competence to practice law that pass the bar exam and some that would be very competent attorneys who struggle to pass the bar exam. The bar exam, like any test, tests the testing ability of the test taker. Like any test, the testing ability of the test taker is impacted by many factors beyond their legal education, work ethic, and ultimate competency for practice.

* Director of Law Success and Service Professor of Law, St. Mary's University School of Law. As an alumnus of *The Scholar*, it is a real privilege to write this article on behalf of an organization that helps dedicated students find and use their voice to advocate for others. The tradition of service cultivated by *The Scholar* is one I have carried into my work as an attorney and in my time at St. Mary's School of Law. One primary goal of mine is to help students from all walks of life accomplish their dream of becoming a licensed attorney. For the work done in helping

The year 2020 was challenging for the bar exam.[2] The longstanding argument that the bar exam is not a fair measure of the minimum competence of someone to practice law was cast into harsh relief and the truth—that the bar exam tests the privilege of its examinees—became startlingly apparent.[3] Not only did 2020 kick off with a devastating global pandemic, but we also saw the rage against systemic racial injustice reach a boiling point just as we were charged with staying in our homes to avoid contracting COVID-19.[4] With a pandemic raging, overt

our graduates navigate the bar exam I want to thank Associate Professor of Law and former leader of Law Success, Professor Zoe Niesel, who was willing from the beginning to invest time and resources in the good ideas of the bar team. Much of the good work we have done would not have been possible without Professor Niesel's support. I also want to thank Law Success Instructor, Professor Sigrid Vendrell Polanco, for her dedication to the Raise the Bar program and to helping bar takers through countless challenges. Additionally, I want to thank the Law Success team that has jumped in to help bar takers cycle after cycle when asked to provide their support.

2. *See, e.g.*, Abigail Johnson Hess, *'Literal Hell'—How the Pandemic Made the Bar Exam Even More Excruciating for Future Lawyers*, CNBC MAKE IT (Aug. 19, 2020, 5:40 PM), https://www.cnbc.com/2020/08/19/literal-hellthe-pandemic-has-made-the-bar-exam-more-excruciating.html [https://perma.cc/V2KQ-4CTZ] (describing the uncertainty regarding the administration of the bar exam in Florida as COVID-19 caused constant changes in the proposed test date).

3. *See 'A Test of Privilege': Law Graduates Say COVID-19 Points Out Inequities of Texas Bar Exam*, KXAN (July 22, 2020, 7:33 PM), https://www.kxan.com/investigations/a-test-of-privilege-law-graduates-say-covid-19-points-out-inequities-of-texas-bar-exam/ [https://perma.cc/B22M-SPQS] (outlining how the pandemic has merely highlighted the disadvantages many students face preparing for the bar exam); *see also* Hess, *supra* note 2 (introducing historical evidence to prove that the bar exam is purposefully structured to be difficult to remain exclusive to those of a specific race, class, and gender).

4. *See* Susan Page & Veronica Bravo, *The Year that was: A Global Pandemic, Racial Protests, a President-Elect. Oh, and Impeachment*, USA TODAY (Dec. 28, 2020, 12:28 PM), https://www.usatoday.com/in-depth/news/politics/2020/12/28/2020-trump-biden-racial-justice-election-covid-rbg/3822810001/ [https://perma.cc/ER58-JKAV] ("What made 2020 unprecedented wasn't that it was a year of pandemic—there have been pandemics before—or that a president was impeached, or that there were massive marches for racial justice across the country, or that there was a disputed election. What made it unprecedented was this: They all happened in the same year.").

White supremacy on the rise, and racial injustice taking its toll on Black and Brown bodies and minds,[5] it may seem that the bar exam is of relatively little importance.[6] Yet, for the approximately 46,000 people on average preparing for and taking the July bar exam each summer cycle,[7] the summer of 2020 shone a bright light on the inequity inherent in a standardized exam serving as the measure of competence for the practice of law.[8]

Though it may not seem so at first glance, the problem with the bar exam and the challenges boiling up in America are in fact somewhat wedded together.[9] Certainly, there are too many causes contributing to systemic racial injustice to contend that a solution to only one aspect of the problem will resolve them all;[10] but identifying and dismantling the

5. *See, e.g.*, *id.* (examining, in chronological order, the horrific events that transpired over 2020 against people of color, such as Ahmaud Arbery's brutal death and Breonna Taylor's wrongful killing while in the privacy of her home).

6. *Cf.* '*A Test of Privilege': Law Graduates Say COVID-19 Points Out Inequities of Texas Bar Exam*, *supra* note 4 ("The students that are most harmed by the bar exam being pushed are students who don't have employment already arranged. It is often that license can help push you into that employment.").

7. *Compare COVID-19 and the July 2020 Bar Exam*, THE BAR EXAM'R, Fall 2020, at 10–11 (finding that on average, a total of 45,938 examinees took the MBE between the years of 2016 to 2019), *with 2020 Bar Exam Process Comes to an End: Approximately 38,000 Applicants Took Bar Exam in July, September, or October*, NAT'L CONF. BAR EXAM'RS (Oct. 7, 2020), https://www.ncbex.org/news/2020-bar-exam-process-comes-to-an-end-approximately-38000-applicants-took-bar-exam-in-july-september-or-october/ [https://perma.cc/9H3D-LVFU] (describing how the 2020 numbers depict a dramatic decline in the number of examinees that sat for the MBE portion of the bar exam—from roughly 46,000 to a mere 8,000 examinees). *See generally Jurisdictions Administering the MBE*, NAT'L CONF. BAR EXAM'RS, https://www.ncbex.org/exams/mbe/ [https://perma.cc/Z6NC-5CBH] (showing the number of jurisdictions that administer the MBE annually which include all states excluding Louisiana and Puerto Rico, a U.S. territory.). The 2020 numbers could be a result of the way the MBE was administered. The upheaval in bar testing due to the COVID-19 pandemic meant that many jurisdictions did not offer the MBE in its traditional form. As such, the number of MBE examinees for summer 2020 reflects only those that took the traditional MBE exam. Even in a normal testing cycle, the MBE would not represent the full number of examinees as two jurisdictions do not test using the MBE.

8. *See* Sam Skolnik, *'Serious Reexamination' of Bar Exam Looms as Grads Sit for Test*, BLOOMBERG L. (Oct. 6, 2020, 4:51 AM), https://news.bloomberglaw.com/business-and-practice/serious-reexamination-of-bar-exam-looms-as-grads-sit-for-test [https://perma.cc/4J39-KFF9] (acknowledging how an already outdated, discriminatory test highlighted greater inequities as different states considered various modes of test administering the bar exam).

9. *See, e.g.*, Ward, *supra* note 1 (portraying how the intersectionality of race and the bar exam contributes to the systemic barriers faced within the legal profession).

10. *See* Shayanne Gal et al., *26 Simple Charts to Show Friends and Family Who Aren't Convinced Racism Is Still a Problem in America*, BUS. INSIDER (July 8, 2020, 12:04 PM),

causes of systemic discrimination will continue the hard work of mending the issues in our system.[11] The U.S. legal system is one of many with a history of bias in favor of White people from the police up through the courts, and the legislature up through the executive branches of state and local governments.[12] One contributing factor to this problem is the lack of representation of Black, Indigenous, and communities of color[13] inside the legal system,[14] and hence the tie back to the bar exam.[15]

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https://www.businessinsider.com/us-systemic-racism-in-charts-graphs-data-2020-6 [https://perma.cc/LP9J-EKQS] (emphasizing how racial disparities exist in nearly all aspects of life in the United States, such as in wealth, employment, incarceration, and education).

11. *See* Nareissa Smith, *Factors Affecting Bar Passage Among Law Students: The REAL Connection Between Race and Bar Passage*, AFR. AM. ATT'Y NETWORK (May 15, 2018), https://aaattorneynetwork.com/factors-affecting-bar-passage-among-law-students-the-real-connection-between-race-and-bar-passage/ [https://perma.cc/4WJD-CV47] (identifying how race affects law school success and describing how many Black students feel their law school is a hostile working environment impeding their ability to fully prepare for the bar exam).

12. *See* Gal et al., *supra* note 10 (demonstrating that Black Americans are underrepresented in Congress and both the corporate and professional world, while devastatingly overrepresented in the criminal justice system); *see also* Mona E. Robbins, *Race and Higher Education: Is the LSAT Systemic of Racial Differences in Education Attainment?*, SUMMER PROGRAM FOR UNDERGRADUATE RSCH. (2017), http://repository.upenn.edu/spur/18 [https://perma.cc/37VE-QMNS] (blaming the law school's admissions process for creating a barrier for people of color to achieve the same tasks and status in the legal field as their White counterparts).

13. *See* Constance Grady, *Why the Term "BIPOC" Is So Complicated, Explained by Linguists*, VOX (June 30, 2020, 9:10 AM), https://www.vox.com/2020/6/30/21300294/bipoc-what-does-it-mean-critical-race-linguistics-jonathan-rosa-deandra-miles-hercules [https://perma.cc/73X6-V5MA] (emphasizing how the thoughtful use of language is a crucial part of respecting diversity in its many forms—gender, race, ethnicity, sexual orientation, gender identity, and much more). This paper focuses on diversity in racial and ethnic identity within the legal profession. Though no one term can be used to capture the full, wonderful spectrum of racial and ethnic diversity, certain terms are generally considered improper. Throughout this paper, the terms 'communities of color,' 'marginalized communities,' and 'Black, Indigenous, and people of color' have been used. The exclusion of people from the legal profession has impacted people of Black, Hispanic, Native American, Asian, Middle Eastern, and Jewish descent to name only a few. Terms are powerful and important, and readers should not think that the terms used in the paper can capture the full extent of the communities excluded from a profession that limited itself to largely to White men for much of American history.

14. *See* Allison E. Laffey & Allison Ng, *Diversity and Inclusion in the Law: Challenges and Initiatives*, AM. BAR ASS'N (May 2, 2018), https://www.americanbar.org/groups/litigation/committees/jiop/articles/2018/diversity-and-inclusion-in-the-law-challenges-and-initiatives/ [https://perma.cc/4SFX-FYZ7] ("Diversity does not mean having a few ethnic or other minorities in the office. It also does not mean a group comprised only of minorities. It means having people of diverse culture, experience, and background in all levels of a law firm.").

15. *See id.* (evaluating the extremely slow rate at which diversity has increased in the legal profession and calling for active steps to achieve inclusion within the legal system).

A small, but necessary step toward overcoming systemic failures of this magnitude is to increase representation within systems to amplify voices that have been shut out.[16] However, to this day, the legal profession is comprised of a majority White population.[17] Similarly, Legislatures—where many individuals with law degrees end up—are also majority White.[18] To ever reach a point of adequate representation in the legal profession, we need more Black, Indigenous, and people of color in law school and passing the bar exam.[19]

Yet, the framework of the bar exam acts as a larger obstacle to licensure for Black, Indigenous, and people of color than it does for their non-Hispanic, White counterparts.[20] As an institution serving a majority population drawn from communities of color,[21] St. Mary's University School of Law has the unique privilege of contributing to the diversity of the legal profession with every graduating class.[22] Recognizing this and

16. *See id.* (acknowledging the legal profession continues to be "one of the least diverse of any profession"); *see also* Robert Ambrogi, *New ABA Report: Everything You Ever Wanted to Know About the Legal Profession but Didn't Know Where to Ask*, ABOVE THE L. (Aug. 12, 2019, 4:16 PM), https://abovethelaw.com/2019/08/new-aba-report-everything-you-ever-wanted-to-know-about-the-legal-profession-but-didnt-know-where-to-ask/ [https://perma.cc/K8NE-AM3Q] ("Only 15 percent of lawyers are racial or ethnic minorities—and that number has risen by only three percentage points in the last 10 years.").

17. *Cf.* Ambrogi, *supra* note 16 (demonstrating the lack of race and ethnic diversity present in the legal profession today despite the continuous and fast growth of the legal field).

18. *See* Amanda Zoch, *The 'Average' State Legislator Is Changing, Slowly*, NAT'L CONF. OF STATE LEGISLATURES (Oct. 29, 2020), https://www.ncsl.org/research/about-state-legislatures/who-s-the-average-state-legislator-depends-on-your-state-magazine2020.aspx [https://perma.cc/HL9S-MU5S] (asserting the racial and ethnic makeup of legislative bodies vary from state-to-state, but overall hold a 78% White majority).

19. *Cf.* Laffey & Ng, *supra* note 14 (highlighting how the disproportionate number of diverse individuals in the legal profession is problematic and taking active steps, such as increasing diversity in law schools and the workplace, is an essential measure needed to be taken to ensure lasting change).

20. *See, e.g.*, Jane Yakowitz, *Marooned: An Empirical Investigation of Law School Graduates Who Fail the Bar Exam*, 60 J. LEGAL EDUC. 3, 19 (2010) (contending that Black and Hispanic graduates are twice as likely to never pass a bar exam and receive a law license when compared to their White peers).

21. *St. Mary's University Standard 509 Information Report*, AM. BAR ASS'N (2020), http://www.abarequireddisclosures.org/Disclosure509.aspx [https://perma.cc/B2FM-7AAP] (illustrating how by choosing "2020" for "Select Year" and "St. Mary's University" for "Select School"; then clicking "Generate Report," grants access to St. Mary's School of Law's student demographics).

22. *See id.* (reporting that as of October 5, 2020, of the 736 total students seeking a J.D. at St. Mary's, 424 of them were from historically marginalized communities. That represents approximately 58% of the St. Mary's law student population); *see also* Katrina Dewey, *Day 14:*

many of the challenges that pose barriers to bar passage, Law Success—St. Mary's academic skills and bar prep program—built an intensive coaching component into bar study to aide bar takers as they prepare with a mission of helping our graduates overcome the hurdle of the bar exam.[23]

This intensive coaching program, a component of Law Success' Raise the Bar initiative, has many goals.[24] One of them is to assist graduates who are less likely to pass the bar exam on a first attempt.[25] By focusing on this goal, Raise the Bar is able to ensure that more St. Mary's law graduates cross the bar exam hurdle and advance the St. Mary's mission to contribute to expanding the diversity of the legal profession.[26] Ultimately, Raise the Bar represents a small and localized amount of progress in this widespread challenge, but its effectiveness in helping raise the passage rate for St. Mary's graduates at risk of not passing the bar exam provides one possible approach for law schools to consider as

St. Mary's Law School Provides Students a Sense of Mission, LAWDRAGON CAMPUS (Aug. 29, 2016), campus.lawdragon.com/day-14-st-marys-law-school-provides-students-a-sense-of-mission/ [https://perma.cc/KEX3-8QD5] ("Students who choose St. Mary's are often first-generation college graduates who have seen their families persevere to start a better life, and who want to continue helping poor, struggling families in South Central Texas. The student body is 45 percent Hispanic, deeply religious and committed to public service.").

23. Dewey, *supra* note 22 ("Coaches work with each student in the class, to identify his or her strengths and improve upon weaknesses through a cycle of training, assessment and retraining. Coaches hone skills appropriate for each year of law school, starting with the pre-legal skills of lawyering: reading, writing, editing, logical analysis of an argument and a strong ethic of work performance."); *see Support for Law Success*, ST. MARY'S SCH. OF L., https://law.stmarytx.edu/academics/special-programs/support-for-law-success/ [https://perma.cc/H9GM-D6V7] (noting that "Raise the Bar" is not a course offered at St. Mary's Law, but rather a supplement to commercial bar study programs with a mission to ensure a higher rate of bar passage among graduates).

24. *See* ST. MARY'S SCH. OF L., *supra* note 23 (emphasizing the one-on-one support Raise the Bar stresses as means to properly prepare St. Mary's law students for bar passage).

25. *See id.* (explaining how St. Mary's School of Law enacted curriculum to help improve statistics of law students more likely to not pass the bar exam).

26. *See id.* (showcasing the mission of the Raise the Bar program and how it "forms the foundation of our rigorous legal skills curriculum, including our first-year writing and lawyering class and our third-year bar preparation for credit course, and involves significant writing development, practice readiness simulations, and individual student skill building."); *see also Raise the Bar*, ST. MARY'S UNIV., https://sites.stmarytx.edu/raisethebar/ [perma.cc/US3W-YGVU] (providing a multitude of sources for St. Mary's law graduates to be able to access during bar preparation in order to ensure success with the bar).

they search for ways to assist their graduates in passing the bar.[27] Moreover, Raise the Bar coaches proved instrumental in helping bar takers navigate the chaotic experience of the summer 2020 testing cycle.[28]

Part I of this paper provides an overview of the history of the bar exam and its role in acting as a significant obstacle to licensure for people from communities of color.[29] Though this issue was discussed long before 2020, this paper also looks at the way in which the pandemic's impact on the bar exam highlighted the fact that the bar exam tests the privilege of its individual applicants at least as much as it tests their skills.[30]

Part II presents an approach to helping graduates prepare for and overcome the bar exam even when the odds are seemingly stacked against their success.[31] It delves into the unique advantage that intensive coaching provides over more generalized guidance on bar

27. *See generally Raise the Bar*, *supra* note 26 ("{St. Mary's School of law] offer[s]: Sessions focused on developing skills, substantive knowledge, and providing opportunities for practice[;] Feedback on submissions requested by your Raise the Bar coach[;] Simulated practice days (practice before you sit for the real thing)[;] One-on-one coaching sessions; Schedule creation, review, and guidance; Strategic advice based on your progress[;] Access to all of our resources online[;] And much more!").

28. *See ST. MARY'S SCH. OF L., supra* note 23 ("The program begins with Law Success faculty meeting with students one-on-one to create personalized study schedules. Law Success faculty then hold numerous review sessions covering the topics most frequently tested on the bar exam, as well as administer practice questions for each section of the bar exam. Students can submit practice work they complete to their Raise the Bar instructor for individualized feedback. The comprehensive Raise the Bar website contains all the course videos and practice problems, making the resources available to all students 24/7."); *see also Raise the Bar*, *supra* note 26 (providing information on Raise the Bar's one-on-one coaching and how it can improve bar passage). *See generally* Sara Randazzo, *Coronavirus Pandemic Creates Bar Exam Chaos*, WALL ST. J. (July 17, 2020, 9:00 AM), https://www.wsj.com/articles/coronavirus-pandemic-creates-bar-exam-chaos-11594990800#:~:text=The%20bar%20exam%2C%20an%20annual,abolish%20this%20year%27s%20test%20altogether [perma.cc/TAJ5-MS9Q] (explaining the extent of the turmoil wreaked upon the bar examiners during the pandemic in the summer of 2020 and how different states opted to handle these unprecedented conditions for the examination).

29. *See* Robbins, *supra* note 12 (describing the expense associated with preparing for the exam and the disadvantage those who cannot afford those materials face).

30. *See, e.g.*, *id.* (citing statistics of races in lower socioeconomic statuses and how they are disproportionally affected before they even enter into law school because of the costs required of the studying, testing, and application process of law school); *see also* Randazzo, *supra* note 28 (emphasizing the economic turmoil resulting from an economic down-turn during the COVID-19 pandemic combined with socioeconomically disadvantaged applicants and students in law school).

31. *See infra* Part II.

success.[32] The success and challenges of this method of assistance will be analyzed with an eye towards how other law schools looking to adopt a similar program might go about mitigating the challenges faced by their students in attempting to pass the bar exam.[33] Finally, this paper explores how Raise the Bar served as an important support for bar takers in an unprecedented time of crisis.[34] Until the problems posed by the bar exam can be resolved, it is incumbent upon law schools to assist their students in overcoming the bar exam barrier.[35]

I. THE HISTORY OF THE BAR EXAM AS A TOOL OF EXCLUSION

The bar exam is only one method in a long line of exclusionary tactics aimed to keep people out of the legal profession.[36] The legal profession has a long history of excluding people from marginalized communities from obtaining a license to practice law.[37] Exclusion of different groups was accomplished covertly and overtly and the method that took precedence in any given decade shifted over time in response to societal pressure.[38] Obtaining a license to practice law was not always tied to an

32. *See, e.g.*, ST. MARY'S SCH. OF L., *supra* note 23 (emphasizing the effectiveness of the unique one-on-one coaching aspect of the Raise the Bar program).

33. *See infra* Part II.

34. *See Raise the Bar*, *supra* note 26 (noting one summer 2020 bar taker's successful experience with Raise the Bar during the unprecedented 2020 coronavirus pandemic); *see also* Randazzo, *supra* note 28 (discussing the tumultuous effects of the pandemic on summer 2020 law graduates prepared for the bar examination).

35. *See* Ben Bratman, *The Next Generation of the Bar Exam, NCBE Style*, BEST PRACS. FOR LEGAL EDUC. (Jan. 14, 2021), https://bestpracticeslegaled.com/2021/01/14/the-next-generation-of-the-bar-exam-ncbe-style/ [perma.cc/9KS2-6QQP] (noting future possible changes to the bar exam, including testing fewer subjects).

36. *See* Robbins, *supra* note 12 (discussing how the LSAT is an important aspect to get to the bar exam and is very discriminatory in price, time, and material); *see also* Deborah L. Rhode, *Law is the Least Diverse Profession in the Nation. And Lawyers Aren't Doing Enough to Change that*, WASH. POST (May 27, 2015, 7:25 AM), https://www.washingtonpost.com/posteverything/wp/2015/05/27/law-is-the-least-diverse-profession-in-the-nation-and-lawyers-arent-doing-enough-to-change-that/ [perma.cc/T7PV-JWGE] (emphasizing how lawyers represent clients from all walks of life and yet it is statistically the least diverse profession).

37. *See* George B. Shepherd, *No African-American Lawyers Allowed: The Inefficient Racism of the ABA's Accreditation of Law Schools*, 53 J. LEGAL EDUC. 103, 108–09 (2003) (describing efforts by state bars and the ABA to keep people of color out of the legal profession. This discrimination started in the Jacksonian period in the 1820s and 1830s and continues to this day).

38. *See id.* at 111–13 (detailing the different methods that the ABA used over the course of the last one hundred years to limit the diversity of incoming law students and lawyers, including

entry exam, or at least not one at all like the bar exam as it exists today.[39] For a long time, exclusion was accomplished by cost, connections, and the overt ability to rule out entire segments of the population based on their ethnicity or the color of their skin.[40] In the decades leading into and right after World War II, attempts at exclusion shifted to become more covert.[41] Enter the modern-day bar exam, which arose in response to a societal move towards less overt obstacles to block attempts by people from traditionally marginalized communities to enter the legal profession in the early 1900s.[42]

A. The Rise of the Modern Bar Exam

In the earliest decades of American history, it was poor, uneducated Whites that were excluded covertly from the practice of law by cost or the inability to find a willing mentor for apprenticeship.[43] There was no question that people from communities of color were not permitted to practice law and thus no need to be covert about the barriers that kept

manipulating the bar exam and accreditation of law schools to substantially reduce the number of minorities and persons of color in the legal community).

39. *See* Richard L. Abel, AMERICAN LAWYERS 43–51, 249 (1989) (changing the requirements necessary to be admitted to practice law from more practical experience—such as apprenticeship—to requiring higher education); *see also* Shepherd, *supra* note 37, at 108–10 (chronicling the changes in prerequisites for admission to the bar and how the bar exam gradually changed from the ten minute oral bar exam Abraham Lincoln took, to the multiday long bar exam we know today).

40. *See* Shepherd, *supra* note 37, at 109 (noting as late as 1943, the ABA formally excluded Black persons from the legal profession and many states prohibited Blacks from attending state university despite these state schools being the only schools many Blacks could afford).

41. *See id.* at 109–110 ("Expressing both bigotry and their economic self-interest in eliminating competition from new lawyers, the bar acted to stop the influx of new minority lawyers in two new ways that did not involve the overt discrimination that was becoming increasingly difficult: decreasing bar exam pass rates and tightening law school accreditation.").

42. *See id.* at 109–11 (explaining how changing the bar exam and introducing accreditation standards in law schools allowed the ABA to institutionalize the systemic oppression of communities of color from continuing to enter the legal profession. The coincidence of plummeting bar passage rates and the willingness of state bars to hop on board with accreditation requirements shut out schools serving a majority of colored students cannot be overlooked in connection with racial motivations of the lawyer elite).

43. *See id.* at 108 (claiming in the early 1800s, only the wealthy, well-connected were able to enter the legal profession and it was not until 1840 that almost any White person could enter into the practice of law).

them from licensure.[44] Indeed, lawyering was reserved for the White, American aristocracy.[45]

In response to the mounting distrust of elitist American lawyers, in the first half of the 1800s, sweeping changes were made to make it much easier for people to obtain a law license.[46] The ranks of lawyers swelled to include more of the White American middle class.[47] The precursors to today's bar exams, such as they were, were easily passed with little or no prior education requirements in many states.[48] Moreover, nearly every state permitted people to clerk with a law firm as a path to licensure rather than obtain any specific education or pass an exam.[49] At the turn of the twentieth century, the business of legal education was booming.[50] In this environment, despite the American Bar Association's (ABA) exclusion of Black lawyers as a matter of policy until 1943, a select few Blacks were able to obtain a license to practice law.[51] In 1910, forty-five

44. *See id.* at 109 ("During the period when the [legal] profession was wide open to [W]hites, overt discrimination caused the profession to include almost no [B]lacks.").

45. *See id.* at 108 (explaining how during the 1820s and 1830s, the existing educational requirements and bar exams resulted in an upper-class profession which unfairly excluded those without wealth and connections).

46. *Id.* (describing the multitude of changes made to law licensure and barriers to entering the legal profession as being broken).

47. *See id.* ("[A]lmost any [W]hite male could practice law, with . . . [an] easily pass[able] bar exam.").

48. *See id.* at 108–09 (noting that before the American Civil War, White men were able to practice law with very education and a rather easy bar exam that in some cases consisted of a ten-minute oral exam).

49. *Id.* at 109 (2003); *see* Abel, *supra* note 39, at 43–44 (stating the first entrance exam into the legal profession was introduced in 1875 and, by 1891, only half the schools had adopted one); *cf.* Ambrogi, *supra* note 16 (displaying the dramatic difference between the requirements to get into law school in the beginning and how the demographics now include more minorities and persons of color, but the profession still has room to become more diverse. "Nearly all minorities are underrepresented in the legal profession compared with their representation in the U.S. population: 5 percent of lawyers are African American, while the U.S. population is 13.4 percent African American; 5 percent of lawyers are Hispanic, while the U.S. population is 18.1 percent Hispanic; and 2 percent of lawyers are Asian, while the U.S. population is 5.8 percent Asian. Only Native Americans, at 1 percent of lawyers, are represented at about the same proportion as their general population numbers. At law firms, the number of minority partners has increased only slightly over the last decade, from 6 percent in 2009 to 9 percent in 2018. At law schools, minority enrollment has gradually risen, from 25 percent of law students in 2011 to 31 percent in 2018.").

50. *See* Shepherd, *supra* note 37, at 109 (stating thousands of lawyers were entering the legal profession due to part-time night law schools that began opening in 1900).

51. *See id.* at 109, 121–22 (discussing the percent of the legal profession made up of Black lawyers and the ABA's policy of only allowing White men membership until 1943 and noting the

years after the Thirteenth Amendment outlawed slavery,[52] Blacks represented less than one percent of the legal profession while making up over eleven percent of the U.S. population.[53]

Between 1900 and 1920, Americans from marginalized communities began to make greater inroads into the legal profession.[54] Lawsuits for equal access helped to expand access to law school for some from communities of color.[55] Before 1950, while some states integrated their law schools, a few created separate schools for law students from communities of color under the still legally valid separate but equal doctrine.[56] Though they were not without their issues, for-profit law schools made the ability to obtain a legal education cheaper and easier as well.[57] Indeed, this period is often thought of as creating more access to the legal profession for people from communities of color than ever before or since.[58]

As the mid-century point neared, it became less acceptable to have overtly racist policies of exclusion based on one's ethnicity or the color

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ABA's accidental admittance of its "first three [B]lacks" in 1914 led the rescission of their admission because of "the settled practice of the association . . . to elect only white men to membership."); *see also* GERALDINE R. SEGAL, BLACKS IN THE LAW: PHILADELPHIA AND THE NATION 19 (1983) (bolstering the fact that Black lawyers represent less than one percent of all lawyers in the United States).

52. U.S. CONST. amend. XIII, § 1.

53. Shepherd, *supra* note 37, at 109.

54. *Id.*

55. *See id.* (expressing one of the catalysts for increased access to law school for minorities resulted from a series of holdings from the U.S. Supreme Court that held "state-run schools could not completely exclude [B]lacks."); *see also, e.g.*, Pearson v. Murray, 182 A. 590, 594 (1936) (ordering integration of Maryland's law school); *see also, e.g.*, Mo. ex rel. Gaines v. Canada, 305 U.S. 337, 349–52 (1938) (ruling Missouri must offer Gaines admission to the law school or make equal facilities available to him); *see also, e.g.*, Sweatt v. Painter, 339 U.S. 629, 635–36 (1950) (deciding that segregating law schools violates the Equal Protection Clause as separate law schools are unequal by nature); *see also, e.g.*, McLaurin v. Okla. State Regents Higher Educ., 339 U.S. 637, 642 (1950) (ruling that segregation in universities violates the Equal Protection Clause).

56. *Cf.* 339 U.S. at 635–36 (ordering the integration of law schools across the U.S.).

57. *See* Shepherd, *supra* note 37, at 109 (sharing the benefits to the minority community of the newly established night law schools, which operated at reasonable prices and times when working people could attend).

58. *See id.* at 113 (indicating it was easier in the 1920s for Black and other minority students to obtain a legal education because schools were required to admit these students and flexible, reasonably priced schooling options were created; however, after the ABA instituted new accreditation and bar exam requirements less minorities were able to gain access).

of one's skin.[59] Thus, as was happening all over the nation at this time, the ABA and state bars were forced to build their exclusionary practices into the system of licensure to the legal profession.[60] This was accomplished by tightening accreditation standards for law schools and making the bar exam much harder for Black, Indigenous, and people of color to pass compared to their White counterparts by changing the requirements of the exam and raising the required pass score.[61] Due, in part, to the systemic problems in secondary and post-secondary education, Black, Indigenous, and students of color did, and still do not, perform as well on standardized testing relative to White students.[62] In 1948, the Law School Admission Test (LSAT) was created as a way to measure likely success in law school and accreditation standards were tied to entering LSAT scores.[63] Greater advance education in

59. *See id.* at 110 (describing the change in the form of discrimination from overt, based on race or ethnicity, to covert, based on access and education); *see also* George B. Shepherd, *Defending the Aristocracy: ABA Accreditation and the Filtering of Political Leaders*, 12 CORNELL J. L. & PUB. POL'Y 637, 640–41 (2003) (indicating despite overt racism, Blacks and other minorities were obtaining law degrees, and in an effort to stem that the ABA instituted new requirements in the form of tightening school accreditation decreasing bar passage rates by implementing more difficult exams).

60. *See* Shepherd, *supra* note 37, at 113 (exploring the reasons behind the ABA's new requirement for law schools to be accredited and making the bar exam more difficult to pass).

61. *See id.* (outlining the efforts the ABA took to promulgate racist policies resulting in more discrimination than the previous policies had accomplished).

62. *See* Grace Austin, *Why Do Minority Test Scores Still Lag behind Whites?*, DIVERSITY J. (May 12, 2012), https://diversityjournal.com/9223-minority-test-scores-behind-whites/#:~:text=Institutional%20factors%20can%20often%20contribute,residency%20in%20lower%2Dincome%20areas [https://perma.cc/W2VL-W6MU] (laying out the various factors that impact the testing gap, such as institutional actors); *see also* Theoni Soublis Smyth, *Who Is No Child Left Behind Leaving Behind?*, 81 THE CLEARING HOUSE 133, 135 (2008) (noting that students of color and economically disadvantaged students did not perform as well on standardized exams due to a lack of educational resources available to them); *see also* Kevin Mahnken, *The Achievement Gap has Driven Education Reform for Decades: Now some are Calling it a Racist Idea*, LA SCH. REP. (Aug. 21, 2020), http://laschoolreport.com/the-achievement-gap-has-driven-education-reform-for-decades-now-some-are-calling-it-a-racist-idea/ [https://perma.cc/MUD9-DR68] (noting a growing concern that standardized testing has been used as a tool of White supremacy by continuing the narrative that students of color are not able to perform as well as White students). *See generally* Meredith Broussard, *Why Poor Schools Can't Win at Standardized Testing*, ATLANTIC (JulY 15, 2014), https://www.theatlantic.com/education/archive/2014/07/why-poor-schools-cant-win-at-standardized-testing/374287/ [https://perma.cc/5AQT-NVNV] (demonstrating how the budget gap in large, urban districts leaves schools largely educating economically disadvantaged students without the funding for materials necessary to obtain better scores on standardized exams).

63. *See* Shepherd, *supra* note 37, at 114 (arguing the LSAT presents a significant barrier to law school for communities of color); *see also* William P. LaPiana, *Merit and Diversity: The*

undergraduate institutions was also required, creating expensive roadblocks to a legal education at a time when many people from communities of color were still not even allowed to attend most colleges and universities.[64]

Purportedly, the ABA and state bars took the measures they did to protect the public from the growing number of "uneducated" people entering the legal profession and to protect law students from paying for an inadequate legal education.[65] But one doesn't have to dig deep to encounter statement after statement by those in power expressing the need for tighter restrictions aimed at keeping people from marginalized communities out of the practice of law.[66] And, in fact, after the tightening of restrictions up through the 1940s, the trend of growing rates of lawyers from marginalized communities entering the practice of law

Origins of the Law School Admissions Test, 48 ST. LOUIS U. L. J. 955, 975 (2003) (discussing the creation of the LSAT and the first administration of the test in 1948); *see also, e.g.*, Robbins, *supra* note 12 ("Law school is the least diverse graduate school program, which translates to the lack of diversity among law professionals. Among America's national law schools, Caucasians fill eighty-eight percent of the seats. This persistent trend over the years has led researchers to question what barriers of entry might exist that are limiting the diversity. One of the most significant barriers has shown to be the Law School Admissions Test. The LSAT is the highest weighing component on whether an applicant will be accepted or denied from law school. Trends have also revealed that underrepresented minorities statistically have much lower scores on the LSAT.").

64. *See* Shepherd, *supra* note 37, at 110 ("The new requirements prohibited for profit-schools, required law students to have had expensive undergraduate education, eventually required expensive building and libraries, and required expensive full-time faculty rather than cheaper adjunct appointments."); *see also* Shepherd, *supra* note 59, at 640–44 (explaining the new requirements and how "the ABA was able to convince state and federal governments to grant licenses to practice law only to graduates of law schools that received AB accreditation.").

65. *See The American Bar Association's Role in the Law School Accreditation Process: A Report of the ABA Section of Legal Education and Admissions to the Bar*, 32 J. LEGAL EDUC. 195, 195 (1982) (explaining how the ABA began developing and seeking to implement accreditation standards in the 1920s to improve the quality of legal education and in recognition of the growing problem of "low-standard diploma mills").

66. *See* LISA LERMAN ET AL., ETHICAL PROBLEMS IN THE PRACTICE OF LAW 47 (5th ed. 2020) ("While the stated purpose of many restrictive policies was to protect the public, practicing lawyers may have been motivated also by economic and social self-interest, and by racism, sexism, and other forms of bias. Some lawyers probably viewed the resulting exclusion of women and minorities from the profession as a beneficial side effect of what they claimed was a form of consumer protection."); *see also* Shepherd, *supra* note 37, at 110–11 (detailing statements from the ABA, state bars, and legal academy leaders indicating the benefit of such standards in keeping marginalized communities out of the legal profession. Many of the comments of these leaders focused on the need to exclude immigrants, as well as Jewish and Eastern Catholics from the profession, at least until they had been sufficiently Americanized).

started cutting back the other way.[67] The ABA and state bars used the model of covert exclusion provided by the medical profession to excel in the job of exclusion.[68] Tighter accreditation standards resulted primarily in closing law schools with larger populations drawn from communities of color.[69] Entry requirements excluded many people from marginalized communities before they could even get into law school.[70] A stricter pass rate and more standardized approach to administering the bar exam meant that even people from communities of color that were admitted to law school and made it through their legal education had a harder time passing the bar exam and obtaining a license to practice law.[71]

In the early decades of the 1900s, many bar exams still only tested the ability of the examinee to recite legal rules and procedures.[72] They did

67. *See* Shepherd, *supra* note 37, at 113 (explaining the number of people from communities of color entering the legal profession following the enactment of the ABA standards and the changes to the bar exam have never reached the same rate of growth again); *see also* Rhode, *supra* note 36 (stating that while all professions are majority White, the legal profession is the least diverse of all with the Bureau of Labor statistics reporting that eighty-eight percent of lawyers are White).

68. *See* Shepherd, *supra* note 37, at 111–12 ("The ABA hoped to follow the lead of the medical profession, which had recently succeeded in reducing the number of minority physicians. At the turn of the century, the number of medical schools had grown substantially. The American Medical Association then issued a report that listed many of them as unacceptable. . . . [B]y 1920 the number of schools had fallen to half the number in 1900. One result was that the number of black physicians declined . . . . An admiring leader in the ABA said, 'I do not know whether we can accomplish in the next few years, working with the American Bar Association, what the American Medical Association has accomplished for the medical profession and medical schools, but I think we can go a very long way.'").

69. *See id.* at 113 (following the implementation of the standards, several historically Black law schools closed right away while others struggled with declining enrollment until they changed their admissions standards); *see also* Tamara Tabo, *What's More Racist? The Trouble with Low Bar Passage Rates at Historically Black Law Schools*, ABOVE THE L. (Aug. 8, 2013, 10:07 AM), https://abovethelaw.com/2013/08/whats-more-racist-the-trouble-with-low-bar-passage-rates-at-historically-black-law-schools/?rf=1 [https://perma.cc/3W6Y-478F] (discussing the tension between the lower bar passage rates of historically Black law schools and the ABA standards necessitating turning away from the mission of serving students from communities of color seeking a chance to join the legal profession in order to survive).

70. *See* Shepherd, *supra* note 37, at 112–14 (laying out some of the accreditation policies that led to the exclusion of more students from communities of color seeking law school admission).

71. *See id.* at 116–18 (noting the lower bar pass rates of students from communities of color and arguing that this creates a catch-22 problem as bar pass ability also drives admissions standards).

72. *See, e.g.*, Margo Melli, *Passing the Bar: A Brief History of Bar Exam Standards*, 21 UNIV. WIS. L. SCH. F. GARGOYLE, no. 1, Summer 1990, at 4 (depicting the format and types of questions on previous bar exams).

not test the ability to engage in more complex legal analysis.[73] Bar exams ranged in length and some were oral while others were written.[74] Starting in the 1930s, as the ABA and state bars began their campaign of tightening restrictions with at least an aim of excluding certain groups,[75] the earliest version of today's bar essays became more common place.[76] Instead of questions such as "what is evidence" the bar shifted to requiring written responses using memorized law that was applied to a hypothetical set of facts and analyzed under intense time conditions.[77] In the 1970s, the Multistate Bar Exam (MBE), the first multiple-choice bar exam, was born and began to supplant other types of exams due to its ease of use by jurisdictions and the ability to test on a greater variety of subjects.[78]

Today, every February and July, a majority of states administer the Uniform Bar Exam (UBE) created by the National Conference of Bar Examiners (NCBE) to graduates seeking to capitalize on their three years of law school by obtaining a license to practice law.[79] States not administering the UBE still administer their own version of the bar exam,

73. *See id.* at 3–4 (pointing to ABA Standard 16, passed in 1958, as the formalizing of efforts aimed at shifting bar exams from testing "information, memory, or experience" to testing logical reasoning and analysis of hypothetical situations as well as the knowledge of fundamental principles of law to be used in application to a factual situation. As states commissioned more formalized boards to oversee admission to law practice, there was growing concern about the disparity in admission to practice from one state to the next. The spoken and unspoken underlying concern was that this disparity resulted in admission to the bar of people who were not qualified to practice law); *see also* Shepherd, *supra* note 37, at 111 (providing several statements from prominent figures in leadership of their concern about the growing number of uneducated people joining the practice of law).

74. *Cf.* Melli, *supra* note 72*,* at 3–4 (comparing the stark difference in the bar exams as administered in the nineteenth century to the early and mid-twentieth century).

75. *See* Shepherd, *supra* note 37, at 113 (indicating that the ABA's campaign on accreditation standards and the changing bar exam in the 1930s resulted in a reduction in the number of lawyers from communities of color entering the legal profession).

76. *See* Melli, *supra* note 72*,* at 4 (analyzing how upon its founding in 1931 the NCBE began guiding states towards using bar exams to use essays requiring the application of the law to a set of facts rather than just testing general knowledge of the law).

77. *See id.* (detailing the changes made to the exam to challenge the applicant's ability to logically reason under intense time pressures).

78. *Id.*

79. *See Jurisdictions that have Adopted the UBE*, NAT'L CONF. BAR EXAM'RS, https://www.ncbex.org/exams/ube/ [https://perma.cc/ZWP9-PD9B] (outlining the testing schedule for the UBE, which requires test takers to achieve a minimum score determined by jurisdiction to qualify for admission into the bar).

often closely mirroring the UBE but more focused on their own state law.[80] A passing score on the bar exam is only one requirement for admission to the bar, but it is one that nearly every jurisdiction requires of its applicants for licensure.[81] The modern bar exam draws directly from the changes implemented by the ABA, the NCBE, and state jurisdictions in the prime of attempting covert exclusion of people from marginalized communities after it became legally and socially unacceptable to simply exclude other races and ethnicities by written policy.[82]

The majority of jurisdictions requiring bar exams administer the UBE.[83] Aside from Wisconsin which permits diploma privilege for graduates of Wisconsin law schools, most of the remainder of the jurisdictions not administering the UBE, administer a bar exam that is similarly designed.[84] In fact, nearly every jurisdiction uses the MBE,[85]

80. *See* 2020 COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS, NAT'L CONF. BAR EXAM'RS 28 (Judith A. Gundersen & Claire J. Guback eds., 2020), https://www.ncbex.org/pdfviewer/?file=%2Fassets%2FBarAdmissionGuide%2FCompGuide2020_021820_Online_Final.pdf#page=40 [https://perma.cc/87A2-8B8L] (capturing states and jurisdictions that do not use the UBE for licensure, but rather their own bar exam. Of the 20 jurisdictions listed, Texas has adopted the UBE as of February 2021, and all but two of the remaining jurisdictions license the MBE exam and include it in their state bar exam. In addition, many of the states also use the MPT and MEE exam on top of their jurisdiction specific bar exam component. Interestingly, Puerto Rico is the only jurisdiction that does not use any components of the NCBE bar exam and drafts its own bar exam entirely).

81. *See* Kim Lyons, *Bar Exam Falling Out of Favor*, PITTSBURGH POST-GAZETTE (Jan. 25, 2014, 7:10 PM), https://www.post-gazette.com/business/2014/01/26/Bar-exam-falling-out-of-favor/stories/201401260118#:~:text=In%20Wisconsin%20%2D%2D%20the%20only,school%20can%20practice%20law%20there [https://perma.cc/85VA-2M3H] (stressing how the bar exam is a major barrier to obtaining a license and is required everywhere except Wisconsin).

82. *See* Melli, *supra* note 72*,* at 4 (describing how the modern version of bar essays were implemented along with the rise of the MBE); *see also* Shepherd, *supra* note 38, at 110–11 (delineating the changes that the ABA and state bars worked together to implement in the early 1900s, which resulted in a decline of students from communities of color being admitted to law school or passing the bar exam).

83. NAT'L CONF. BAR EXAM'RS, *supra* note 79 (noting a majority of jurisdictions have adopted or currently administer the UBE).

84. Lyons, *supra* note 81; *see* NAT'L CONF. BAR EXAM'RS, *supra* note 80, at 28 (showing the characteristics of each non-UBE state's bar exam). Based on recent announcements, it is expected that soon additional jurisdictions will implement UBE testing as well. *See, e.g.*, *February '21 Bar Exam to be Remote Online Test*, MICH. CTS. NEWS RELEASE, https://courts.michigan.gov/News-Events/press_releases/Documents/BLE%20Media%20Release%2012-4_FINAL.pdf [https://perma.cc/22KU-SQM2] ("The [Michigan Supreme] Court is moving to implement the Uniform Bar Exam (UBE) for future testing.").

85. *Jurisdictions Administering the MBE*, *supra* note 7.

the multiple-choice exam originally created back in the 1970s.[86] The UBE is a two day exam typically requiring six hours of testing on each of the two testing days.[87]

On day one, bar takers complete the written portions of the exam, including two Multistate Performance Tests (MPTs) and six Multistate Essay Examinations (MEEs).[88] Examinees have ninety minutes for each MPT and thirty minutes for each essay.[89] Success on the written exam requires memorizing massive amounts of law.[90] Success also requires the ability to produce an organized, written response identifying the rule and analyzing a hypothetical scenario under intense time pressure.[91] Day two of the bar exam includes two 100-question sets of MBEs testing across seven different areas of law.[92] Success on the MBE requires broad

86. Melli, *supra* note 72, at 4.

87. *Understanding the Uniform Bar Examination*, NAT'L CONF. BAR EXAM'RS (July 2017), https://www.ncbex.org/pdfviewer/?file=%2Fdmsdocument%2F209 [https://perma.cc/FW2W-V9JZ].

88. *Id.*

89. *Id.*

90. *Compare Jurisdictions Administering the MEE*, NAT'L CONF. BAR EXAM'RS, https://www.ncbex.org/exams/mee/ [https://perma.cc/U8W4-V7RP] ("The purpose of the MEE is to test the examinee's ability to (1) identify legal issues raised by a hypothetical factual situation; (2) separate material which is relevant from that which is not; (3) present a reasoned analysis of the relevant issues in a clear, concise, and well-organized composition; and (4) demonstrate an understanding of the fundamental legal principles relevant to the probable solution of the issues raised by the factual situation. The primary distinction between the MEE and the Multistate Bar Examination (MBE) is that the MEE requires the examinee to demonstrate an ability to communicate effectively in writing."); *and Preparing for the MEE*, NAT'L CONF. BAR EXAM'RS, https://www.ncbex.org/exams/mee/preparing/ [https://perma.cc/99F4-KQPE] (outlining how the MEE tests all the same subjects included on the MBE as well as Business Associations, Family Law, Trusts and Estates, Secured Transactions, and Conflicts of Law); *with Preparing for the MPT,* NAT'L CONF. BAR EXAM'RS, https://www.ncbex.org/exams/mpt/preparing/ [https://perma.cc/9Y72-NATE] (explaining the MPT is different from the MEE in that the law is provided in the packet); *and Jurisdictions Administering the MPT*, NAT'L CONF. BAR EXAM'RS, https://www.ncbex.org/exams/mpt/ [https://perma.cc/4MLT-PQPP] ("The MPT is designed to test an examinee's ability to use fundamental lawyering skills in a realistic situation and complete a task that a beginning lawyer should be able to accomplish. The MPT is not a test of substantive knowledge; rather, it is designed to evaluate certain fundamental skills lawyers are expected to demonstrate regardless of the area of law in which the skills are applied.").

91. *See Preparing for the MEE*, *supra* note 90 (explaining how bar takers never know which of the twelve major categories of subjects will be tested on the essay exam. Each exam varies, making it necessary for bar takers to memorize enough law in each area to have the ability to answer or respond to any essay encountered).

92. *See Preparing for the MBE*, NAT'L CONF. BAR EXAM'RS, https://www.ncbex.org/exams/mbe/preparing/ [https://perma.cc/2MTS-2BY7] (excluding twenty-five non-scored

knowledge of legal principles and the ability to apply them to discrete factual situations in under two minutes per question.[93]

The score needed to pass this exam varies across jurisdictions, but ranges from 260-280 of out of the possible 400 points available on the UBE.[94] Presumably, a score from 260 to 280, depending on the jurisdiction, indicates that a person is minimally competent to practice law.[95] The passing score—also known as a cut score—is not a raw score, but a scaled score based on a method of equating prior exams using formulas that are not released to the public.[96] In many jurisdictions today, an applicant has a limited number of attempts at the bar exam before they are no longer permitted to keep attempting to pass the bar and obtain a law license.[97] This cut off means that in some states, like Texas, graduates cannot take the bar exam an infinite number of times until they pass.[98] As such, the bar exam is a high stakes test that can become an

questions, "[t]he 175 scored questions on the MBE are distributed evenly, with 25 questions from each of the seven subject areas: Civil Procedure, Constitutional Law, Contracts, Criminal Law and Procedure, Evidence, Real Property, and Torts.").

93. *See id.* (determining the straight calculation of time available for each question is: 180 minutes/100 questions = 1.8 minutes per question. The MBE presents bar takers with a set of facts from one of seven subjects and provides four possible answer choices; points are not deducted for wrong answers.).

94. *UBE Scores*, NAT'L CONF. BAR EXAM'RS, https://www.ncbex.org/exams/ube/scores/ [https://perma.cc/G6RE-2N3F] (indicating that UBE scores are reported on a 400-point scale); *see Minimum Scores*, NAT'L CONF. BAR EXAM'RS, https://www.ncbex.org/exams/ube/score-portability/minimum-scores/ [https://perma.cc/4L35-NHK3] (providing a map that indicates the minimum passing score required in each UBE jurisdiction).

95. *Minimum Scores*, *supra* note 94; *see Resolution 109 of the American Bar Association*, AM. BAR ASS'N 2 (2016), https://www-alt.ncbex.org/dmsdocument/193 [https://perma.cc/P9LE-QDDS] (urging the adoption of resolution 109 by reporting that "UBE jurisdictions maintain local control over bar admissions while administering a uniform, high quality examination of minimum competence to practice law").

96. *See MBE Scores*, NAT'L CONF. BAR EXAM'RS, https://www.ncbex.org/exams/mbe/scores/ [https://perma.cc/428B-S4RN] ("MBE scaled scores are calculated by NCBE based on a statistical process known as equating that is commonly used on standardized examinations. This statistical process adjusts raw scores on the current examination to account for differences in difficulty as compared with past examinations. Equating makes it possible to compare scaled scores across test administrations because any particular scaled score will represent the same level of knowledge/performance from one test date to another. Equating helps to ensure that no examinee is unfairly penalized or rewarded for taking a more or less difficult form of the test.").

97. NAT'L CONF. BAR EXAM'RS, *supra* note 80, at 18–19, 28 (documenting on charts five and seven the limit, if any, each jurisdiction has on the number of bar exams an applicant may take).

98. *See id.* at 28 (illustrating how in Texas, a bar taker is allowed five chances to pass the UBE prior to disqualification from further testing, and from obtaining their license to practice law).

absolute bar to licensure for graduates that have presumably failed to show they possess the knowledge and skills needed for minimum competence in the practice of law.[99]

B. An Ongoing Tool for Exclusion

The NCBE's stated purpose of the bar exam is "to test [the] knowledge and skills that every lawyer should be able to demonstrate prior to becoming licensed to practice law."[100] Though they take various forms, every jurisdiction has its own state bar tasked with making decisions for their state about licensure.[101] States use the bar exam to test that someone seeking licensure has "minimum competency" in the skills necessary to practice law.[102] Most state bar examiners view their role as protecting the public from incompetent lawyers and use the bar exam as the measure for competency.[103] In lawsuits challenging the assumption about the bar exam's ability to measure minimum competency, courts have been unwilling to question a state board's determination of how competency is measured for their state.[104]

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99. *Id.*

100. *Jurisdictions That Have Adopted the UBE*, NAT'L CONF. BAR EXAM'RS, https://www.ncbex.org/exams/ube/ [https://perma.cc/6QRG-NHCR].

101. *See* LISA LERMAN ET AL., *supra* note 66, at 19–20 (indicating in most states, final decisions about admission to the bar are made by the state's highest court).

102. *See* Elizabeth Olson, *Bar Exam, the Standard to Become a Lawyer, Comes Under Fire*, N.Y. TIMES (Mar. 19, 2015), https://www.nytimes.com/2015/03/20/business/dealbook/bar-exam-the-standard-to-become-a-lawyer-comes-under-fire.html [https://perma.cc/67A9-26GW] (quoting former President of the NCBE, who described the bar exam as "a basic text of fundamentals" with "no justification other than protecting the consumer.").

103. *See* Melli, *supra* note 72*,* at 3 (indicating the bar exam has "almost universal" acceptance as the main measure for determining competency to practice law); *see also* Shepherd, *supra* note 37, at 126 (analyzing the myth of the bar exam as protection for the consumer. "[H]istory shows that the true objective [of the bar] has often been to reduce competition by excluding disfavored racial groups.").

104. *See* Joan W. Howarth, *The Professional Responsibility Case for Valid and Nondiscriminatory Bar Exams*, 33 GEO. J. LEGAL ETHICS 931, 934–38 (2020) ("Bar examiners' immunity from Title VII rests on a collection of cases from the 1970s that upheld highly questionable practices of bar examiners from Georgia, Alabama, South Carolina, and Virginia against challenges by African American applicants. Although these cases immunized bar exams from Title VII scrutiny, their discussions of both job-relatedness and disparate impact are worth our attention. These cases provided bar examiners with immunity, but they should not offer bar examiners much comfort."). *See generally* Tyler v. Vickery, 517 F.2d 1089 (5th Cir. 1975) (holding the Georgia bar exam was not intentionally or inherently discriminatory even though a disproportionate number of Black applicants failed it); *see generally* Melli, *supra* note 72*,* at 4

While it may be true the bar exam measures minimum competence, its history as a tool of discrimination is also well documented.[105] The bar exam arose as one prong in a multi-prong approach to limiting access sought by communities of color to careers in the legal profession.[106] It persists in accomplishing that goal to this day.[107] White examinees are far more likely to pass the bar exam on their first try than their counterparts from communities of color.[108] Law graduates from marginalized communities are also more likely to be excluded from practice by the cap on the number of times an applicant can take the bar exam.[109] In 1998, the Law School Admissions Council undertook a massive study of national bar pass rates that captured the disparity in first-time bar passage, which breaks down as follows:[110]

(highlighting the incredible difficulties that the bar exam brought forth upon its creation, including the over burdening of state resources and significant delays in the grading process).

105. *See* Shepherd, *supra* note 37, at 109–13 (documenting the ABA's controversial overt and covert history of discrimination on disfavored groups).

106. *See id.* (describing a two-prong approach to protecting the legal profession from those unqualified to practice law).

107. *See* Howarth, *supra* note 104, at 953–55 (comparing the higher passage rates of White bar takers with the lower passage rates of communities of color in California and New York, which highlighted the discriminatory impact of the bar exam); *see also* Smith, *supra* note 11 (indicating bar passage for Black law students has remained consistently lower than White law students for a myriad of complicated reasons that cannot be resolved simply by more selective admissions standards).

108. *See* Smith, *supra* note 11 (explaining how, as of the LSAC's last major study twenty years ago, about eight percent of White law students failed the bar exam on a first attempt compared to approximately forty percent of Black law students that failed on their first attempt at the bar exam).

109. *See* Yakowitz, *supra* note 20, at 19 (stating Black and Hispanic graduates are twice as likely never to pass a bar exam nor receive a law license).

110. Linda F. Wightman, *LSAC National Longitudinal Bar Passage Study*, L. SCH. ADMISSIONS COUNCIL iii, 27 (1998), https://www.lawschooltransparency.com/reform/projects/investigations/2015/documents/NLBPS.pdf [https://perma.cc/WVS6-Q66M] (explaining there were no reliable sources of national empirical data to support or refute claims that there was a lack of wisdom to invest time and resources that are necessary to obtain a legal education).

Racial/ Ethnic Group	Whites	Blacks	Native Americans	Mexican Americans	Hispanics	Asian Americans
National First-Time Passage Rate	91.93%	61.40%	66.36%	75.88%	74.81%	80.75%

Interestingly, the report showed that despite the difference in first-time bar passage, for those that persisted in taking the bar exam eventual passage rates within these groups ranged from 78–92%.[111] Eventual passage does not come without its own challenges for law graduates,[112] but it is worth noting that many graduates are able to eventually prove their competency to practice law, again at least to the extent that bar passage actually measures competency.[113]

The bar exam arose to create a built-in systemic block to the practice of law for communities of color, and it continues to serve as an effective block to this day.[114] Yet, for some reason, bar examiners today defend the importance of the bar exam in determining minimum competence for practice.[115] Essentially, by continuing the use of the bar exam, bar examiners are indicating an acceptance of the discriminatory impact of

111. *See id.* at 75 (clarifying how the data substantiates significant differences across ethnic grounds but does not find discrepancies in pass rates between men and women, nor between male and female examinees within any individual ethnic group).

112. *See* Yakowitz, *supra* note 20, at 12–14 (indicating eventual passers absorb important short-term costs, experience higher rates of unemployment, and higher rates of dissatisfaction in general).

113. *See* Steven Foster, *Does the Multistate Bar Exam Validly Measure Attorney Competence?*, 82 OHIO ST. L. J. ONLINE 31, 41 (2021) (arguing the MBE does not measure competency for practice, as shown by the attorneys with varying years of experience who took the MBE and failed. The more "competent" the attorneys were, based on their respective years of experience, the worse they did).

114. *See* Shepherd, *supra* note 37, at 113 (indicating access to careers in the legal profession for those from communities of color remains a challenge to this day).

115. *See* Melli, *supra* note 72, at 3 (indicating the bar exam almost has universal acceptance as the main determinant of competence to practice law); *see also* Shepherd, *supra* note 37, at 126 ("Even if the ABA's true objective were to protect consumers of legal services, the cutoffs are a failure. A long literature demonstrates that the bar exam is a seriously flawed means of protecting the public from incompetent lawyers.").

the bar exam.[116] Indeed, by continuing to not address the problem, bar examiners are providing their approval for the notion that in order to measure competency—via the bar exam—the price of a lack of diversity in the legal profession is acceptable.[117] Naturally, this leads to a serious inquiry into whether the bar exam measures competency, and that is where the main thrust of the growing arguments against the bar exam have centered in recent years.[118] If the bar exam is not measuring competency, what is it testing?[119] And, even if the bar exam is measuring competency, does it follow that there are no alternatives that could effectively serve as a measure of competency as well?[120]

116. *See* Howarth, *supra* note 104, at 935 (recognizing that bar examiners have been declared immune from Title VII despite a record showing racial disparities in bar pass rates and problematic scoring practices, bringing to light questions of our profession's willingness to take seriously the professed values).

117. *See id.* at 959 ("Bar examiners defend disparate results on bar exams by arguing that bar passage differences reflect prior differences, such as the LSAT and in law school grades. Bar Examiners cannot be expected to eliminate preexisting differences at the licensing stage . . . [b]ut bar examiners should be expected to eliminate *unnecessary* disparities in their test results.").

118. *See* Foster, *supra* note 113, at 41–42 (examining the ability of the MBE to measure competence, as the bar exam appears to erect a major hurdle to law graduates wanting to enter the profession and imposes particularly harsh results on minority graduates); *see also* Joan W. Howarth & Judith Welch Wegner, *Ringing Changes: Systems Thinking About Legal Licensing*, 13 FIU L. REV. 383, 406 (2019) (demonstrating there is no single understanding of what constitutes minimum competence for practitioners in the legal profession). *See generally* Marsha Griggs, *Building a Better Bar Exam*, 7 TEX. A&M L. REV. 1, 12, 64–69 (2019) (asserting the UBE fails to measure competency and proposing alternatives, such as allowing law schools the flexibility to develop and report a UBE pass rate and the option of diploma privilege). Further, the legal profession has a special responsibility to ensure that diversity is accomplished and should not shirk the need to examine and resolve racial disparities in testing by pointing to problems that exist before a student is ever admitted to law school.

119. *See* Kerry Abrams et al., *An Open Letter on the 2020 Bar Exam from Law Deans*, AM. BAR ASS'N. FOR L. STUDENTS (Oct. 8, 2020), https://abaforlawstudents.com/2020/10/08/an-open-letter-on-the-2020-bar-exam-from-law-deans/ [https://perma.cc/SC7A-XJG3] (asserting the bar exam tests the "privilege and opportunity" of its takers instead of the competency to practice law); *see also* Josh Guckert, *COVID-19 Should Signal the End of the Bar Exam*, MEDIUM (Apr. 28, 2020), https://medium.com/@joshguckert/covid-19-should-signal-the-end-of-the-bar-exam-d37251dedda0 [https://perma.cc/NUF3-MUPV] (arguing the bar exam is not a good measure of competency, as the best way to learn the legal profession has been through experience and practical training, not the ability "regurgitate as much information as possible" and take a test).

120. *See* Howarth & Wegner, *supra* note 118, at 459–62 (listing alternative strategies for demonstrating and documenting expertise, including simulations, portfolios, and component-based testing).

C. The 2020 Problem

To illustrate how important the need to answer the question of how to effectively measure competency truly is, enter a global pandemic and the need for a radical shift from the normal path to licensure.[121] In March and April 2020, as third-year law students began to wind down their journey through law school and prepare to study for the bar exam, the world shifted abruptly.[122] Graduates of the class of 2020 not only faced the largest and swiftest shift in legal education in history, but they also faced roiling social and political unrest.[123] Like the rest of the world, law students grappled with issues involving housing, the wellbeing of themselves and their loved ones, access to technology, financial insecurity, and the death of loved ones.[124] Some law students were better able to weather the challenges posed by the pandemic.[125] Others, particularly those from traditionally marginalized communities, struggled to finish law school in the midst of the change brought on by the COVID-19 pandemic.[126] Communities of color were especially hard hit by the

121. *See* Abrams et al., *supra* note 119 ("In the midst of all this uncertainty, thousands of law school graduates who hope to soon become lawyers are trying to make plans, care for families, pay their rent, and study for a bar exam to be offered on some future date perhaps under conditions that could result in contracting a deadly virus.").

122. *See* Marsha Griggs, *An Epic Fail*, 64 HOW. L. J. 1, 15 (2020) (illustrating the final semester of law school for graduates in 2020 spring semester as the pandemic ushered, which included last minute cancellations of bar exams "months into the bar study process" without a replacement date(s), and a constant changing of locations and dates with little forewarning).

123. *See id.* at 12–14 (highlighting growing protests combatting racial injustice that continued for months after George Floyd was murdered by law enforcement during the 2020 summer); *see also* David G. Broz, *We are in the Midst of a Paradigm Shift for Higher Education*, GENSLER (Mar. 17, 2020), https://www.gensler.com/research-insight/blog/coronavirus-paradigm-shift-for-higher-education [https://perma.cc/TZ9H-5DBU] (predicting how the changes in response to the pandemic will potentially shape the future trajectory of higher education).

124. Abrams et al., *supra* note 119 (emphasizing it was the most vulnerable among law school graduates who were burdened with the worst of the overwhelming uncertainty, such as those students from low-income backgrounds who had to scramble to find replacement income for rent and basic necessities).

125. *See id.* (describing how the needs of some law students varied and were exacerbated by the pandemic).

126. *See* Lauren Hutton-Work & Rae Guyse, *Requiring a Bar Exam in 2020 Perpetuates Systemic Inequities in the Legal System*, THE APPEAL (July 6, 2020), https://theappeal.org/2020-bar-exam-coronavirus-inequities-legal-system/ [https://perma.cc/E8XG-FQXQ] ("Black students noted that, because COVID-19 coincided with a national reckoning on race, they had been under intense personal stress. Many expressed concerns about being unable to pay rent, health insurance,

global health crisis.[127]

Concern about the fate of the July 2020 bar exam followed immediately on the heels of the swift changes seen around the nation in response to the COVID-19 pandemic.[128] Bar prep professionals in the legal academy moved quickly to make recommendations that state bars might consider implementing to ensure that anyone slated to take the bar exam in the summer of 2020 would not find themselves unable to move forward on the path to licensure.[129] The livelihood and wellbeing of thousands of bar takers rested in the hands of bar examiners.[130] Yet, state bar examiners were slow to respond at best and unfailing in their unwillingness to heed bar examinee concerns at worst.[131] Since the vast

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car loans and other necessary expenses if they could not start their jobs soon."); *see also* Abrams et al., *supra* note 120 (demonstrating how the issues that law students of color confront to become a licensed attorney were amplified due to the pandemic).

127. *See generally* Joseph R. Betancourt, *Communities of Color Devastated by COVID-19: Shifting the Narrative*, HARV. HEALTH PUBL'G HARV. MED. SCH. (Oct. 22, 2020, 10:30 AM) https://www.health.harvard.edu/blog/communities-of-color-devastated-by-covid-19-shifting-the-narrative-2020102221201 [https://perma.cc/7USQ-MBW8] ("The numbers were astounding: Blacks and Latinos were four to nine times more likely to be infected by COVID than whites, even in our nation's top hot spots.").

128. *See, e.g.*, Guckert, *supra* note 119 ("Now, due to the COVID-19 crisis, the future of the bar exam is in question. The State of California has suspended the July administration and is planning to administer the test online in September."). In March 2020, I taught two sections of Bar Preparation for Credit at St. Mary's School of Law. It was my fifth semester teaching Bar Preparation for Credit. St. Mary's returned on March 22, 2020, after taking an additional week off following spring break to transition all curriculum online. In our first live, online class following the break, I opened the class up for discussion about concerns regarding the July 2020 bar exam. In both sections of my course I spent the entire class period listening to student concerns and sharing my own thoughts about the possible routes the bar examiners might take. In the remaining weeks of the semester, discussion about the fate of the bar exam was a topic in every class.

129. *See, e.g.*, Claudia Angelos et al., *The Bar Exam and the COVID-19 Pandemic: The Need for Immediate Action*, SCHOLARLY WORKS (Mar. 22, 2020), https://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=2309&context=facpub [https://perma.cc/N8T6-8TP4] (introducing and discussing possible alternate solutions to licensing graduating law students for the 2020 class such as online exams, exam administration to small groups, versions of emergency diploma privilege, and supervised practice).

130. *See generally id.* (alluding to the precarious situation the legal world currently finds itself in. Not only does the field of law need new lawyers, but these budding law students need the financial security. The future of their careers as lawyers lives and dies through passing the bar exam, giving tremendous power to bar examiners).

131. *See* Sara Randazzo, *Coronavirus Pandemic Creates Bar Exam Chaos*, WALL ST. J. (July 17, 2020, 9:00 AM), https://www.wsj.com/articles/coronavirus-pandemic-creates-bar-exam-chaos-11594990800#:~:text=The%20bar%20exam%2C%20an%20annual,abolish%20this%20year%27s%20test%20altogether [https://perma.cc/TAJ5-MS9Q] (describing the turmoil created by

majority of jurisdictions are reliant on the NCBE for the MBE exam (if not the entire UBE),[132] one major factor was how the NCBE was going to handle licensing its exam materials in the midst of a pandemic.[133] The NCBE announced in March 2020 that it was going to make its decision about whether to deploy the MBE, the MEE, and the MPT for a July administration on or about Tuesday, May 5.[134] The NCBE's decision would be based on whether there would be a "sufficient number of jurisdictions and examinees to support equating of scores" and all the scoring support and grader training associated with the exam."[135]

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the failure of state licensing boards in adapting to the situation created by the COVID-19 pandemic and listing many of the states that have delayed the in-person testing weeks before the exams were scheduled to begin or remain undecided in selecting an alternative); *see also* Shandyn Pierce, *2020 Bar Applicants Held Hostage by Hubris*, LAW.COM (Sept. 08, 2020, 7:00 AM), https://www.law.com/therecorder/2020/09/08/2020-bar-applicants-held-hostage-by-hubris/ [https://perma.cc/GJ63-YN48] ("In the midst of dual calamity, the time has come for us to admit that the court's expectations of applicants are inappropriate and traumatic.").

132. *See, e.g.*, *Jurisdictions Administering the MBE*, NAT'L CONF. BAR EXAM'RS, https://www.ncbex.org/exams/mbe/ [https://perma.cc/Z6NC-5CBH] (illustrating almost all states in the United States use the MBE that is provided by the NCBE).

133. *Compare* Griggs, *supra* note 122, at 9 ("[T]he National Conference of Bar Examiners ("NCBE") issued its own organizational policy paper pointing states away from diploma privilege, supervised practice, and any path to licensure not involving a bar exam."), *with COVID-19 and the July 2020 Bar Exam*, BAR EXAM'R (2020), https://thebarexaminer.org/article/fall-2020/covid-19-july-bar-exam/ [https://perma.cc/JBA2-KGQ2] ("As shown in the timeline below, NCBE quickly addressed how to assist jurisdictions by announcing that we would make our exam materials available on two additional dates in the fall, and later announcing an emergency remote testing option for early October.").

134. *COVID-19 and the July 2020 Bar Exam*, *supra* note 133.

135. *COVID-19 and the July 2020 Bar Exam*, *supra* note 133; Stephanie Francis Ward, *Decision About Releasing July Bar Exam Materials Will Come in May, NCBE says*, AM. BAR ASS'N J. (Mar. 27, 2020, 1:43 PM), https://www.abajournal.com/news/article/ncbe-decision-about-releasing-july-bar-exam-materials-will-come-in-may [https://perma.cc/C7CL-55JK].

Following my first live, online Bar Preparation for Credit class, on March 26, 2020, at 5:58 PM, the NCBE released the update about its approach to working with jurisdictions to ensure the bar exam could move forward. My email to the class stated in part:

> I have promised to provide updates regarding the bar exam when I receive them. A few hours ago, the NCBE released an update about their portions of the bar exam that they license to Texas—including the MBE and MPT. Their decisions will have an impact on what Texas decides to do. I have copied the update below for you.
>
> This does not give us definitive answers, but here are my thoughts/opinions on what this means for you. Texas will probably wait until close to the May 5th date the NCBE has sent out to make a decision which means the bar is still scheduled to take place at its normal time until that decision is made. Until the NCBE has made their decision, will need to wait to know if it will have access to the MBE and MPT. It looks like there is some coalescing around a possible date in later fall if July

Effectively, this announcement left each jurisdiction to decide how it wanted to handle licensure.[136] However, the NCBE also made it clear that the bar exam was still the only real way to ensure competency to practice law by releasing a white paper that acknowledged the plight of 2020 graduates—particularly those from "low income" and "vulnerable populations"—and then sought to systematically push back on any consideration of options for licensure that eliminated the bar exam.[137] Bar examiners across the country largely aimed to continue to require the bar exam for licensure even as the pandemic worsened.[138] As promised,

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> can't go forward. That the NCBE is willing to make additional materials available for a fall date is a good sign that you may not have to wait until February if July does not occur.
>
> Finally, one of the key things for all of you is that May 5th is before bar study begins. Typically, you start around mid-to-late May. That will help commercial companies adjust their scheduled accordingly before you have begun to use your course. A decision could come sooner, but this gives us a timeline that won't have you start studying for no reason.

E-mail from Afton Cavanaugh, Director of Law Success and Service Professor, St. Mary's University School of Law, to course students (Mar. 26, 2020, 9:38 PM) (on file with author). As early as March 2020, future summer 2020 examinees were concerned about the possibility they would not be able to take the bar exam. Even my attempts at reassurance turned out to be false as the bar exam changed forms many times after the May 5th date. The uncertainty started at the same time higher education institutions around the United States shifted to online learning.

136. Ward, *supra* note 135 ("Jurisdictions are at varying points on a decision about a July administration. Some have felt the impact of COVID-19 more severely than others. The goal is that by May 5 we will all know more and can have more confidence in our decision about whether there will be a July exam anywhere.").

137. *See Bar Admissions During the COVID-19 Pandemic: Evaluating Options for Class of 2020*, NAT'L CONF. BAR EXAM'R 1–3, 5, 7 (Apr. 9, 2020), https://www.ncbex.org/pdfviewer/?file=%2Fdmsdocument%2F239 [https://perma.cc/8SY8-ZL3L] (criticizing any temporary paths to licensure that would eliminate the need to take the bar exam; the NCBE further included a defense of the bar exam's ability to measure competency to practice law. Moreover, the NCBE acknowledged the disproportionate social burdens the bar exam places on minority communities but explained the difference in passage rates is a reflection of the historical unequal societal issues that stem from education, experiences, and opportunities that the NCBE is not responsible for and cannot be expected to account for in testing. However, one may question the motivations of a private entity—such as the NCBE—whose existence relies on the continued use of the bar exam, arguing the bar exam is the only valid way to measure competency). One might question the motivations of a private entity that's ongoing existence relies on the continued use of the bar exam, arguing that the bar exam is the only valid way to measure competency.

138. *See Bar Exam Modifications During COVID-19: 50-State Resources*, JUSTIA, https://www.justia.com/covid-19/50-state-covid-19-resources/bar-exam-modifications-during-covid-19-50-state-resources/ [https://perma.cc/9JQQ-BUNP] (providing a state-by-state breakdown of decisions regarding bar licensure and the bar exam amongst the COVID-19 pandemic). Certainly, 2020 was not an easy time to serve as a bar examiner. The task of weighing and implementing options fell to understaffed agencies and overworked staff members who made what they felt were the best decisions based on the resources and information available to them.

in May 2020, the NCBE announced that it would make additional exam materials available on new dates in the fall for states that wanted to see if time lessened the rising cases of COVID-19.[139] Chaos ensued as states made decisions about bar exams and then had to change them as the pandemic raged into the summer.[140] Live, in-person proctored exams were cancelled by a number of states and online exams were added into the mix.[141] Left with little choice, some states abandoned the UBE and sought to test applicants in their own way to ensure an exam of some kind was given before licensure.[142] Moreover, online bar testing software platforms failed and exposed bar taker data to hackers.[143] As hostages to the state bar requirements for licensure, bar takers could only sit back and watch the comedy of errors and poor planning unfold.[144]

In the quest to protect the public from incompetent lawyers, bar examiners all over the nation showed little concern for the thousands of

139. *Evaluating Options for Class of 2020*, *supra* note 137, at 2 (providing for two additional testing dates after the traditional July dates).

140. *See, e.g.*, JUSTIA, *supra* note 138 (comparing the state-by-state decision making at the beginning of the pandemic and seeing the rapid shift in plans each state undertook with regard to conducting the bar exam as the pandemic progressed); *see also* Abigail Johnson Hess, *'Literal Hell'—How the Pandemic Made the Bar Exam Even More Excruciating for Future Lawyers*, CNBC MAKE IT (Aug. 19, 2020, 5:40 PM), https://www.cnbc.com/2020/08/19/literal-hellthe-pandemic-has-made-the-bar-exam-more-excruciating.html [https://perma.cc/V2KQ-4CTZ] (representing the disorganization prospective bar examinees experienced as states continued changing plans from an in-person July bar exam to a last minute online examination or its postponement and the adverse effect it had on the examinees).

141. *See* Hess, *supra* note 140 (demonstrating how multiple jurisdictions, including Washington D.C., New York, and Illinois chose to transition to an online exam format in the face of the challenges posed by the pandemic).

142. *Id.*

143. *See, e.g.*, David Jesse, *Michigan Online Bar Exam Crashes in Middle of Testing; Hacking Attempt Blamed*, DETROIT FREE PRESS (July 28, 2020, 7:34 PM), https://www.freep.com/story/news/education/2020/07/28/michigan-online-bar-exam-crashes-test-examsoft/5526919002/ [https://perma.cc/V3HR-35U5] ("Michigan's online bar exam crashed Tuesday about an hour into the exam, temporarily locking out aspiring lawyers taking the hours-long test. After the test was complete later in the day, the Michigan Supreme Court and the state Board of Law Examiners issued a statement saying the crash was the result of a hacking attempt."); *see also, e.g.*, Sam Skolnik, *October Online Bar Exams Spark Technology, Privacy Concerns*, BLOOMBERG L. (Aug. 18, 2020, 5:00 AM), https://news.bloomberglaw.com/us-law-week/october-online-bar-exams-spark-technology-privacy-concerns [https://perma.cc/35D2-FCRQ] (relating the various challenges like software crashes, breaches of cybersecurity, or failed examinee identification encountered as states prepared for online bar testing).

144. *See* Jesse, *supra* note 143 ("The glitch confirmed the fears of many test-takers, some of whom spent the days before the test asking for it be canceled.").

lives impacted by their delayed and seemingly out-of-touch decisions.[145] Those looking to take the bar in the summer of 2020 paid a toll greater than any class before them for the ability to obtain a law license.[146] And for what? For an exam with its roots in discriminatory motivations with no proven connection to ascertaining the true minimum competence of someone to practice law.[147] All the chaos swirled around the insistence that the bar exam must go on against all odds and that proposed alternative paths to licensure were not acceptable methods of protecting the public.[148] The COVID-19 pandemic catapulted forward the growing disagreement between the NCBE and state bar examiners on one side and

145. *See* Angelos et al., *supra* note 129 ("Candidates seeking to take the July bar exam have been tossed into a limbo clouded by job uncertainty, financial hardship, and deep personal anxiety. Alternatives to this licensing abyss exist. . . . Jurisdictions could license lawyers based on their successful completion of a rigorous three-year JD program at accredited law schools. They could make those licenses provisional, requiring graduates to work under a more senior lawyer's supervision for their first two years. States could impose other educational requirements, such as mandatory mentoring or continuing legal education. They could even require weeks (or months) of supervised practice before granting these licenses. Wouldn't three years of full-time professional education plus supervised practice on real client matters demonstrate a new lawyer's competence to practice law? The answer from courts and bar examiners seems to be 'no.'"); *see also Texas Board of Law Examiners' Personal*, YOUTUBE, https://www.youtube.com/channel/UCj9OYNqt4Ml-sbttNi_DM5A [https://perma.cc/Q4CX-53CN] (showing the Texas Board of Law Examiners (BLE) meetings during the spring/summer 2020 that included time for public comment urging the Texas BLE to consider alternatives to the bar exam). Examinees noted the challenges they faced in scrambling to cover additional time off work, being fired from jobs due to the ever-changing time frame of the exam, technological challenges, and financial challenges. I attended every meeting and watched as many of the bar takers I was assisting that summer offered comments describing the hardships they were facing to be ready for the bar exam. In each of these meetings, the board members thanked everyone for the comments and with little discussion pressed forward with the bar exam and whatever adjustment needed to be made to ensure the exam could take place at some point in 2020.

146. *See* Hess, *supra* note 140 (recognizing the significant stressors placed on examinees and criticizing bar examiners for placing the necessity of licensing that allegedly tests "competency" during a pandemic over the safety and well-being of the students who were forced to deal with the stress of the pandemic and the uncertainty of being able to start their job on time).

147. *Cf.* Abrams et al., *supra* note 119 (asserting the bar exam's stated goal of licensing those who are ready for the practice of law is inconsistent with its prejudicial history and discriminatory impact).

148. *See Evaluating Options for Class of 2020*, *supra* note 137, at 1–3 ("Diploma privilege in effect removes the public protection function vested in the courts and places it with the law schools, but with no independent, vetted, objective, or consistent final check on whether graduates are in fact competent to provide legal services. The Public, and certainly legal employers, rely on passage of the bar examination as a reliable indicator of whether graduates are ready to begin practice.").

the legal academy on the other about the ability of the bar exam to test the competency of new attorneys.[149]

The bar exam has always tested the privilege of its takers at least as much as it has tested their ability to memorize and apply law.[150] The COVID-19 pandemic only cast a spotlight on this longstanding issue that the legal profession has been slow to come to terms with over the years.[151] In a pandemic, when so many are struggling financially, when so many fear for their health, when so many are unable to access the technology needed in the increasingly virtual world, and when so many face challenges in housing and child care, it is much harder to write off the impact these challenges pose to success on the bar exam as simply part of societal problems too big to be addressed by any one licensing exam.[152] Rather, a new generation of soon-to-be-lawyers watched as

149. *See* Abrams et al., *supra* note 119 ("Far too often, the bar exam measures privilege and opportunity, rather than competency to practice law. This privilege includes being able to study for months without the necessity to work; being able to pay thousands of dollars for a commercial bar preparation course; and being able to have a safe and comfortable place to study day-after-day without the disruption of caregiving responsibilities. The conditions under which graduates are now trying to persevere guarantees that existing inequalities—built in large part on race, class, disability status, and gender—will be exacerbated."); *see also* Griggs, *supra* note 122, at 18 (providing the numerous uncanny hardships imposed upon the 2020 bar exam takers. "For most bar takers, the story of 2020 is one that got progressively worse. States refused to acknowledge a need to provide licensure alternatives because COVID-19 made an in-person exam unsafe, and, at the same time, required applicants to sign assumption of risk liability waivers to hold them harmless . . . ."). *But see Evaluating Options for Class of 2020*, *supra* note 137, at 2–3 (reinforcing the NCBE's stance recognizing the hardships COVID-19 caused on the class of 2020 but maintaining that the bar exam is the best way forward).

150. *See* Abrams et al., *supra* note 119 (postulating the bar exam lopsidedly discriminates against vulnerable law students with fewer resources); *see also* Griggs, *Building a Better Bar Exam*, *supra* note 118, at 16, 27 (asserting the UBE fails to measure competency and "fails to take into account the varied learning styles and testing strengths of our students."); *see also* Howarth & Wegner, *supra* note 118, at 414 (demonstrating there is no standard understanding of what constitutes minimum competence for law practice in the legal profession).

151. *See* Griggs, *supra* note 122, at 5 (emphasizing how marginalizing the bar exam process is to underprivileged exam takers).

152. Not that the NCBE did not try to do exactly that in their effort to ensure the bar exam remained the only path to licensure in most state. *Compare Evaluating Options for Class of 2020*, *supra* note 137 (defending the continued use of the bar exam while at the same time noting the unprecedented circumstance facing law students in the time of COVID-19); *with* Abrams et al., *supra* note 119 (noting already existing factors when compounded with the hardships created by COVID-19 will continue to affect the most vulnerable law students). In my years of preparing students for the bar exam, all of these factors have prevented success on the bar exam for different graduates at different times. Bar takers that have children at home, need to work while studying for the bar exam, struggle with the cost of commercial courses, struggle with their health or the

many state bar leaders failed to demonstrate an ability to pivot—even in the midst of an unprecedented crisis—from the tradition of the bar exam.[153] Indeed, even knowing that the discriminatory impact of the bar exam persists and would only be made worse by the effect of the pandemic on communities of color,[154] the tradition of the bar exam remained steadfast in all but a few brave states that at least temporarily instituted diploma privilege.[155]

Unsurprisingly, there are mounting calls to reconsider the ongoing effectiveness of the bar exam following the chaos of the summer 2020 testing cycle.[156] While temporary changes made in a pandemic may not be the gold standard for the types of long term changes that might bring about an end to the discriminatory impact of the bar exam, the rallying cry around the failures of the 2020 summer testing cycle may finally create some momentum.[157] The ongoing focus on bar exams as the *only*

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health of a loved one, and those that are unable to carve out months of uninterrupted study have a much harder road to pass the exam. As a result, there are many in this situation that face taking the bar exam multiple times, which only exacerbates the challenges. Those working with bar takers are well aware that an examinee's ability to take time off, purchase a commercial course, and study uninterrupted are more likely to lead them to pass the bar exam on a first attempt. It is no surprise than to hear the growing chorus of people arguing that the bar exam tests the financial and familial privilege of examinees.

153. *See* Griggs, *supra* note 122, at 14–17 (chronicling various state decisions regarding the execution of the summer 2020 bar exam).

154. *See Evaluating Options for Class of 2020*, *supra* note 137, at 9 (showing the NCBE's acknowledgement on the disproportionate differences in passage rates on the bar exam among minorities and women).

155. *See, e.g.*, Stephanie Francis Ward, *Jurisdictions with COVID-19-Related Diploma Privilege are Going Back to Bar Exam Admissions*, AM. BAR ASS'N J. (Dec. 10, 2020, 3:16 PM), https://www.abajournal.com/web/article/jurisdictions-with-covid-related-diploma-privilege-going-back-to-bar-exam-admissions [https://perma.cc/63K4-JGEX] (noting a few states that implemented temporary diploma privilege have also announced plans for a remote bar exam in February 2021); *see also* JUSTIA, *supra* note 138 (stressing how while a majority of states continued normal bar exam procedures, a few states implemented temporary diploma privileges while others implemented supervised practice).

156. *See* Griggs, *supra* note 122, at 6 (recounting the growing criticisms raised by various members of the legal community against the bar exam); *see also* Abrams et al., *supra* note 119 ("As deans leading law schools through this global pandemic and into a new future for legal education, we are committed to reimagining a legal profession that more closely resembles the diversity of our country. The path to that future does not end with diploma privilege for the class of 2020, but such an equitable privilege for all is a good start."); *see also* Guckert, *supra* note 119 ("What is even worse is that the exam does not at all measure any ability to practice the law.").

157. *See* Guckert, *supra* note 119 ("[P]erhaps we can reflect on this situation and realize that the problems [the bar exam] bring[s] up have always existed, and will continue to exist so long as we allow the bar exam to control the legal profession.").

measure of competency and the obsession with the first-time passage rate of law schools as an indicator of success led to paralysis in the face of a global crisis.[158] Ultimately, 2020 was an embarrassing failure by the legal profession on behalf of the class of 2020;[159] but to the extent that failure garnered more attention and unity around the need to end the discriminatory impact of the bar exam, perhaps the 2020 problem will be the spark that lights a fire for real change.[160] Until that change comes, law schools must persist in their efforts to help graduates pass the bar exam.[161]

II. COACHING FOR BAR SUCCESS IN A PANDEMIC

St. Mary's was fortunate in that the law school's approach to assisting with bar prep in a pandemic was to lean heavily on the coaching

158. *See* Griggs, *supra* note 122, at 42–43, 48–49 ("[T]he courts are distrustful of new ideas, and to some degree of themselves. The courts have become so far removed from legal education and attorney qualifications that rarely will they make a move that is not in lock step with a resolution or recommendation from the ABA . . . . The ABA distrusts the law schools it regulates, and the states' ability to test and regulate entry into the legal profession. The ABA distrust of law school is both obvious and problematic."); *see also What Schools have the Best First-Time Bar Passage Rate?*, U.S. NEWS & WORLD REPORT, https://www.usnews.com/best-graduate-schools/top-law-schools/bar-pass-rate-rankings [https://perma.cc/N9H7-QZZH] (ranking law schools by their first-time bar pass rate). Although the LSAC study reveals that different racial and ethnic groups tend to eventually pass the bar exam at fairly high rates, the legal profession is obsessed with first time pass rates as a measure of success for law schools. *See generally* Jeffrey Evans Stake, *The Interplay Between Law School Rankings, Reputations, and Resource Allocation: Ways Rankings Mislead*, 81 INDIANA L. J. 229, 230, 240 (2006) (describing the interplay between rankings and the impact that it has on legal education). The focus on first time passage rate does a disservice to students that may require multiple attempts to pass the bar exam, but will ultimately be good, competent lawyers. Such a ranking system encourages law schools to focus on admitting students that are likely to pass on a first attempt at the bar exam. While certainly first-time bar passage is ideal for a law graduate, the challenges identified thus far indicate why that may not always prove possible outside of any indicator regarding a graduate's actual lack of competence to practice law.

159. *See* Griggs, *supra* note 122, at 48 (emphasizing strict adherence to the bar exam coupled with the broad deference to NCBE test makers caused a disjointed slow response to the COVID-19 pandemic in the legal field).

160. *See* Guckert, *supra* note 119 ("[T]he silver lining of the cloud of this pandemic for the legal profession should be that it grants the perfect opportunity to end this draconian and altogether exam. The alternative doesn't have to be that there are no requirements; they should simply be connected to practice and not more concerned with controlling the legal job market.").

161. *See generally* Griggs, *supra* note 122, at 49 (explaining the distrust the ABA holds for law schools and how this hinders students' abilities to succeed on the bar exam).

component of Law Success' Raise the Bar initiative.[162] Even in a more normal year without a raging public health crisis calling into question the challenge represented by the bar exam, every law school in a jurisdiction where the bar exam is required has its own approach to helping students pass the bar exam.[163] For some law schools, bar passage consumes far more time and energy than it does at others.[164] This is driven partly by the fact that some law schools solve the bar passage problem on the front end.[165] Their admissions standards are so high that bar passage is not a challenge.[166] These schools tend to be majority White-serving institutions.[167] For law schools that accept a wider range of entering credentials and admit more students at the lower end of the common LSAT and Undergraduate Grade-Point Average (UGPA) ranges, bar passage must take center stage.[168]

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162. *Raise the Bar*, ST. MARY'S UNIV., https://sites.stmarytx.edu/raisethebar/ [https://perma.cc/US3W-YGVU].

163. *See* Aleatra P. Williams, *The Role of Bar Preparation Programs in the Current Legal Education Crisis*, 59 WAYNE L. REV. 383, 385 (2013) (explaining how many schools implemented bar passage programs to combat generational shifts in students' abilities to perform well on the bar exam).

164. *See* Stake, *supra* note 158, at 239 (discussing the trend in shifting law school curriculum to what students need to know to pass the bar exam).

165. *See generally Application Requirements for Top Law Schools (2020–2021)*, 7SAGE (2021), https://7sage.com/admissions/lesson/application-requirements-for-top-schools/ [https://perma.cc/9TWY-3AGE] (detailing the target LSAT and undergrad GPA for applicants to the fifty best ranked law schools in the United States).

166. *See generally id.* (listing the target LSAT and UGPA scores for high ranked schools); *see generally* Katherine Austin et al., *Will I Pass the Bar Exam? Predicting Student Success Using LSAT Scores and Law School Performance*, 45 HOFSTRA L. REV. 753, 755–57 (2017) (explaining the role UGPA and the LSAT have in predicting bar success and discussing how they inform law school admissions decisions).

167. *2020 Raw Data Law School Rankings*, PUBLICLEGAL, https://www.ilrg.com/rankings/law/1/desc/MinorityStudents [https://perma.cc/KC4V-HWZ4]. The breakdown of law students in the top ranked schools from different racial and ethnic backgrounds in order of their ranking on 7Sage cited in note 166 above is as follows: Yale—46.1% of Yale students are from different racial and ethnic backgrounds; Stanford—42.1%; Harvard—49.6%; Columbia—49.8%; University of Chicago—37.2%; New York University—41.6%; University of Pennsylvania—42.9%; University of Virginia—26%; Northwestern University—43%; University of California–Berkley—49.6%; University of Michigan—32.1%; and Duke University—35.8%. This is not to suggest there are no top ranked schools that serve a majority of students from communities of color, but such schools are rare. When you drill down into the various ethnic and racial groups represented in top law schools as compared to the general population, a greater disparity exists.

168. *See* Austin et al., *supra* note 166, at 755–57 (explaining the role that UGPA and the LSAT have in predicting bar success and discussing how that informs law schools' admissions

As an institution serving a majority of students from marginalized communities,[169] St. Mary's University School of Law is no stranger to the challenges posed by the bar exam identified in Part I of this paper.[170] St. Mary's School of Law serves a range of students, many of whom have entering credentials that indicate they will face a tougher road to bar passage.[171] A mission of the law school is to serve as a school of opportunity for people who want to be lawyers.[172] St. Mary's undertakes this mission fully committed to providing more people from marginalized communities access to law school and a pathway into the legal profession.[173] Expanding diversity in the legal profession is part of the culture of the law school.[174]

St. Mary's is located in San Antonio, Texas and is the southernmost law school in the state.[175] In 2020, the student population at St. Mary's School of Law was 49.4% Hispanic, 40.5% White, 5.9% Black, and 2.7% Asian—59.5% of St. Mary's students are from diverse racial and ethnic

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decisions); *see also* Williams, *supra* note 163, at 395–98 (discussing the role of legal education and bar preparation programs to help with bar passage rates among students).

169. *See* ST. MARY'S UNIVERSITY STANDARD 509 INFORMATION REPORT, AM BAR ASS'N (2020), http://www.abarequireddisclosures.org/Disclosure509.aspx [https://perma.cc/B2FM-7AAP] (showing that as of October 5, 2020, of the 736 total students seeking a J.D. at St. Mary's, 424 of them were from historically marginalized communities. That represents approximately 58% of the St. Mary's law student population).

170. *See St. Mary's University Ultimate Bar Passage Rate*, AM BAR ASS'N (2019), https://law.stmarytx.edu/wp-content/uploads/2019/04/BarPassage.pdf [https://perma.cc/FN4H-GH4R] (showing the less-than-average bar passage rates from St. Mary's School of Law during 2016 and 2018).

171. ST. MARY'S UNIVERSITY STANDARD 509 INFORMATION REPORT, *supra* note 169; *see* Austin et al., *supra* note 166, at 755–57 (discussing the usefulness of the LSAT in predicting bar passage). *But see* CAUTIONARY POLICIES CONCERNING LSAT SCORES AND RELATED SERVICES, L. SCH. ADMISSION COUNCIL (2014), http://www.lsac.org/docs/default-source/publications-(lsac-resources)/cautionarypolicies.pdf [https://perma.cc/W5UQ-QJQT] (cautioning law schools against using the LSAT as a measure of bar pass ability).

172. *See* Frank Garza, *Justice for All: New Dean to Build on Spirit of Service at St. Mary's Law*, GOLD & BLUE L. EDITION (2020) https://www.stmarytx.edu/2021/justice-for-all/ [https://perma.cc/64QC-Z6QG] (supporting St. Mary's commitment to enroll "diverse student populations").

173. *See id.* (affirming St. Mary's School of Law's commitment to enroll "diverse student populations").

174. *See id.* (outlining the goals of the new dean, Patricia Roberts, of St. Mary's School of Law's is to further diversify the law student population).

175. Katrina Dewey, *Day 14: St. Mary's Law School Provides Students a Sense of Mission*, LAWDRAGON CAMPUS (Aug. 29, 2016), campus.lawdragon.com/day-14-st-marys-law-school-provides-students-a-sense-of-mission/ [https://perma.cc/KEX3-8QD5].

backgrounds.[176] St. Mary's School of Law is ranked 14th in the nation for "the highest percentage of students who" identify as hailing from communities of color.[177] St. Mary's is the second most diverse law school in Texas.[178] The law school's 2020 entering admissions statistics reflect a median LSAT score of 151 and a median UGPA of 3.19.[179] In the entering class of 2020, 75% of students had an LSAT score below 154 and 75% of students had a UGPA score below 3.48.[180] These two metrics play a role in indicating likely success in law school, and, to a lesser extent, a role in indicating the potential for success on the bar exam.[181]

There are two measures for bar passage rates that are considered important for law schools to track as an indicator of the school's success.[182] The rate of passage for first-time bar takers is the most widely reported rate.[183] Then there is the ultimate bar pass rate, which looks at the overall bar passage rate of a law school's graduates within two years of graduation.[184] The ultimate bar pass rate is directly tied to

176. *St. Mary's University*, PUBLICLEGAL, https://www.ilrg.com/rankings/law/view/97 [https://perma.cc/7TNP-JXLE].

177. *Id.*

178. *See 2020 Raw Data Texas Law School Rankings*, PUBLICLEGAL, https://www.ilrg.com/rankings/law/1/desc/MinorityStudents?utf8=✓&name=&state=TX&commit=Search [https://perma.cc/BE2F-SU66] (providing a breakdown of the student population of law schools in Texas as follows: Texas Southern—15% white & 85% racial and ethnic minority; South Texas—48% white & 52% racial and ethnic minority; University of Houston—60.3% white & 39.7% racial and ethnic minority; UT Austin—64.4% white & 35.6 racial and ethnic minority; SMU—65.8% white & 34.2% racial and ethnic minority; Texas A&M—65.9% white & 34.1 racial and ethnic minority; Texas Tech—68.1% white & 31.9% racial and ethnic minority; and Baylor—74.2% white & 25.8% racial and ethnic minority).

179. PUBLICLEGAL, *supra* note 167.

180. PUBLICLEGAL, *supra* note 176.

181. *See* Austin et al., *supra* note 166, at 755 ("When prospective students apply to law school, the primary pieces of information available to predict their success are their undergraduate GPAs and LSAT scores.").

182. *See* Charles Sullivan, *Understanding the 'Ultimate' Bar Passage Rate in Comparing Law Schools*, OFF THE REC. WITH SETON HALL L. (Feb. 6, 2019, 8:10 AM), https://blog.law.shu.edu/off-the-record/understanding-ultimate-bar-passage-rate-in-comparing-law-schools [https://perma.cc/97SJ-FTTA] (suggesting first time bar passage rates and ultimate bar passage rates are relevant considerations in law school selection).

183. *See id.* ("For years, law schools focused on 'first time takers,' that is the success rate of those sitting for their first bar examination after graduation—usually in July but sometimes February for mid-year graduates.").

184. *See id.* (defining "ultimate bar passage" as the "bar passage by all graduates who sit for the bar within two years of graduation."); *see also ABA Section of Legal Education Releases*

determining if a law school is compliant with ABA Standard 316.[185] For St. Mary's School of Law, the following chart[186] indicates the first-time and ultimate bar pass rates from reports submitted in 2018–2020:

Year	First-Time Pass Rate	Ultimate Pass Rate
2018	61.67%	90.91%
2019	69.65%	91.71%
2020	70.41%[187]	84.91%

Comprehensive Report on Bar Passage Data, AM. BAR ASS'N (Feb. 18, 2020), https://www.americanbar.org/news/abanews/aba-news-archives/2020/02/aba-section-of-legal-education-releases-comprehensive-report-on-/ [https://perma.cc/HU2X-SWJZ] ("[D]ata shows that in the aggregate, 89.5% of 2017 law graduates who sat for a bar exam passed it within two years of graduation.").

185. *See* 2020-2021 STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS, AM. BAR ASS'N 25 (2020), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2020-2021/2020-21-aba-standards-and-rules-for-approval-of-law-schools.pdf [https://perma.cc/HU2X-SWJZ] ("At least 75 percent of a law school's graduates in a calendar year who sat for a bar examination must have passed a bar examination administered within two years of their date of graduation.").

186. St. Mary's University 2021 Bar Passage Report, Am. Bar Ass'n (2021), http://abarequireddisclosures.org/BarPassageOutcomes.aspx [https://perma.cc/Q7FV-DLVB]; St. Mary's University 2020 Bar Passage Report, Am. Bar Ass'n (2020), http://abarequireddisclosures.org/BarPassageOutcomes.aspx [https://perma.cc/64T6-NKNZ]; St. Mary's University 2019 Bar Passage Report, Am. Bar Ass'n (2019), http://abarequireddisclosures.org/BarPassageOutcomes.aspx [https://perma.cc/EP4K-2EBD]; St. Mary's University 2018 Bar Passage Report, Am. Bar Ass'n (2018), http://abarequireddisclosures.org/BarPassageOutcomes.aspx [https://perma.cc/3HKK-5WEU]. In reviewing the reports, it is important to note that although the chart lists the report by year, the information reported looks at prior year's classes. For example, in the 2020 bar passage report, ultimate passage is reported for 2017 graduates and first-time passage is reported for 2019 graduates.

187. *See generally Statistics & Analysis*, TEX. BD. L. EXAM'RS, https://ble.texas.gov/statistics [https://perma.cc/U5JP-FBMV] (showing annual Texas Bar Exam statistics for first time examinees in Texas law schools). We can look at the first-time pass rates of 2020 bar examinees for the state of Texas. Most, but not all, St. Mary's Law graduates sit for the bar exam in Texas. As such, the numbers reported in the chart will not account for bar takers not sitting for the Texas Bar Exam. First time pass rates for St. Mary's Law in Texas for 2020 are as follows:

Bar Exam Administration	First Time Pass Rate
February 2020	55.56%
September 2020	79.41%
October 2020	67.90%
Texas Overall Pass Rate for 2020	69.73%

As illustrated, the first-time bar passage rate has fluctuated some over the last few years.[188] The ultimate bar passage rate has also remained above the 75% required to maintain accreditation by Standard 316.[189] But St. Mary's School of Law is not in a position to ignore the first-time or ultimate bar passage rates.[190]

Numbers mean little when you are talking to individual law graduates that have not found success on the bar exam on their first try.[191] The bar does not get easier, less expensive, or less time consuming the second, third, fourth, or fifth time someone takes it.[192] In Texas, five tries to pass the bar exam is all you get if you want to become a licensed Texas lawyer.[193] As such, our commitment to serving a diverse population and helping them gain access to the legal profession requires a commitment to providing support for bar passage within the confines of the Texas rules for admission to the practice of law.[194]

The overall rate for Texas was determined by adding the total number of bar takers in February, September, and October and the total number of passers from all three 2020 administrations. The passer total was then divided by the total of takers overall—the same method the BLE uses to calculate the first-time passage rate for each administration.

188. *See id.* (reflecting a 70.18% first-time bar pass rate in July 2018, a 69.81% first-time bar pass rate in July 2019, a 79.41% first-time bar pass rate in September 2020, and a 67.90% first-time bar pass rate in October 2020 for St. Mary's students).

189. ST. MARY'S UNIVERSITY 2020 BAR PASSAGE REPORT, *supra* note 186 (reflecting on the 2020 ultimate bar passage rate of 84.91% for St. Mary's Law School graduates).

190. *See Support for Law Success,* ST. MARY'S SCH. L., https://law.stmarytx.edu/academics/special-programs/support-for-law-success/ [https://perma.cc/H9GM-D6V7] (highlighting St. Mary's' dedication to helping students prepare for and pass the bar exam via the Law Success program).

191. *See* Paul Caron, *Picking Up The Pieces After Flunking The Bar*, TAXPROF BLOG (May 8, 2019), https://taxprof.typepad.com/taxprof_blog/2019/05/picking-up-the-pieces-after-flunking-the-bar.html [https://perma.cc/KGG9-5G64] (discussing the toll that failing the bar exam can take on a law graduate). After the results are in each cycle, I connect with St. Mary's law graduates that were not successful on the bar exam. These are some of the toughest conversations to have as so often the graduate is reeling from the news. Many feel they have let themselves and their families down. Even those that try to push past the initial grief and get right back into studying often find themselves hitting emotional walls that lead to the feeling they will never pass.

192. *See id.* (stressing factors such as difficulty, time consumption, and costs do not dissipate after taking the bar exam for the first time).

193. 2020 COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS, NAT'L CONF. BAR EXAM'RS 28 (Judith A. Gundersen & Claire J. Guback eds., 2020), https://www.ncbex.org/pdfviewer/?file=%2Fassets%2FBarAdmissionGuide%2FCompGuide2020_021820_Online_Final.pdf#page=40 [https://perma.cc/87A2-8B8L].

194. *See id.* at 37 (providing the bar admission requirements for applicants wishing to practice law in Texas).

The bar exam is the end of a long academic journey that contributes to the disparate impact on bar passage between White students and students from marginalized communities.[195] The challenges in academic performance between White students and students from marginalized communities exists long before students arrive to law school.[196] These challenges start from elementary school, continue to grow through high school, and are carried into the undergraduate experience as well.[197] It was the very fact that educational quality provided to White students versus students from marginalized communities was so different, that allowed the ABA and state bars to rely on the earliest restrictions on law school admissions standards to succeed so effectively in excluding people from marginalized communities from attending law school.[198] To implement rules of exclusion, the ABA and state bars in the first half of the 1900s could comfortably rely on the fact that, due to many factors, people from traditionally marginalized communities were less prepared for college and for standardized exams such as the LSAT.[199] Of course, that is not to say that law schools do not have a responsibility to help try and mitigate the impact of these challenges for students they admit.[200]

195. *See* Grace Austin, *Why do Minority Test Scores Still Lag Behind Whites?*, DIVERSITY J. (May 12, 2012), https://diversityjournal.com/9223-minority-test-scores-behind-whites/#:~:text=Institutional%20factors%20can%20often%20contribute,residency%20in%20lower%2Dincome%20areas [https://perma.cc/W2VL-W6MU] (discussing the gap in achievement scores that exists between Whites and minorities); *see also Evaluating Options for Class of 2020*, *supra* note 137, at 6–7 (attributing the differences in average performance across racial and ethnic groups on the bar exam to deeply rooted societal problems that create unequal educational (and other) experiences and opportunities). The NCBE was not wrong in their assertion that the disparities in bar scores are driven by societal problems far up the chain from law school and the bar examination. However, that does not make shirking responsibility for how the bar exam reinforces those issues the appropriate response.

196. *See* Austin, *supra* note 195 (noting challenges in academic performance between White students and students from marginalized communities are seen early on in childhood development and education).

197. *See id.* (indicating differences in performance persist for minority students throughout high school and higher education).

198. *See* George B. Shepherd, *No African-American Lawyers Allowed: The Inefficient Racism of the ABA's Accreditation of Law Schools*, 53 J. LEGAL EDUC. 103, 104, 113, 120 (2003) (indicating the ABA's campaign on accreditation standards and the changing of the bar exam in the 1930s resulted in a reduction in the number of lawyers from communities of color entering the legal profession).

199. *See id.* at 104–05, 114–20 (discussing the racist impact of the ABA's accreditation system in two forms: academic racism and financial racism).

200. *Cf.* Martin Pritikin, *Are Law School Curriculums Preparing Students to Succeed?*, NAT'L JURIST (May 8, 2018, 2:56 PM), https://www.nationaljurist.com/national-jurist-

Law schools lag behind in reacting to the gaps in education that exist for all students, but especially for students from marginalized communities.[201] That educational gap is part of the reason for the rise in academic support programs and additional supports for students during their time in law school.[202]

St. Mary's School of Law undertakes efforts to help bridge the educational gap all throughout a student's time here.[203] But the real focus of this paper is at the end of that chain—the bar exam.[204] From 2016–2017, St. Mary's School of Law undertook an extensive data review of the factors that contribute to bar success.[205] The data study also resulted in a list of consistent best practices that graduates passing the bar exam on their first try utilized.[206] These best practices include: (1) completing 85% or more of their commercial bar program, (2) completing 2200–2400 practice MBE questions, (3) completing seven practice essays per essay subject, (4) completing eight to ten practice

magazine/are-law-school-curriculums-preparing-students-succeed [https://perma.cc/B672-9R2A] (reflecting on the institutional impediments law schools may face while preparing graduates for practice and the bar).

201. *See id.* (asserting some of the reasons law schools have lagged behind in educational reform).

202. *See* Denise Riebe, *A Bar Review for Law Schools: Getting Students on Board to Pass Their Bar Exams*, 45 BRANDEIS L. J. 269, 290–300 (2007) (discussing the academic support movement for minority students at its initiation and how it has since substantially and demonstrably improved both short and long-term academic performance); *see also* Williams, *supra* note 163, at 395–97 (discussing the role of legal education and bar prep programs to help with bar passage).

203. *See* ST. MARY'S SCH. OF L., *supra* note 23 (noting St. Mary's Office of Law Success is one initiative undertaken by the law school to support students develop their foundation for curriculum and sharpen legal skills).

204. *Cf. Raise the Bar*, *supra* note 162 (helping prepare St. Mary bar exam takers through a sponsored supplemental program alongside their commercial bar programs and offering one-on-one individualized assistance).

205. *See* Jennifer R. Lloyd, *New Law Success Program Carves Out National Niche*, GOLD & BLUE L. EDITION (Dec. 13, 2017), https://www.stmarytx.edu/2017/law-success-program-national-niche/ [https://perma.cc/MZH7-A63H] (evaluating the use of data and assessment to help guide students).

206. *See generally Goals for Bar Study*, ST. MARY'S UNIV., https://sites.stmarytx.edu/raisethebar/preparing-for-the-bar/goals-for-bar-study/ [https://perma.cc/4KXU-2CGF] (recommending bar exam takers hit several benchmarks to ensure passing the bar exam on the first try).

MPTs, and (5) focusing their energy and attention on heavily tested topics.[207]

Following the conclusion of the data study, the next step was to analyze what prevented some bar takers from accomplishing these bar benchmarks. At St. Mary's School of Law, a few common roadblocks to success in meeting these best practices included a lack of shared knowledge about what led to success on the bar exam, an inability to budget time to meet these benchmarks, work and family factors that impacted the time available for bar study, the emotional toll of preparing for the bar exam, and inconsistent messages about the bar exam that led to confusion and a lack of preparedness when the time to study for the bar exam arrived.[208]

The information campaign to help spread the word on the best practices revealed by the data was accomplished through 3L orientation, graduation meetings, and the Bar Prep for Credit course.[209] To tackle the other challenges, Raise the Bar, a program designed to work alongside bar takers as they prepared for the bar exam, was started by Law Success.[210] The earlier iterations of the Raise the Bar program aimed to provide many opportunities for practice and feedback on bar work and to answer basic questions about improving bar performance.[211] The Law Success program focused on providing a more generalized guidance based on the best practices revealed by the data study.[212] By the summer

207. *Id.* (acknowledging those within the past five years who passed the bar studied eighty-seven more hours than those who did not pass).

208. *See, e.g.*, Kerriann Stout, Watch Out for These 5 Bar Prep Roadblocks, ABOVE THE LAW (Jan. 18, 2019, 2:18 PM) https://abovethelaw.com/2019/01/watch-out-for-these-5-bar-prep-roadblocks/ [https://perma.cc/7CQQ-VC6V] (highlighting the overwhelming emotional toll students experience while preparing for the bar); *cf. Goals for Bar Study*, *supra* note 207 (utilizing data from St. Mary's Raise the Bar Program to describe the best practices for taking and passing the bar).

209. *See generally* ST. MARY'S SCH. OF L., *supra* note 23 (indicating the programs that 3L students participate in during the final year of law school).

210. *See Raise the Bar*, *supra* note 162 ("Raise the Bar is an innovative, data-driven program built around what *St. Mary's* students need to pass the bar exam!" This program is an innovative, supplemental program that proffers confidence in a simulated, guided, and strategic approach).

211. *See id.* (noting Raise the Bar continually still focuses on prioritizing feedback alongside one-on-one coaching sessions).

212. *See* ST. MARY'S SCH. OF L., *supra* note 23 ("The mission of Law Success is to help prepare students for success in law school, on the bar exam, and in practice. To accomplish this mission, the Law Success program takes an innovative, data-driven approach to student growth by

of 2018 though, it was clear that a more intensive approach was needed as the generalized guidance was not making a difference for those that most needed help.[213]

Instead of focusing the program primarily on practice sessions and feedback, graduates enrolled in Raise the Bar and were assigned a bar coach.[214] While the opportunities for practice and feedback continued, the true goal of the coach was to work with individual bar takers to assist with the other challenges impacting a bar taker's ability to meet the recommended best practices.[215] For the first time in 2018, Raise the Bar offered significant assistance with weekly planning and schedule creation.[216] Students with work and family factors impacting the amount of time they could study each week were encouraged to spread their study over a longer period to ensure they could reach the recommended completion rate of 85% of their commercial course.[217] The assigned

using assessments and data-gathering to plan legal skills development, bar exam initiatives, and individual academic counseling." Such data allows for the creation of supplemental programs such as the "Bar Prep for Credit" course which focuses on heavily-weighted parts of the bar exam and offers students the ability to get a head start on bar-preparations).

213. *See July 2018 Examination Statistics*, TEX. BD. L. EXAM'RS, https://ble.texas.gov/2018_July [https://perma.cc/68MQ-H626] (last revised Jan. 8, 2019) (revealing St. Mary's School of Law's 2018 bar passage rate as the second lowest scoring law school in the state of Texas).

214. *Compare Raise the Bar*, *supra* note 162 (describing Raise the Bar as a hybrid form that entails an online supplemental program with one-on-one individualized guidance and opportunities for additional resources and coaching sessions), *with How a Bar Exam Coach Can Help You Pass the Bar Exam*, JD ADVISING, https://www.jdadvising.com/how-a-bar-exam-coach-can-help-you-pass-the-bar-exam/ [https://perma.cc/P3JB-7LE5] (reiterating the difference a bar exam coach can make and offering bar takers the opportunity to pay for tutoring and coaching services from a bar coach). The idea of a bar exam coach is not new, but it often comes with a cost that students from marginalized communities cannot afford in addition to the high cost of the bar exam and study time. Our goal was to provide this service without any additional costs to our graduates.

215. *See Raise the Bar*, *supra* note 162 (providing resources to have one-on-one guidance on creating a personal schedule for bar-preparations, revising needed changes, and guiding program enrollees through the finish line—completing the bar exam). Coaches worked with bar takers to find solutions in challenges to budgeting time to meet the benchmarks of bar success, to account for work and family factors in their schedule planning, and to resolve inconsistent messages about the bar exam that led to confusion about how to prioritize their study time.

216. *Id.*

217. *See, e.g.*, Vanessa Oliver, *Balancing Act: I Had 3 Kids While Taking the Bar Exam*, ESSENCE (Mar. 2, 2011), https://www.essence.com/news/balancing-act-i-had-3-kids-while-taking-bar-exam-vanessa-olivier/ [https://perma.cc/F97Q-4EE9] ("When I finally took and passed the bar [the third time] I was ecstatic. I knew I could not have done it without my mate, family and friends —and kicking mommy guilt to the curb. I had to be okay with sequestering myself in a library to study for 90% of my time. I didn't even come home the week before the exam; I spent all of my time preparing for the test.").

Raise the Bar coach provided assistance in scheduling that bar work over a less traditional bar study period.[218] As a tool for bar success, bar schedules helped budget time for hitting the benchmarks.[219] Schedules could be modified from week-to-week following a discussion of the progress made the last week and where the bar taker needed to focus their study efforts.[220] Coaches committed to offering a judgment free, bar schedule planning zone.[221]

The other real benefit to an assigned coach that worked with a graduate all the way through the bar experience was the ability to develop a solid advisor/advisee relationship.[222] Even without the added pressure that students from marginalized communities often feel to succeed on the bar exam, the bar is mentally challenging.[223] The number of topics and the different modes of testing place a significant cognitive load on bar takers.[224] The mental fatigue caused by the bar exam often results in a struggle to sleep, to regulate emotion, and to factor in time for one's personal wellbeing.[225] Many in our student population from

218. *See Raise the Bar*, *supra* note 162 (tailoring bar prep for students facing atypical demands and providing individualized assistance based on each students' bar prep progress. Demands affecting a bar examinee may include raising children or caretaking family members).

219. *Goals for Bar Study*, *supra* note 206.

220. *See generally id.* (having a Raise the Bar coach review practice essays and MPTs allows individual bar takers to receive insight as to where their 270 points are more likely to come from when taking the bar).

221. *See Raise the Bar*, *supra* note 162 (pointing out how past bar takers discussed the importance of being vulnerable and trusting the Raise the Bar materials in connection with their commercial program).

222. *See, e.g.*, JD ADVISING, *supra* note 214 (affirming the proposition that bar coaches working collaboratively with bar takers for an extended period of time creates a mentor/mentee relationship).

223. *See* Raul Ruiz, *Leveraging Noncognitive Skills to Foster Bar Exam Success: An Analysis of the Efficacy of the Bar Passage Program at FIU Law*, 99 NEB. L. REV. 141, 144–45, 152 (2020) (capturing some of the challenges posed by the bar exam).

224. *Id.* at 152–53 ("Working memory is where the learning process begins, and increasing cognitive load beyond the limits of our working memory hinders learning and performance.").

225. *See* Lee Burgess, *Warning: Working and Studying Can Cause Sleep Deprivation!*, BAR EXAM TOOLBOX (Aug. 22, 2013), https://barexamtoolbox.com/warning-working-and-studying-can-cause-sleep-deprivation/ [https://perma.cc/G6F3-ZN2B] (suggesting students prioritize sleep because students encountering sleep deprivation will be less likely to retain information); *see also* Alison Monahan, *Managing Stress and Anxiety While Studying for the Bar Exam*, NAT'L JURIST (May 30, 2018, 4:15 PM), https://www.nationaljurist.com/national-jurist-magazine/managing-stress-and-anxiety-while-studying-bar-exam [https://perma.cc/WA6M-AS5U] (recommending beneficial habits to implement while studying for the bar exam such as breathing, sleeping, eating, and moving).

marginalized communities also feel added pressure to live up to the expectations of their family, their peers, and their expectations of themselves.[226] Raise the Bar coaches are not only focused on the practicalities and techniques of passing the bar exam, they are also focused on the wellbeing of their charges.[227]

Raise the Bar has proven successful in helping people navigate toward a passing score on the bar exam.[228] The program has by no means solved the challenges of bar pass for St. Mary's School of Law as a whole, nor is it likely to ever accomplish such a goal for all the issues surrounding the bar exam discussed throughout this paper.[229] However, the increasing success rate for students with low odds of passing the bar exam on a first attempt is a special victory.[230] The success with that population

226. *See, e.g.*, Scot Goins, *Wondering if you "Belong in Law School? Feeling Like an Imposter? Part 1*, JOHN MARSHALL L. SCH., https://www.johnmarshall.edu/doubting-yourself-and-your-abilities-wondering-if-you-belong-in-law-school-feeling-like-an-imposter-part-1/ [https://perma.cc/2KA6-TSWK] (illustrating the effect of Imposter Syndrome on law students). In my time as a coach, I have spent many scheduled meetings with bar takers discussing the internal and external pressure they feel to pass the bar exam. For law graduates from communities of color, there is often added stress about passing the bar exam for their families. Of course, their family has little doubt they will pass the bar, but the bar taker is often far less sure and carrying a lot of stress about letting their loved ones down. For some, the fear of failure occupies much of their waking hours. Further, initial (but normal) lower scores on MBEs, MEEs, and MPTs contributes to the mounting fear of failure.

227. *See How Raise the Bar can Help You*, ST. MARY'S UNIV., https://sites.stmarytx.edu/raisethebar/preparing-for-the-bar/raise-the-bar-info/ [https://perma.cc/N6FD-YDZ8] ("We can help you make strategic and holistic decisions for success. We are also here to provide support, encouragement, and accountability."). Coaching meetings are often a mix of bar strategy discussions, advice, and mental checkups to work through the stress an examinee is feeling as they prepare for the bar exam.

228. For the September 2020 bar exam, the pass rate for Raise the Bar enrollees was 90%. E-mail from Zoe Niesel, Director of Assessment and Statistics and Associate Professor of Law, St. Mary's University School of Law, to course students (Nov. 6, 2020, 1:01 PM) (on file with author). For the October 2020 bar exam, the pass rate for Raise the Bar enrollees was 80%. E-mail from Zoe Niesel, Director of Assessment and Statistics and Associate Professor of Law, St. Mary's University School of Law, to course students (Dec. 6, 2020, 3:46 PM) (on file with author).

229. *See Raise the Bar*, *supra* note 162 (encouraging students to sign up and conquer the exam through the program, but ultimately, it is left to the student on how best to leverage their resources).

230. *See generally* Ruiz, *supra* note 223, at 163–65 (echoing how noncognition factors—such as academic behavior—are one of the most important factors a student could have and how law school bar exam preparation programs should develop the skills). In the lead-up to each testing cycle, Raise the Bar coaches work to encourage students identified as likely to struggle in passing the bar exam through the Bar Preparation for Credit course. Not all of these soon-to-be graduates enroll in Raise the Bar; or if they do enroll, not all take advantage of any of the services offered.

of law graduates demonstrates that with intensive coaching, they are able to do what the data would predict they could not have done.[231] To be clear, the victory of bar passage actually belongs entirely to the graduate, as Raise the Bar is a voluntary program that relies on the willingness of enrollees to use it to its full potential on their behalf.[232] That makes the success of law graduates at risk of not passing the bar on a first attempt only more important because it is truly a success of their own making and they can carry that confidence into their careers as licensed members of the bar.[233]

For law schools considering adopting an approach like Raise the Bar to help with bar success, there are a few challenges to consider.[234] Coaching is an intensive process that must be supported with sufficient manpower.[235] The number of coaches needed depends on the size of the class and the parameters of the coaching experience.[236] Further, not everyone is able to serve in the advisor side of the role adequately.[237] While most people in the legal academy are able to provide feedback on essays, critique someone's knowledge of substantive law, and even build a bar schedule after some research on best practices, not as many are

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But those in this group that enroll and work closely with a Raise the Bar coach tend to pass at greater rates than their peers that do not enroll or participate.

231. *See generally id.* at 159 ("The theory of design of a law school bar exam preparation program must necessarily revolve around the idea that such programs must target students with underdeveloped skills to provide them additional resources to develop the skills necessary to succeed on the bar exam, namely knowledge of the law, cognitive skills, and noncognitive skills.").

232. *See, e.g.*, *Goals for Bar Study*, *supra* note 206 ("Successful bar takers understand how much work it is to study for the bar exam. Graduates of St. Mary's who passed the bar exam on the first try studied, on average 463.1 hours over the course of the 10-week summer study period.").

233. *Cf., e.g.*, Ruiz, *supra* note 223 ("Learning these state-specific rules may provide students with meaning to the course beyond mere bar exam preparation by generating interest in knowledge they see as practical to their careers.").

234. *See id.* at 161 (presenting some challenges schools could encounter such as students are at different cognitive levels, finding the appropriate material, or choosing the appropriate faculty).

235. *See, e.g.*, JD ADVISING, *supra* note 214 (showing coaches not only help with tracking a student's progress, but should also motivate, encourage, and help a student study in the most efficient way possible. "The true advantage of a bar exam coach is that a coach can provide you with one-on-one instruction, individualized feedback, and tailor each session to what you need.").

236. *See* ST. MARY'S SCH. OF L., *supra* note 23 (detailing how the program requires coaches to meet with students on a one-on-one basis).

237. *See* Ruiz, *supra* note 223, at 161 (reiterating that a bar exam program does not need a doctrinal faculty member to teach substantive law, but rather requires a faculty member who will help students develop cognitive and non-cognitive skills).

equipped to support the emotional component of bar success.[238] For students from marginalized communities with some unique concerns during bar study, the number of people capable of providing sufficient support for their mental wellbeing is even fewer.[239] In sum, you cannot simply assign people to serve as coaches—at least as they are envisioned here—at random.[240] There must be a thoughtful selection process for people with a proven ability to meet students where they are, and connect with them in a way that inspires an advising relationship of trust and support.[241] Certainly, however, faculty with this proven ability could be called on to serve as coaches with guidance from a law school's bar prep faculty on best practices to convey for bar strategy.[242]

At St. Mary's School of Law, Raise the Bar is open to all graduates at no cost.[243] Graduates only have to enroll to take advantage of the program's services.[244] Enrollment is required so that coaches can focus their attention on the graduates that want the assistance.[245] During Bar Prep for Credit in the 3L year, the faculty teaching that course encourage

238. Monahan, *supra* note 225 (discussing a bar coach's approach to addressing the emotional and mentally exhausting toll a bar exam can take on an individual examinee).

239. Nareissa Smith, *Factors Affecting Bar Passage Among Law Students: The REAL Connection Between Race and Bar Passage*, AFR. AM. ATT'Y NETWORK (May 15, 2018), https://aaattorneynetwork.com/factors-affecting-bar-passage-among-law-students-the-real-connection-between-race-and-bar-passage/ [https://perma.cc/4WJD-CV47] ("Because Black students are most likely to be struggling with issues that can place them at risk for failing the bar, those who want to see them succeed should make a special effort to minimize the financial, racial, and other stressors that Black students face during law school. Advocates should ensure that these students' needs are met so they can meet the challenge of the bar exam head-on.").

240. Ruiz, *supra* note 223, at 161 ("In my experience, commercial bar preparation vendors and doctrinal faculty that do not specialize in bar exam preparation often focus on emphasizing doctrinal law. This route focuses more on memorization of the black letter rules. To espouse this system is to do a disservice to our students.").

241. *See generally* JD ADVISING, *supra* note 214 (acknowledging bar exam coaches should have skills to help a student study in the most efficient way possible, keep students motivated and accountable, and give tips and tricks for studying and taking the bar exam).

242. *See* Williams, *supra* note 163, at 395–98 (discussing the role of legal education and bar prep programs to help with bar passage).

243. ST. MARY'S SCH. OF L., *supra* note 23 (highlighting the program comes at no cost to St. Mary's law students).

244. *Raise the Bar*, *supra* note 162 (indicating the Raise the Bar program is a voluntary program intended to be a no-cost supplement to a bar prep course).

245. *Id.*

students to utilize Raise the Bar.[246] Bar Prep faculty—who also serve as the Raise the Bar coaches—also make a concerted effort to encourage those who would most benefit from the coaching and resources offered by the Raise the Bar program to enroll.[247] Despite specifically encouraging those most at risk of not passing the bar exam to enroll, Raise the Bar enrollees have a higher pass rate than the general St. Mary's law student population.[248]

In part, the shift to the coaching model seems to have helped bar takers get more of the one-on-one guidance they need from the program.[249] Additionally, as discussed, Raise the Bar coaches dedicate countless hours to talking through the mental and emotional challenges posed by the bar exam.[250] They provide encouragement, advice, and a willingness to listen and normalize the struggle a bar taker is experiencing.[251] One goal of a coach is to help bar takers gain confidence in themselves by recognizing where they are succeeding in a process that often feels surrounded by failure.[252] Moreover, coaches build days off into bar schedules, encourage their advisees to step away when needed, and aim to share in the burden of the bar exam.[253] In a normal bar study period,

246. *See generally* ST. MARY'S SCH. OF L., *supra* note 23 (discussing the relationship between Bar Prep for Credit and Raise the Bar).

247. *See id.* (targeting students with lower grades, as Bar Prep for Credit is required for students in the bottom fifty percent of the class and open to others wanting to get a head start on bar prep).

248. For the September 2020 bar exam, the pass rate for Raise the Bar enrollees was 90%. E-mail from Zoe Niesel, *supra* note 228. For the October 2020 bar exam, the pass rate for Raise the Bar enrollees was 80%. The Raise the Bar pass rate of actively involved enrollees has been consistently higher than the general St. Mary's pass rate since at least the July 2018 bar cycle.

249. *See, e.g.*, JD ADVISING, *supra* note 214 (emphasizing how an advantage to having a bar exam coach is the individualized feedback each student receives from one-on-one instruction).

250. *Cf.* Lloyd, *supra* note 205 (recalling how instructors help not only with material instruction, but also with the test anxieties and other aspects of skill building).

251. *See* JD ADVISING, *supra* note 214 (noting a bar exam coach should encourage students and typically helps create to-do lists to alleviate the feelings of being overwhelmed. Coaches also keep students accountable and let students know when they are falling off track but support them by creating new study plans to study in the most efficient ways).

252. *Cf. Feeling Lonely, Suicidal, or Depressed During Bar Prep?*, JD ADVISING, https://www.jdadvising.com/feeling-lonely-suicidal-depressed-bar-prep/ [https://perma.cc/6PGY-S9RT] (identifying the external and internal pressures affecting an individual's ability or mentality to pass the bar exam).

253. *See* ST. MARY'S UNIV., *supra* note 227 ("We will be available for individual coaching and review sessions. During these sessions you may get personal feedback on scheduling, practice problems, discuss study strategies, test-taking strategies, or do any other activities that would be

the lead up to the bar exam is rife with stress and pitfalls that Raise the Bar coaches help guide examinees through on their path to test day.[254]

This past summer, with the pandemic in full swing and the bar exam facing frequent change and disruption, the advising aspect of coaching became more important than the more practical bar advice component.[255] Bar takers were sad, angry, fatigued, uncertain of the future, and unclear on how to press on after every announced change.[256] Though the impact of a pandemic on the bar exam was certainly new territory for Raise the Bar coaches, the ability to have someone to share the frustration, to offer advice about how to press forward, and to simply validate the range of emotions impacting the day-to-day experience of bar study reportedly made a large difference for summer 2020 bar takers.[257] Even in a pandemic, that support proved integral to the success

helpful to you as you work to conquer the bar exam."); *see also* Monahan, *supra* note 225 (stressing the importance of intentional breaks, as opposed to unintentional breaks, to allow the brain to recover and be more productive during the studying process. Unintentional breaks can prolong studying time and cause the test taker to feel panicked because less progress is made so they feel overworked. Taking time away helps refresh the mind).

254. ST. MARY'S UNIV., *supra* note 227; *see also* Monahan, *supra* note 225 (introducing stress managing skills such as breathing and moving to help students maintain calmness before and during the bar exam).

255. *See COVID-19 and the July 2020 Bar Exam*, BAR EXAM'R (2020), https://thebarexaminer.org/article/fall-2020/covid-19-july-bar-exam/ [https://perma.cc/JBA2-KGQ2] (discussing the changes of the bar exam during the coronavirus pandemic).

256. *See, e.g.*, *'A Test of Privilege': Law Graduates Say COVID-19 Points Out Inequities of Texas Bar Exam*, KXAN (July 22, 2020, 7:33 PM), https://www.kxan.com/investigations/a-test-of-privilege-law-graduates-say-covid-19-points-out-inequities-of-texas-bar-exam/ [https://perma.cc/B22M-SPQS] (addressing how the changes affect minority classes at a higher rate because of the financial burden placed on the family. Those from low-income backgrounds cannot afford to take three months off of work to study for the bar exam, much less five, which is what the changes from COVID-19 led many test takers to do. Forcing students to continue studying for an additional two months only added stress and the health implications of going to test in person also added additional challenges).

257. We surveyed bar takers after the conclusion of the Summer 2020 exam season to determine the usefulness of Raise the Bar in their bar preparation process. On a 1–5 scale, 88.9% of responders ranked Raise the Bar at a 5 in its ability to support them during the pandemic, and 11.1% of responders ranked the program at a 4. Comments from responders indicate the role coaches played in assisting with bar strategy and mental wellbeing:

> I sincerely appreciated the weekly update emails, they helped me stay more focused on the finish line as the finish line was unknown or delayed. They were also great sources of encouragement. I

for our graduates most at risk of not passing the bar exam.[258]

The challenge of 2020 was that the metrics that would place someone at risk of not passing were rendered somewhat useless by the chaos of the changing bar exams.[259] Many examinees had risk factors that may have impacted their bar success without one-on-one guidance.[260] As a result, though Raise the Bar existed before the pandemic and will exist long after, 2020 proved a particularly important time for the powerful advisor/advisee relationship cultivated by our coaches.[261] Through that connection, we were able to serve our graduates in particularly important ways during the chaos of the 2020 pandemic.[262] First, bar coaches

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> also appreciated the scheduling help in the beginning as I entered bar prep with no idea how to manage everything alongside my commercial program.
>
> [M]aking and adjusting a study schedule as needed and calming my stress/anxiety about all the changes and not knowing the information well enough.
>
> Simply being there as a coach and mentor throughout the process made a huge impact.
>
> Yes, Professor Cavanaugh and I would meet weekly and if I pass the bar exam, I will give him a lot of credit for that. He always made sure I stayed on track with my program, adapted my study schedule as need be, and let me vent when I was struggling with a topic.
>
> Yes, Professor Niesel was really helpful because she was comforting and encouraging.
>
> As a second time Bar taker it was helpful to have someone bounce ideas off of to improve my studying techniques and strategy in approaching this exam.

Survey responses are on file with the author.

258. *Cf. 'A Test of Privilege': Law Graduates Say COVID-19 Points Out Inequities of Texas Bar Exam*, *supra* note 257 ("To keep the materials fresh, you just have to keep going and going . . . . There was a lot of indecision, and it was really hard for [examinees] to try and concentrate when they didn't know when they were going to take the bar exam, if they were going to take the bar exam. . . . ").

259. *Cf.* Sherry Karabin, *Bar Exam Standouts: A New Study Identifies Law Schools Whose Graduates Overperform on that Crucial Test*, NAT'L JURIST (Nov. 6, 2020, 9:30 AM) https://www.nationaljurist.com/national-jurist-magazine/bar-exam-standouts-new-study-identifies-law-schools-whose-graduates [https://perma.cc/3L9K-UMC7] (commenting on metrics commonly used to predict bar passage rates at law schools).

260. *See* Jane Yakowitz, *Marooned: An Empirical Investigation of Law School Graduates Who Fail the Bar Exam*, 60 J. LEGAL EDUC. 3, 5, 11, 19–27 (2010) (outlining the factors that lead to bar failure risk such as credentials, school performance, socio-economic status, foreign origin, and certain career interests. A disproportionate number of minorities are considered "never-passers," a term coined to refer to J.D.-holder who will never pass the bar. The outlined factors affect minority students at a higher percentage than others).

261. *Raise the Bar*, *supra* note 162.

262. E-mail from Afton Cavanaugh, Director of Law Success and Service Professor of Law, St. Mary's University School of Law, to Raise the Bar enrollees (July 2, 2020, 2:24 PM) (on file with author) (recognizing the time and experiences students were facing while studying for the bar

attended Texas BLE meetings and kept bar takers informed of updates regarding the 2020 bar exam.[263] Second, the ability of coaches who have studied the bar exam to keep up with changes in the scoring and administration logistics of the exam and present bar takers with advice grounded in experience, hopefully helped mitigate some of the worry bar takers were experiencing.[264] Third, in a moment of uncertainty, the function of bar coaches in reviewing work and helping bar takers assess their progress towards bar passage also helped worried bar takers focus on their particular strengths and weaknesses rather than the whole overwhelming picture.[265] Finally, and probably most importantly, the ability to have someone to validate feelings and to vent concerns to helped in a time of tremendous stress.[266] Raise the Bar was also able to

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examination and extending advice on how to move forward in while decisions continued to be made).

263. *Id.* (reaching out to update Raise the Bar enrollees following the Texas Board of Law Examiners' decision to recommend cancellation of the July Texas Bar Exam).

> Dear Bar Takers:
>
> As many of you know the BLE is meeting right now live on YouTube to discuss the feasibility of a July and September exam. For those that have watched the meeting, you probably have already heard that the one definitive recommendation at this point is that the July exam cannot safely go forward. The fate of the September exam, the possibility of an online exam, and other paths to practice are still being debated. Please know that we will reach out later when we know more about the plan based on the decisions of the Supreme Court.
>
> We know that saying you are stressed is a serious understatement. Watching your future being debated is hard enough, without the very real frustration so many of you have reached out to express about the tone of this debate. The purpose of this message is just this, to tell all of you to take the day off of studying. Do not try to persist in studying in the face of this stress. Know that we are thinking about all of you and we want you to take care of yourselves first and foremost right now.
>
> We will be in touch soon.
>
> Sincerely,
>
> The Raise the Bar Team

264. *See* Riebe, *supra* note 202, at 341 (outlining how third parties (i.e., bar coaches) can help students who are blinded by short-term concerns make more thoughtful decisions because the coaches are more experienced and understand the bar exam process better).

265. *See* ST. MARY'S UNIV., *supra* note 227 (relaying the way Raise the Bar coaches help by keeping students accountable and understanding the stresses and anxieties that come with studying for the bar exam).

266. *See* Riebe, *supra* note 202, at 341 (reporting the helpfulness of students having a third party who understand the bar exam process, the necessary preparation, and the significance of their decision); *see also Feeling Lonely, Suicidal, or Depressed During Bar Prep?*, *supra* note 252

work with administrators to connect bar takers to resources and to coordinate spaces on campus for examinees to take the remote exam in October.[267]

The COVID-19 pandemic and social and political upheaval positioned summer 2020 bar takers for one of the most challenging bar cycles Raise the Bar coaches had ever experienced.[268] Bar prep extended from graduation in late May into early September or October.[269] Bar examinees expressed serious financial concerns, lacked the ability to secure quiet places to study, were struggling with sickness and grief, and students from communities of color were grappling with the "national reckoning on race" happening all around them.[270] The concerns raised by bar examinees and the deans of every Texas law school to bar

(recognizing the feelings of loneliness and depression that comes with studying for the bar exam. To help from falling further into depressive and suicidal states, having someone to confide in lessens the feelings of inadequacy).

267. *See Town Hall July 7*, KALTURA (July 7, 2020) https://cdnapisec.kaltura.com/index.php/extwidget/preview/partner_id/1873141/uiconf_id/45000912/entry_id/0_82l52tj2/embed/dynamic (preparing 3Ls for the changes in the bar exam dates and supporting students with equipment and resources to be able to complete the exam remotely on a computer).

268. Abigail Johnson Hess, *'Literal Hell'—How the Pandemic Made the Bar Exam Even More Excruciating for Future Lawyers*, CNBC MAKE IT (Aug. 19, 2020, 5:40 PM), https://www.cnbc.com/2020/08/19/literal-hellthe-pandemic-has-made-the-bar-exam-more-excruciating.html [https://perma.cc/V2KQ-4CTZ] ("[I]n many ways[,] the exam is even more stressful today than in the past.").

269. *See, e.g.*, Sam Skolnik, *October Online Bar Exams Spark Technology, Privacy Concerns*, BLOOMBERG L. (Aug. 18, 2020, 5:00 AM), https://news.bloomberglaw.com/us-law-week/october-online-bar-exams-spark-technology-privacy-concerns [https://perma.cc/35D2-FCRQ] (charting the expected dates of the summer 2020 bar examination by state. The delay in examination means students will spend more time ensuring they are prepared for the test. Many tests originally scheduled for July or August were postponed until September or October. One example was on August 16, Florida postponed the exam for October).

270. Lauren Hutton-Work & Rae Guyse, *Requiring a Bar Exam in 2020 Perpetuates Systemic Inequities in the Legal System*, THE APPEAL (July 6, 2020), https://theappeal.org/2020-bar-exam-coronavirus-inequities-legal-system/ [https://perma.cc/E8XG-FQXQ]; *see A Test of Privilege': Law Graduates Say COVID-19 Points Out Inequities of Texas Bar Exam*, *supra* note 256 (showing the financial stability needed to study for the bar exam during the COVID-19 causes additional bar study gaps for racial and class lines). In a number of coaching meetings, bar takers expressed serious distress about whether to prioritize involvement in supporting the social movements over bar study or vice versa. Their friends and families did not understand their refusal to venture out when they needed to be at home studying. If they did venture out, they faced falling behind. Further, the fear of contracting COVID-19 and losing weeks of bar study to illness left bar takers feeling helpless. Many bar takers from communities of color chose to focus on the positive difference they could make for their communities if they obtained their license, and to do that they had to prioritize the bar exam.

examiners and Justices of the Texas Supreme Court charged with making final decisions about the bar exam fell on deaf ears.[271]

In response to the concerns expressed in hours of public comments across a number of public meetings, Texas BLE members encouraged bar takers to "just borrow money from law schools, family and friends, or explore loan abatement programs."[272] Such comments showed the Texas BLE to be out-of-touch with the plight of all but the most privileged of bar takers.[273] For Raise the Bar coaches, the mental, physical, and financial toll on bar takers caused by the 2020 pandemic and the corresponding failure of bar examiners to adapt in a moment of global crisis, will likely stand out as the most challenging exam cycle ever in a role that is always nothing short of incredibly demanding.[274] Indeed, the 2020 bar cycle amplified the reality of the bar exam as a function for testing a graduate's privilege to not face the myriad challenges created by the pandemic at least as much as it was testing their memorization and application of law to fact.[275]

Ultimately, whether in a pandemic or in less chaotic times, no law school's bar program alone can solve all the underlying problems with the bar exam as long as it remains the only way to measure competency to practice law.[276] Alternate pathways to licensure ought to be

271. Hutton-Work & Guyse, *supra* note 270 ("[I]n response to the pandemic, the Board of Law Examiners met and considered alternatives to an in-person bar examination proposed by the Deans of the Texas law schools . . . . The Board declined to recommend the diploma privilege to the Texas Supreme Court."); Letter from Deans of the Ten Texas law schools, to Texas Supreme Court and Texas Board of Law Examiners (June 29, 2020), https://law.utexas.edu/wp-content/uploads/sites/5/Deans-Letter-June-29.pdf [https://perma.cc/B79H-G92W].

272. *Id.*

273. *See id.* ("Dean of the South Texas College of Law Michael Barry concluded . . . a 2020 bar exam would undeniably disadvantage examinees who are disproportionately impacted by COVID-19. But, just as the board largely ignored the public commentary, the board ignored the suggestion that any exam this year would simply measure privilege.").

274. *See* Lloyd, *supra* note 205 (explaining how Raise the Bar coaches are determined to meet the needs of each individual student).

275. *See* Hutton-Work & Guyse, *supra* note 270 ("Even in a non-COVID year, studying for the bar privileges wealthy law graduates . . . .").

276. *See* Aleatra P. Williams, *The Role of Bar Preparation Programs in the Current Legal Education Crisis*, 59 WAYNE L. REV. 383, 385–97 (2013) (discussing the role between legal education and bar prep programs aimed at helping bar passage rates); *see also* Hutton-Work & Guyse, *supra* note 270 (explaining how there is no evidence that the bar exam tests competency of a lawyer).

considered in lieu of, or in addition to, the standardized test approach.[277] Unless and until some of the sweeping changes to licensure some jurisdictions implemented in response to the COVID-19 pandemic become permanent, bar exam passage is the reality the legal profession must labor under.[278] In the interim, it is incumbent upon law schools to focus their efforts on working to help students from marginalized communities overcome the block the bar exam poses for some in their quest for a law license.[279] We must focus our efforts on what we can control, advocate for changes to what we cannot control, and invest the time and energy it takes to set our students up to reach for bar exam success.[280]

Finally, it should be noted that there are proposed changes to the bar exam coming in the next four to five years, and these changes are in part a recognition of the challenge the bar exam poses to increasing diversity in the legal profession.[281] One reason for the change is to ensure the next generation bar exam truly tests minimum competency.[282] The proposed changes do not appear to be sweeping enough in measure to truly resolve the problem of testing privilege, which means the need for investment in helping graduates pass the bar will continue well into the future if we

277. *See generally* Marsha Griggs, *An Epic Fail*, 64 HOWARD L.J. 1, 30–37 (2020) (chronicling the final semester of law school for graduates in spring 2020 and exploring viable alternatives to the bar exam).

278. *See id.* at 49–50 ("The origins of the ABA as an early bar exam regulator, and its role in establishing the NCBE, has predictably led to a sustained and deferential relationship between the two entities. Whether or not merited, the deference, at times may be to a detriment to the public good, as seems the case with the debacle made of the July 2020 bar exam administration.").

279. *See id.* at 20 (detailing how the pandemic exposed disparities and barriers to entry in the legal field that must be remedied); *see also, e.g.*, ST. MARY'S UNIV., *supra* note 227 (highlighting St. Mary's Raise the Bar program's commitment to soon to be law school graduates).

280. *See* Lloyd, *supra* note 205 (describing the types of help provide by law success instructors, such as reducing test anxiety and assisting students with their bar exam preparation); *see also* Letter from Deans of the Ten Texas law schools, to Texas Supreme Court and Texas Board of Law Examiners (June 29, 2020), https://law.utexas.edu/wp-content/uploads/sites/5/Deans-Letter-June-29.pdf [https://perma.cc/B79H-G92W] (documenting the commitment of Texas law schools in advocating for a change to the bar exam's structure).

281. Ben Bratman, *The Next Generation of the Bar Exam, NCBE Style*, BEST PRACS. FOR LEGAL EDUC. (Jan. 14, 2021), https://bestpracticeslegaled.com/2021/01/14/the-next-generation-of-the-bar-exam-ncbe-style/ [https://perma.cc/9KS2-6QQP] (discussing the positives and negatives of NCBE's proposed changes to future bar exams including testing a person's legal research ability and client counseling skills).

282. *Id.*

want to ensure adequate representation of *all* Americans in the legal profession.[283]

CONCLUSION

The bar exam in its current form has hindered the legal profession from reaching the goal of adequate representation of all Americans because it continues to test the privilege of applicants at least as much as it tests their knowledge and skills for the practice of law.[284] It tests the privilege of where someone obtained their high school diploma, the privilege of where they went to college, the privilege of their income, their family situation, and the privilege of performing well on standardized exams.[285] If an examinee is lacking privilege in any or all of those areas, they are less likely to pass the bar exam on their first try regardless of the rigor of their legal education.[286] Students from marginalized communities tend to have less privilege than their White counterparts in the education

283. *See id.* ("[T]here are at least two aspects of the task force's recommendation that strike me as problematic—or at least present the risk of inadequate or counterproductive reform to the bar exam.").

284. *See* Pilar Margarita Hernández Escontrías, *The Pandemic is Proving the Bar Exam is Unjust and Unnecessary*, SLATE (July 23, 2020 5:45 PM), https://slate.com/news-and-politics/2020/07/pandemic-bar-exam-inequality.html [https://perma.cc/LC9Z-LLX8] ("The bar has a sordid history as one of the many racialized gatekeeping mechanisms into the practice of law. . . . The COVID-19 pandemic has only made the uneven playing field more obvious. This year's upheaval should force us to reconsider the value of gatekeeping mechanisms we have long taken for granted.").

285. *See, e.g.*, Valerie Strauss, Why This Pandemic is a Good Time to Stop Forcing Prospective Lawyers to Take Bar Exams, WASH. POST. (July 13, 2020, 1:45 PM) https://www.washingtonpost.com/education/2020/07/13/why-this-pandemic-is-good-time-stop-forcing-prospective-lawyers-take-bar-exams/ [https://perma.cc/P67J-V2PB] ("For starters, an online administration of the bar exam will privilege those exam takers with the social, economic and structural resources to set up the necessary exam infrastructure needed to take a 12-hour, two-day online test. Some of these privileges include access to a well-performing laptop or computer, speedy and consistent Internet, and a space to quietly take an exam over the course of two days without distractions."); *see also* Escontrías, *supra* note 284 (revealing the ways the lack of privilege manifested itself throughout the pandemic).

286. *See* Paul Caron, *Only 5% Of Black First-Time Takers Passed February California Bar Exam, Compared To 52% Of Whites, 42% Of Asians, And 31% Of Hispanics*, TAXPROF BLOG (June 15, 2020), https://taxprof.typepad.com/taxprof_blog/2020/06/only-5-of-black-first-time-takers-passed-february-california-bar-exam-compared-to-52-of-whites-4.html [https://perma.cc/J7EM-VQF5] (showing how marginalized communities of color continue to struggle in reaching equitable results across racial lines).

system and that impacts their performance on standardized exams like the bar exam.[287]

The problem posed by the bar exam is not only the fact that it tests privilege, but the fact that it came into being as it exists today with the specific purpose of using privilege as a means to exclude people from communities of color from the practice of law.[288] It was implemented to advance racist ideologies about who ought to be admitted to the legal profession.[289] Indeed, when overt racism became uncouth, tightened ABA accreditation restrictions and the bar exam were built into the system of legal education to accomplish the same goal that could once be accomplished with a formal written policy of not admitting students from communities of color to the bar.[290]

Today we are asked to accept the ongoing existence of accreditation standards that have a greater impact on the admission of Black, Indigenous, and people of color to law school and a bar exam that keeps more law graduates from marginalized communities from obtaining their license are fine because they are no longer *meant* to have that impact, they now only *happen* to have that impact.[291] If the legal profession values diversity and inclusion as much as it purports to, it is past time to recognize that continuing to use the same tools of systemic racial oppression is not rendered acceptable merely because we no longer use

287. *Cf.* Ibram X. Kendi, *Why the Academic Achievement Gap is a Racist Idea*, BLACK PERSPECTIVES (Oct. 20, 2016), https://www.aaihs.org/why-the-academic-achievement-gap-is-a-racist-idea/ [https://perma.cc/85ZS-ZQX4] ("Our faith in standardized tests causes us to believe that the racial gap in test scores means something is wrong with the Black test takers—and not the tests. . . . The testing movement values the racist hierarchy of difference . . . .").

288. Shepherd, *supra* note 198, at 104 (2003); *see, e.g.*, J. Cunyon Gordon, *Painting by Numbers: "And, Um, Let's Have a Black Lawyer Sit at Our Table*," 71 FORDHAM L.R. 1257, 1274 (2003) (quoting a 1912 ABA resolution that led to the creation of the ABA's early requirement of demographic data stated statistics which concluded "if at any time any of them shall recommend a person of the colored race for membership, they shall accompany the recommendation with a statement of the fact that he is of such a race.").

289. *See generally* Shepherd, *supra* note 198, at 109 (revealing the racist origins of state requirements for bar admission).

290. *Id.* (illustrating how higher accreditation standards were meant to discriminate on the basis of race).

291. *Id.* at 125–26 ("The ABA's accreditation standards and the way the ABA applies them have had the same impact on [B]lacks as George Wallace standing with policemen at the schoolhouse door in Alabama, blocking [B]lacks from entering. Present ABA accreditors may not have rigged the standards intentionally to close [B]lack law schools . . . . Instead they may be motivated by a genuine belief that substantial numbers of new [B]lack lawyers would harm the profession. Regardless, the result is the same.").

them with nefarious motivations.[292] The 2020 pandemic did not cause the discriminatory impact of the bar exam, but it certainly led to heightened scrutiny on that impact forward.[293] The legal profession should seize the moment of change created by the pandemic to move towards alternate, non-discriminatory paths to licensure.[294]

292. *Id.* at 103–04 (discussing how the ABA's profession to be dedicated to increasing diversity as a central priority only rings in hollow efforts to make a change and advancement and instead has instilled barriers for communities of color); *cf.* Escontrías, *supra* note 285 (advocating for the elimination of the bar exam and a shift toward other alternatives such as diploma privilege due to the bar exam's legacy of racism and discrimination).

293. Karen Solan, *Amid COVID-19, the Bar Exam Faces a Reckoning and a Revamp*, LAW.COM (Dec. 02, 2020), https://www.law.com/2020/12/02/amid-covid-19-the-bar-exam-faces-a-reckoning-and-a-revamp/?slreturn=20210215224606%20 [https://perma.cc/5DD6-TC5H] ("[T]he pandemic has prompted many to question whether the bar exam is even necessary . . . . [I]nsiders say that the bar exam is unlikely to disappear anytime soon. But nearly all agree that 2025's bar exam will look different than today's. The extent of those changes remains to be seen . . . .").

294. *See, e.g.*, *About*, UNITED FOR DIPLOMA PRIVILEGE (2020), https://www.unitedfordiplomaprivilege.org/about/ [https://perma.cc/UT2Z-7GYT] (organizing law students across the USA during the COVID-19 to advocate for diploma privilege).