

**BLACK AND BARRED: THE BAR EXAMINATION’S HISTORY OF  
EXCLUSIVITY AND THE THREAT OF FURTHER EXCLUSION POSED BY ABA  
STANDARD 316**

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I. INTRODUCTION

America is often described as a “melting pot.”<sup>1</sup> This metaphor implies that the country has experienced a melting of individuals from diverse cultural and ethnic backgrounds “assimilate[d] into a cohesive whole.”<sup>2</sup> Assimilation and acculturation are perhaps evident in the country’s makeup, but the “cohesive whole” concept continues to escape the reality of America. In the vast “melting pot,” Whites make up approximately 60% of the population, with Hispanics/Latinos making up 19%, Blacks/African-Americans making up 13%, and Asian and Indigenous people comprising approximately 6%.<sup>3</sup> As unbalanced as the general population groups may be, the legal profession is

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1. David Michael Smith, *The American Melting Pot: A National Myth in Public and Popular Discourse*, 14 NAT’L IDENTITIES 387, 387 (2012).

2. *Melting Pot*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/melting%20pot> [https://perma.cc/U7NC-GTR3].

3. *QuickFacts: United States*, U.S. CENSUS BUREAU (July 1, 2021), <https://www.census.gov/quickfacts/fact/table/US/PST045219> [https://perma.cc/6YZU-DS5R].

more glaringly unequal. According to 2021 ABA data, 85.4% of all lawyers are white.<sup>4</sup> The data reveals that Blacks are 4.7% of all lawyers, Hispanics are 4.8%, Asians are 2.5%, and Native Americans are less than 1%.<sup>5</sup> The legal profession is continuing its history of being perhaps one of the “whitest” professions<sup>6</sup> and the almost “exclusive province of Anglo-Saxon, White men.”<sup>7</sup>

A number of factors contribute to the limited diversity in the legal profession, ranging from the entrance exam,<sup>8</sup> to admissions criteria,<sup>9</sup> to law school curriculum.<sup>10</sup> Applicants who score well on law school entrance examinations,<sup>11</sup> gain admission to an ABA-accredited institution, and graduate from that institution must also face the challenging hurdle to gain licensure to practice law via the bar examination (the bar exam). In most states, despite a graduate’s law school performance, failure to obtain a passing score on the bar exam will preclude licensure and the ability to practice law. Although the bar exam is not generally accepted as a predictor of an individual’s ability to have a successful career as a lawyer,<sup>12</sup> it continues to be

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4. AM. BAR ASS’N, PROFILE OF THE LEGAL PROFESSION 13 (2021), <https://www.americanbar.org/content/dam/aba/administrative/news/2021/0721/polp.pdf> [<https://perma.cc/VL9F-7R3W>].

5. *Id.*

6. *E.g.*, Michelle J. Anderson, *Legal Education Reform, Diversity, and Access to Justice*, 61 RUTGERS L. REV. 1011, 1012 (2009) (stating that U.S. Census data reveal a higher rate of cultural diversity in fields such as medicine, accounting, architecture, and engineering, compared to the legal field); Beverly I. Moran, *Disappearing Act: The Lack of Values Training in Legal Education—A Case for Cultural Competency*, 38 S.U. L. REV. 1, 39 (2010) (“[T]here are few professional spaces as segregated as United States law schools.”).

7. Milo Colton, *What Is Wrong with the Texas Bar Exam? A Minority Report*, 28 T. MARSHALL L. REV. 53, 55 (2002) (“For most of American history, the practice of law in the United States has been considered the exclusive province of Anglo-Saxon, White men; and today, non-Hispanic White males throughout the nation still overwhelmingly dominate the practice of law.”).

8. *See, e.g.*, Jeffrey S. Kinsler, *The LSAT Myth*, 20 ST. LOUIS UNIV. PUB. L. REV. 393, 393 (2001).

9. *See, e.g.*, John Nussbaumer, *Misuse of the Law School Admissions Test, Racial Discrimination, and the De Facto Quota System for Restricting African-American Access to the Legal Profession*, 80 ST. JOHN’S L. REV. 167, 167 (2012).

10. *See, e.g.*, Faisal Bhabha, *Towards A Pedagogy of Diversity in Legal Education*, 52 OSGOODE HALL L.J. 59, 59 (2014) (“[E]xperiential/clinical learning practices offer a useful method to achieve a more engaged pedagogical commitment to diversity in legal education.”).

11. The most common law school entrance examination is the Law School Admission Test (LSAT). *See* Stephanie Francis Ward, *Under Examination*, 104 A.B.A. J. 68, 68 (2018). In recent years, some law schools have also accepted the Graduate Requirement Exam (GRE) results for law school applicants. *Id.*

12. Deborah L. Rhode, *Institutionalizing Ethics*, 44 CASE W. RESV. L. REV. 665, 690 (1994) (“No showing has ever been made that performance either on bar exams or in law school correlates with performance in practice.”); Robert M. Jarvis, *An Anecdotal History of the Bar*

a critical and oftentimes unavoidable requirement to practice law. This Article will discuss the bar exam and its interplay with Standard 316 promulgated by the American Bar Association (ABA). Standard 316 is one of the more than fifty standards which law schools “must meet to obtain and retain ABA approval.”<sup>13</sup> The Standard’s focus is on the reported percentage of a law school’s graduates who pass the bar exam within two years of graduation.<sup>14</sup>

Successful bar passage within two years of graduation is therefore critical to a law school’s compliance with accreditation standards. Yet, passage rates for those taking the bar exam for the first time mimic the disparities seen in the demographics of the legal profession. The disparities in the passage rates for the bar exam between White and non-White examinees is starkly evident nationwide. Statistics evidence that White test takers are significantly more likely to pass the bar exam on the first try than test takers of other races and ethnicities.<sup>15</sup> Of the White women and men taking the bar exam for the first time, 88% passed.<sup>16</sup> In comparison, 66% of Black first-time test takers passed on their first attempt.<sup>17</sup> More troubling statistics emerged in 2020, when only 5% of Black first-time test takers in California passed the February 2020 bar exam, compared to 52% of Whites.<sup>18</sup>

In addition to statistical findings, events at the turn of the decade in 2020 further highlighted the disparate impact of the bar exam. The bar passage rates

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*Exam*, 9 GEO. J. LEGAL ETHICS 359, 387 (1996) (“It is generally agreed that there is no correlation between how a person does on the bar exam and how he or she will fare in practice . . . . As is often pointed out, Charles Evans Hughes, who ran for President of the United States in 1916 and served as Chief Justice of the U.S. Supreme Court from 1930 to 1941, failed the New York State bar exam seven times.”).

13. AM. BAR ASS’N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2021-2022 at v, § 316 (2021) [hereinafter 2021–2022 ABA STANDARDS], [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/standards/2021-2022/2021-2022-aba-standards-and-rules-of-procedure.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2021-2022/2021-2022-aba-standards-and-rules-of-procedure.pdf) [https://perma.cc/E4ST-XSEE].

14. *See id.* § 316.

15. AM. BAR ASS’N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, SUMMARY BAR PASS DATA: RACE, ETHNICITY, AND GENDER 2020 AND 2021 BAR PASSAGE QUESTIONNAIRE [hereinafter SUMMARY BAR PASS DATA], [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/statistics/20210621-bpq-national-summary-data-race-ethnicity-gender.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/20210621-bpq-national-summary-data-race-ethnicity-gender.pdf) [https://perma.cc/5NPM-XFN2].

16. *Id.*

17. *Id.*

18. Paul Caron, *Only 5% of Black First-Time Takers Passed 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://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/967P-TSMM].

skewed along racial lines<sup>19</sup> in inverse relation to COVID-19 mortality rates by race.<sup>20</sup> First-time bar passage rates correlate with bar-preparation study time, low student debt, and post-exam employment.<sup>21</sup> The impact of these factors on communities of color was all too evident during the pandemic. The pandemic, the outcries of injustice, and the displays of racism in the United States “amplified the exam’s segregationist history and obvious inequities.”<sup>22</sup> The world continues to grapple with solutions to create a fair and just society for all people. The legal profession is not immune and does not exist outside of those societal trends. As a profession, it should seek to eliminate inequities occasioned by the bar exam, including threats to access and opportunity for underrepresented communities.<sup>23</sup>

Calls to abolish the bar exam increased with the occurrence of the COVID-19 pandemic.<sup>24</sup> While some scholars argue that eliminating the bar exam is not an imminent answer to remedy inequities in the legal profession,<sup>25</sup> the issue of the impact of the bar exam on diversity, equity, and inclusion in the practicing bar must be confronted. At a minimum, the time has come to

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19. See Christina S. Chong, *Battling Biases: How Can Diverse Students Overcome Test Bias on the Multistate Bar Examination*, 18 U. MD. L.J. RACE, RELIG., GENDER & CLASS 31, 36 (2018).

20. See Tiana N. Rogers et al., *Racial Disparities in COVID-19 Mortality Among Essential Workers in the United States*, 12 WORLD MED. & HEALTH POL’Y 311, 314 (2020) (noting the apparent racial disparities in the mortality rates caused by COVID-19).

21. See, e.g., ACCESSLEX INST., ANALYZING FIRST-TIME BAR EXAM PASSAGE ON THE UBE IN NEW YORK STATE 2–6 (2021), [https://www.accesslex.org/sites/default/files/2021-05/NYBOLE\\_2021\\_050521\\_0.pdf](https://www.accesslex.org/sites/default/files/2021-05/NYBOLE_2021_050521_0.pdf) [<https://perma.cc/8KL8-QCNJ>] (finding that key ingredients to bar passage include time dedicated to bar preparation, the quality of such time, and non-academic factors such as debt, mindset, and significant life events).

22. 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/BY8T-WWAX>] (“Prioritizing bar examiners’ gatekeeping function during a pandemic and economic crisis means putting aspiring lawyers at risk and making it harder for nonwhite and low-income people to enter the legal profession.”).

23. Deseriee A. Kennedy, *Access Law Schools & Diversifying the Profession*, 92 TEMP. L. REV. 799, 808 (2020) (“‘Access law schools,’ which view providing wide access to legal education to students who traditionally underperform on law school entrance examinations as a core part of their mission, have a unique role to play in increasing diversity in the profession.”).

24. See, e.g., Valerie Strauss, *Why this Pandemic Is a Good Time to Stop Forcing Prospective Lawyers to Take Bar Exams*, WASH. POST (June 13, 2020), <https://www.washingtonpost.com/education/2020/07/13/why-this-pandemic-is-good-time-stop-forcing-prospective-lawyers-take-bar-exams/> [<https://perma.cc/BR43-EFYS>].

25. See, e.g., A. Benjamin Spencer, *Calls to Eliminate Bar Exams Are Premature*, BLOOMBERG L.: U.S. L. WK. (Aug. 3, 2021), <https://news.bloomberglaw.com/us-law-week/calls-to-eliminate-bar-exams-are-premature> [<https://perma.cc/WG3E-EW28>] (“[T]he goal should be transforming [the bar exam] into a more effective gauge of professional readiness that facilitates access to the legal profession. . . . A key step in that direction . . . is to expand adoption of the Uniform Bar Examination (UBE) across more states.”).

have an intensive and broader discussion regarding law licensing that better measures lawyer competence and significantly decreases the disparate impact of the current licensing regime. That discussion must necessarily include a review of the efficacy of Standard 316 and its continued threat to the much-needed diversity, equity, and inclusion in the legal profession.

The ABA's Council on Legal Education and Admissions to the Bar is "required to take regular and systematic review of its accrediting standards."<sup>26</sup> The ABA's Standards Committee affirmed its commitment to review the standards in light of recognized hardships that bar exam takers experienced during the pandemic:

At the beginning of the 2021–22 Council year, the Standards Committee agenda included a number of significant issues, including the need to review the current standards related to distance learning in light of new experience gained by law schools during the Covid-19 pandemic, and significant changes in the landscape related to the use of admissions tests in legal education.<sup>27</sup>

An ad hoc "Strategic Review Committee" was formed in April 2022 "to undertake a big-picture 'strategic' review of the Standards to identify other areas that may need refinement and improvement in light of recent changes in legal education."<sup>28</sup> It is imperative that the Council consider the history of the bar exam and the implications of continued enforcement of Standard 316 in its current form.

To provide a framework for needed reform to ABA Standard 316, this Article will first provide a brief history of Standard 316 in Part II. A brief history of the ABA and the bar exam will follow in Part III, to include a discussion of a proposed new bar exam format, with the conclusion in Part IV providing a foundational basis for a timely and relevant discussion in the legal profession beginning with the review of enforcement of Standard 316.

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26. 34 C.F.R. § 602.21 (2021).

27. Memorandum from Leo Martinez, Council Chair of Legal Educ. & Admissions to the Bar & William Adams, Managing Dir. of Accreditation & Legal Educ., to Interested Parties, at 1 (Apr. 19, 2022) [hereinafter Memorandum from Leo Martinez], [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/src-est-memo.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/src-est-memo.pdf) [https://perma.cc/8UPH-JRZL].

28. *Id.*

## II. HISTORY OF ABA STANDARD 316

The ABA, despite its critics and challenges,<sup>29</sup> has maintained a monopoly on accreditation of law schools. The U.S. Department of Education recognizes the ABA as the only accreditation agency for degrees in law.<sup>30</sup> This is critically important because “since 1952 the DOE has limited federally subsidized financial assistance only to those law students attending ABA-approved schools.”<sup>31</sup> Today, in order to be accredited and remain accredited by the ABA, a law school must meet certain minimum standards.<sup>32</sup> One of those standards is Standard 316 – Bar Passage, which provides that “[a]t 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.”<sup>33</sup>

In May 2019, the ABA approved revisions to Standard 316 that “replace[d] previous Standard 316 that permitted measuring compliance based on as few as 70 percent of a law school’s graduates and included multiple methods for complying, including multiple measures for first-time and ultimate pass rates based on different cohorts of students and different time frames.”<sup>34</sup> Before May 2019, the Standard required that:

[a]t least 75% of a law school’s graduates in a calendar year who sat for a bar examination must have either passed a bar examination administered within four years of their date of graduation, or the law

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29. See Andy Portinga, *ABA Accreditation of Law Schools: An Antitrust Analysis*, 29 U. MICH. J.L. REFORM 635, 636–38 (1996) (accusing the accreditation process of “violat[ing] antitrust laws”; “increas[ing] the cost of legal education”; and being “at odds with maintaining quality”); see also *Mass. Sch. of L. at Andover, Inc. v. Am. Bar Ass’n*, 107 F.3d 1026, 1031–32 (3rd Cir. 1997) (describing the law school’s actions after failing to get ABA accreditation: it sued the ABA in federal court and claimed that the ABA’s standards existed principally to enhance the salaries and working conditions of law professors).

30. *Schools Seeking ABA Approval*, A.B.A., [https://www.americanbar.org/groups/legal\\_education/accreditation/schools-seeking-aba-approval/](https://www.americanbar.org/groups/legal_education/accreditation/schools-seeking-aba-approval/) [https://perma.cc/85S5-PQZC] (“Under Title 34, Chapter VI, Part 602 of the Code of Federal Regulations, the Council of the ABA Section of Legal Education and Admissions to the Bar . . . is recognized by the United States Department of Education (ED) as the accrediting agency for programs that lead to the J.D. degree.”).

31. Herb D. Vest, *Felling the Giant: Breaking the ABA’s Stranglehold on Legal Education in America*, 50 J. LEGAL EDUC. 494, 499 (2000).

32. 2021–2022 ABA STANDARDS, *supra* note 13, at v.

33. 2021–2022 ABA STANDARDS, *supra* note 13, § 316.

34. Guidance Memorandum from the Managing Director, ABA Section of Legal Educ. & Admissions to the Bar, on Standard 316 and Reporting of Bar Exam Outcomes (June 2019) [hereinafter *Managing Director’s Guidance Memo*], [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/governancedocuments/316-guidance-memo-june-2019.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/governancedocuments/316-guidance-memo-june-2019.pdf) [https://perma.cc/R9Q4-2NBZ].

school's mean MBE score must be within "X" standard deviations from the national mean MBE score for three out of the last five years.<sup>35</sup>

As such, 75% of graduates had to pass the bar exam within five years of graduation, or the law school could also fulfill the requirements of the Standard by (1) a first-time bar pass rate within fifteen percentage points of the statewide average, and (2) meeting that standard based on data from only 70% of graduates.<sup>36</sup> This pre-2019 standard took into account bar passage rates of minority candidates who, per statistics, have a lower first-time bar passage rate than other candidates.<sup>37</sup> In fact, there is an approximate thirty percentage point difference in the passage rates of Whites compared to minorities.<sup>38</sup>

Under the new "ultimate pass rate" standard, at least seventy-five percent of a law school's alumni who take a bar exam must pass the bar within two years of graduation, as opposed to the previous five-year period.<sup>39</sup> Schools are required to "file their completed bar examination outcomes questionnaires on or about February 1 for the preceding year's bar exam outcomes."<sup>40</sup> A bar pass rate below the required seventy-five percent will trigger a letter from the Council advising that the law school "has not demonstrated compliance" with the Standard.<sup>41</sup> Findings of non-compliance with any ABA Standard can lead to a law school losing its accreditation.<sup>42</sup> The Council provided its rationale behind the new provisions by citing to the importance of bar passage rates to assess whether a law school is "maintain[ing] a rigorous program of legal education;"<sup>43</sup> the need for consumer information for prospective law students;

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35. William Wesley Patton, *A Blueprint for a Fairer ABA Standard for Judging Law Graduates' Competence: How a Standard Based on Students' Scores in Relation to the National Mean MBE Score Properly Balances Consumer Safety with Increased Diversity in the Bar*, 24 WASH. & LEE J. CIV. RTS. & SOC. JUST. 3, 7 (2017) (emphasis removed).

36. AM. BAR ASS'N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, REVISIONS TO STANDARD 316: FREQUENTLY ASKED QUESTIONS 5 (May 17, 2019), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/council\\_reports\\_and\\_resolutions/may19/3-19-may-316-faq.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/may19/3-19-may-316-faq.pdf) [<https://perma.cc/8YLP-38WS>].

37. Stephen P. Klein & Roger Bolus, *The Size and Source of Differences in Bar Exam Passing Rates Among Racial and Ethnic Groups*, 66 BAR EXAM'R 8, 15 (1997), <https://thebarexaminer.ncbex.org/wp-content/uploads/PDFs/660497-Klein-Bolus.pdf> [<https://perma.cc/Z8GW-6MRY>].

38. *Id.* at 9.

39. Managing Director's Guidance Memo, *supra* note 34, at 1.

40. *Id.*

41. *Id.* at 1–2.

42. *Id.* at 2.

43. 2021–2022 ABA STANDARDS, *supra* note 13, § 301(a).

consumer protection for law graduates; and satisfaction of the Department of Education (DOE) criteria to be an accrediting agency.<sup>44</sup>

When the modification to Standard 316 was first proposed by the ABA's Council of the Section of Legal Education and Admission to the Bar (Council) during the 2016–2017 academic year, “many opponents demonstrated the

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44. Managing Director's Guidance Memo, *supra* note 34, at 6–7, states the explanation for the bar pass outcome standard as follows:

The ABA Standards include a standard on bar pass outcomes for several reasons.

Among them are:

- a. Because how a law school's graduates perform on the bar examination is a key outcome measure in assessing whether a law school is maintaining a “rigorous program of legal education that prepares its students . . . for admission to the bar . . .” as required by ABA Standard 301(a). Bar passage rates are also directly relevant to Standard 501(b) which states, “A law school shall only admit applicants capable of satisfactorily completing its program of legal education and *being admitted to the bar*.” (Emphasis added.)
- b. Because how a law school's graduates perform on the bar examination is one of the critical pieces of consumer information that prospective law students should consider in deciding where to study law. For that reason, bar passage outcomes must be reported under Standard 509.
- c. Because bar passage outcomes are an important element in the Council's satisfying the criteria of the United States Department of Education for recognition as an approved accrediting agency. Section 34 of the Code of Federal Regulations (CFR), Part 602 sets forth the requirements and standards accrediting agencies must meet in the discharge of their duties. Section 602.16 of the CFR requires an accreditor to:
  - (a) . . . demonstrate that it has standards for accreditation . . . that are sufficiently rigorous to ensure that the agency is a reliable authority regarding the quality of the education or training provided by the institutions or programs it accredits. The agency meets this requirement if
    - (1) The agency's accreditation standards effectively address the quality of the institution or program in the following areas:
      - (i) Success with respect to student achievement in relation to the institution's mission, which may include different standards for different institutions or programs, as established by the institution, including, as appropriate, consideration of State licensing examinations, course completion, and job placement rates. . . .

34 C.F.R. § 602.16(a) (2010).

- d. Because while applicants to law school and law school students are adults and, given good information, should be free to make their own decisions about matters such as education and finances, risk and debt, Council members also accept that in today's world their responsibility extends beyond simply providing information. The Council plays a critical role in protecting prospective and current students as a matter of consumer protection. As many entities, including the ABA have noted, most law students incur substantial debt to earn a law degree. Whether students pass a bar exam influences their future livelihood and quality of life immensely, including their abilities to pay back their loans while maintaining an acceptable quality of life.

modifications' probable impact on diversity."<sup>45</sup> In light of those objections, the ABA House of Delegates (the House) rejected the first proposed modification of the Standard.<sup>46</sup> The House expressed concerns about the "substantive changes [to] the [S]tandard," specifically the "shortening [of] the Standard's measuring period from five to two years" and "removing the ability [for law schools] to comply [with the Standard] by first-time pass rates that were within [fifteen] percentage points of the state's overall ABA school first-time pass rate."<sup>47</sup> Additionally, the House was concerned about the new Standard's impact on law schools "that were historically minority-serving institutions."<sup>48</sup> After House discussions, the proposal was "referred back to the Council for further consideration."<sup>49</sup> "At its September 2018 meeting, the Council affirmed its commitment to the revised standard and directed that it be resubmitted to the House for concurrence at the 2018 ABA Midyear Meeting in February."<sup>50</sup> Once again, deans, scholars, and advocates for access and inclusion in the Bar pointed out that the application of the new Standard would cause a disparate impact to people of color.<sup>51</sup>

The Council noted that it "took several steps to address the concern expressed in some comments filed during the revision process that the new Standard could have a disproportionate impact on minority students."<sup>52</sup> In the June 2019 guidance memo, the Managing Director noted the Council's directive to emphasize the "commitment to continue enforcing Standards 205 [Non-Discrimination and Equality of Opportunity] and 206 [Diversity and

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45. Patton, *supra* note 35, at 5; *see also* Karen Sloan & Celia Ampel, *ABA Rejects Stricter Bar-Pass Rule for Law Schools*, NAT'L L.J. (Feb. 6, 2017, 4:36 PM), <https://www.law.com/nationallawjournal/almID/1202778545389/> [<https://perma.cc/4J96-7NZT>] (describing the effects of testimony given by law school deans and diversity advocates at the ABA's midyear meeting opposing the proposed measure to modify ABA Standard 316).

46. Patton, *supra* note 35, at 5; Memorandum from Barry Currier, Managing Dir., Section of Legal Educ. & Admissions to the Bar, Am. Bar Ass'n, to the Council of the Section of Legal Educ. & Admissions to the Bar, Am. Bar Ass'n 1–2 (Oct. 20, 2017) [hereinafter Memorandum from Barry Currier], [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/council\\_reports\\_and\\_resolutions/November2017\\_CouncilOpenSession/17\\_nov\\_standard\\_316\\_memo\\_to\\_council.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/November2017_CouncilOpenSession/17_nov_standard_316_memo_to_council.pdf) [<https://perma.cc/ZR3B-4GVQ>] (indicating that, after debate, the House of Delegates rejected the proposal by a divided voice vote).

47. Memorandum from Barry Currier, *supra* note 46, at 1.

48. *See id.* at 1–2.

49. *Id.* at 1.

50. Memorandum from the Section of Legal Educ. and Admissions to the Bar, Am. Bar Ass'n, on Revisions to Standard 316: Bar Passage 2 (Nov. 16, 2018), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/council\\_reports\\_and\\_resolutions/nov18opensesion/18-nov-316-memo.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/nov18opensesion/18-nov-316-memo.pdf) [<https://perma.cc/D72B-9RPC>].

51. The author participated in these discussions during the ABA Dean's Workshop 2019.

52. Managing Director's Guidance Memo, *supra* note 34, at 5.

Inclusion].”<sup>53</sup> The guidance memo noted that although the new Standard did not list the factors that appeared in the previous standard, “the Council . . . directed that those factors continue to be relevant and include items the school considers relevant, including its ‘demonstrated and sustained mission.’”<sup>54</sup> The Council further authorized the collection of data in an effort to help determine compliance with diversity and inclusion standards,<sup>55</sup> a move that caused additional alarm as the collection of race, ethnicity, and gender data could threaten the privacy of some graduates.<sup>56</sup>

The Council offered a number of opportunities for comment and dialogue regarding the impending revision to the bar passage standards.<sup>57</sup> Despite opposition, in what might be considered a “quintessential monopolistic outcome,”<sup>58</sup> the ABA implemented Rule 316, which became effective immediately upon its implementation.<sup>59</sup> This immediate enactment afforded no opportunity for schools to implement any changes in admissions, curriculum, or bar preparation activities for the 2017 cohort of law school graduates.

In 2020, responding to the challenges in education caused by the COVID-19 pandemic, the Society of American Law Teachers (SALT) recommended suspension of Standard 316.<sup>60</sup> With the restrictions posed by the pandemic, testing environments were unstable and uncertain, leading to conflict in administering the bar exam to students.<sup>61</sup> SALT noted that a suspension in Standard 316 would allow schools to make changes to their curriculum and bar preparation programs and make reasonable accommodations to conform to the COVID protocols for their test takers.<sup>62</sup> SALT appealed to the ABA to

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53. *Id.*

54. *Id.* at 5–6.

55. *Id.* at 6.

56. Where there are small numbers of law school graduates in the noted groups, providing data regarding bar passage by race can lead to easy determination of the identity of those Black graduates’ bar outcomes.

57. See Managing Director’s Guidance Memo, *supra* note 34, at 4 (referring to a “revision process” utilized by the Council).

58. See Vest, *supra* note 31, at 499 (discussing the failure of new law schools to open despite public demand and noting how critics’ arguments that the ABA accreditation process prevented such openings was a “quintessential monopolistic” outcome).

59. See Managing Director’s Guidance Memo, *supra* note 34, at 4.

60. Mary A. Lynch, *SALT Calls for Emergency Suspension of ABA Standard 316 Concerning a Law School’s Bar Passage Rate*, BEST PRACTICES FOR LEGAL EDUC. (May 8, 2020), <https://bestpracticeslegaled.com/2020/05/08/salt-calls-for-emergency-suspension-of-aba-standard-316-concerning-a-law-schools-bar-passage-rate/> [https://perma.cc/YUR3-D34P].

61. See Letter from Soc’y of Am. Law Tchrs. to Am. Bar Ass’n, Council of the Section of Legal Educ. & Admission [sic] to the Bar (Aug. 19, 2020).

62. See *id.*

suspend Standard 316 as a “necessary accommodation” to address the “overwhelming disruption” caused by the pandemic.<sup>63</sup>

Despite opposition and recommendations for suspension, Standard 316’s focus on results of the bar examination has remained effective since its 2019 promulgation, requiring law schools to adhere to its provisions or risk loss of accreditation and potentially cease to exist. In its wake, law schools have strategized on ways to impact the bar passage rates of its graduates, in some cases by altering admissions criteria.<sup>64</sup> Reliance on standardized tests to determine admissions criteria can inevitably create yet another layer of disparate impact on applicants of color. All this necessary strategizing and action has focused on the passage rates of a bar examination, which itself has a history of disparate impact on underrepresented and marginalized groups.

### III. BRIEF HISTORY OF THE ABA AND THE BAR EXAMINATION

Historically, twice per year, thousands of individuals pay thousands of dollars to take a grueling multi-day standardized test: the bar exam.<sup>65</sup> The COVID-19 pandemic upended this tradition in 2020 as states postponed the exam<sup>66</sup> (sometimes twice<sup>67</sup>), with many moving from the traditional in-person crowded auditorium format to an online format.<sup>68</sup> Three states, Washington, Oregon, and Utah, allowed graduates from accredited law schools to enter the bar without taking the standardized bar exam.<sup>69</sup> The use of this “diploma privilege” in those states increased calls to abolish the bar exam.<sup>70</sup> Instead of being a stalwart rite of passage from law school to practice, the test with the stated purpose of determining minimum competence to practice law<sup>71</sup> was

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63. *Id.*

64. Gregory G. Murphy, *Revised Bar Passage Standard 316: Evolution and Key Points*, 88 BAR EXAM’R 21, 21–23 (stating that schools would be expected to address the revisions “by altering their admissions policies and protocols, their programs of education, or both, with salutary effects on their bar passage outcomes”).

65. See 2020 Statistics, BAR EXAM’R (Spring 2021), <https://thebarexaminer.ncbex.org/article/spring-2021/2020-statistics/> [<https://perma.cc/R844-7XYG>]; *How Much Does the Bar Exam Cost?*, JD ADVISING, <https://jedadvising.com/much-bar-exam-cost/> [<https://perma.cc/3RDN-FS4A>].

66. See generally *July 2020 Bar Exam: Jurisdiction Information*, NAT’L CONF. BAR EXAM’RS (Sept. 24, 2020), <https://www.ncbex.org/ncbe-covid-19-updates/july-2020-bar-exam-jurisdiction-information/> [<https://perma.cc/FA32-8DS3>].

67. *Id.*

68. *Id.*

69. *Id.*

70. See Stephanie F. Ward, *Jurisdictions with Covid-19-Related Diploma Privilege are Going Back to Bar Exam Admissions*, A.B.A. J. (Dec. 10, 2020), <https://www.abajournal.com/web/article/jurisdictions-with-covid-related-diploma-privilege-going-back-to-bar-exam-admissions> [<https://perma.cc/P54S-F7E2>].

71. See Michael T. Kane, *The Role of Licensure Tests*, 74 BAR EXAM’R 27 (2005).

dubbed “a test of who has the support and privilege to prepare to do the unthinkable in the midst of the most destabilizing time in our collective history.”<sup>72</sup> Nevertheless, the bar exam continues to be the main route for licensure to practice law. Despite its importance, very little has been written about the history of the bar exam and its “rise from humble formality to career-threatening ordeal.”<sup>73</sup>

#### A. *The ABA’s Exclusionary History*

When the first law school was founded in 1784, there was no American Bar Association, no ABA standards, and no bar exam.<sup>74</sup> Prior to 1784, “reading law” (also referred to as “law office study”) was the means by which most people became lawyers in the United States.<sup>75</sup> Without the requirement for formal law school training, a number of historical figures became lawyers without law school, such as John Adams, Thomas Jefferson, and Abraham Lincoln.<sup>76</sup> In 1878, the American Bar Association was founded.<sup>77</sup> Between 1890 and 1930, the number of law schools in the U.S. tripled.<sup>78</sup> In 1892, the American Bar Association began a concerted campaign to abolish the privilege to practice law without a law school degree.<sup>79</sup> “At the first ABA Annual Meeting, the ABA charged the Committee with recommending ‘some plan for assimilating throughout the Union, the requirements for candidates for admission to the bar’ by the second Annual Meeting.”<sup>80</sup>

In 1900, the ABA’s Section on Legal Education and Admissions to the Bar formed an alliance with law professors by inviting delegates from law schools to a meeting and forming the American Association of Law Schools

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72. Strauss, *supra* note 24.

73. Jarvis, *supra* note 12, at 359.

74. See Andrew Siegel, “To Learn & Make Respectable Hereafter:” *The Litchfield Law School in Cultural Context*, 73 N.Y.U. L. REV. 1978, 2003, 2007 (1998).

75. Charles R. McKirdy, *The Lawyer as Apprentice: Legal Education in Eighteenth Century Massachusetts*, 28 J. LEGAL EDUC. 124, 124–27 (1976) (describing the legal clerkship system in colonial America).

76. Baqsam Behbehani, *How Many US Presidents Actually Studied Law?*, HIST. OF YESTERDAY (July 9, 2021), <https://historyofyesterday.com/president-qualification-d868881b56c> [<https://perma.cc/S4V3-4EYF>].

77. *The American Bar Association*, A.B.A., [https://www.americanbar.org/about\\_the\\_aba/](https://www.americanbar.org/about_the_aba/) [<https://perma.cc/6MRY-4R5L>].

78. Vest, *supra* note 31, at 496.

79. See David M. White, *The Definition of Legal Competence: Will the Circle Be Unbroken?*, 18 SANTA CLARA L. REV. 641, 659 n.84 (1978) (citing Robert Stevens, *Two Cheers for 1870: The American Law School*, 5 PERSPS. AM. HIST. 529 n.98 (1971)).

80. Peter A. Joy, *The Uneasy History of Experiential Education in U.S. Law Schools*, 122 DICKINSON L. REV. 551, 556 (2018).

(AALS) comprised of the thirty-five attendee schools.<sup>81</sup> The alliance created strict rules for membership in the AALS.<sup>82</sup> Requirements ranged from restriction of admissions to students with a “high school or equivalent education” to “requiring ten hours of instruction per week for at least two years.”<sup>83</sup> A member law school was also required to “graduate students only after [they had passed] an examination,” and the school’s library had to contain “the reports of the state where the school was located, together with the reports of the Supreme Court of the United States.”<sup>84</sup> In drafting these requirements, the alliance noted that “the membership requirements encouraged greater conformity among law schools striving to belong to the AALS and essentially served an accreditation function.”<sup>85</sup>

The newly formed AALS found an ally in the ABA who joined in the lobbying of state legislatures and supreme courts to begin requiring graduation from an ABA-approved law school in order to gain admission to the state bars.<sup>86</sup> Under this new requirement, only the full-time, elite, nonproprietary schools received ABA approval.<sup>87</sup> Thus, it appears that “the ABA’s accreditation standards did *not* originate as a means of ensuring quality of education, but rather as a means of combating increasing competition among lawyers and among law schools.”<sup>88</sup> The ABA issued its “first Standards for Legal Education in 1921.”<sup>89</sup> “The ABA’s interest in standards for entrance into the legal profession was directly related to the general attack on the legal profession that had occurred primarily from 1836–1870.”<sup>90</sup> The movement in many states to “admit[] every one freely [to the practice of law] irrespective of education and professional training”<sup>91</sup> was of concern to the elite, all-male Anglo-Saxon ABA.<sup>92</sup> “Opening the practice of law to all served to deprofessionalize the practice of law, and directly threatened the social and economic standing of lawyers.”<sup>93</sup> “The ABA responded by imposing

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81. Warren A. Seavey, *The Association of American Law Schools in Retrospect*, 3 J. LEGAL EDUC. 153, 157 (1950).

82. *Id.* at 157–58.

83. *Id.* at 157.

84. *Id.* at 157–58.

85. Joy, *supra* note 80, at 559.

86. Vest, *supra* note 31, at 496.

87. George B. Shepherd & William G. Shepherd, *Scholarly Restraints? ABA Accreditation and Legal Education*, 19 CARDOZO L. REV. 2091, 2116–17 (1998).

88. Vest, *supra* note 31, at 497.

89. *Standards Archives*, A.B.A., [https://www.americanbar.org/groups/legal\\_education/resources/standards/standards\\_archives/](https://www.americanbar.org/groups/legal_education/resources/standards/standards_archives/) [<https://perma.cc/8DS7-8RTU>].

90. Joy, *supra* note 80, at 557.

91. ROSCOE POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 225 (1953).

92. See *ABA Timeline*, A.B.A., [https://www.americanbar.org/about\\_the\\_aba/timeline/](https://www.americanbar.org/about_the_aba/timeline/) [<https://perma.cc/GEG8-LQNP>].

93. Joy, *supra* note 80, at 558.

educational requirements that made entrance into the legal profession more time-consuming and costly, which in turn shored up the status of lawyers by restricting entrance to the legal profession.”<sup>94</sup> In doing so, the bar expressed “great concern over the quality of new applicants for admission, especially immigrants and their families and individuals of mixed-race parentage.”<sup>95</sup> For sixty-six years, Black lawyers were barred from membership in the American Bar Association solely on the basis of race.<sup>96</sup>

In 1912, the ABA, which had resolved “to admit no men who would not be worthy members”<sup>97</sup> unwittingly admitted three Black lawyers.<sup>98</sup> When the blunder was realized, the ABA asked its membership to vote on possible expulsion, emphasizing the “importance of ‘keeping pure the Anglo-Saxon race.’”<sup>99</sup> By resolution, the ABA stated the following:

“[r]esolved: That, as it has never been contemplated that members of the colored race should become members of this Association the several local councils are directed that, 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 race.”<sup>100</sup>

Thus, the ABA “committed itself to lily-white membership for the next half-century. It had elevated racism above professionalism.”<sup>101</sup>

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94. *Id.*

95. Dan Subotnik, *Does Testing = Race Discrimination?: Ricci, the Bar Exam, the LSAT, and the Challenge to Learning*, 8 U. MASS. L. REV. 332, 365 (2013); see Daria Roithmayr, *Deconstructing the Distinction Between Bias and Merit*, 10 LA RAZA L.J. 363, 396 (1998) (noting that in an important study of the implications of such applicants practicing law, for example, a committee member called for action to protect the political and legal order against the “influx of foreigners’ . . . [who] comprised an uneducated mass of men who have no conception of our constitutional government”); Daniel R. Hansen, *Do We Need the Bar Examination? A Critical Evaluation of the Justifications for the Bar Examination and Proposed Alternatives*, 45 CASE W. RESV. L. REV. 1191, 1198 n.40 (1995).

96. In 1911, William Henry Lewis became the first African American to be admitted to the American Bar Association. Steven J. Jager, *William Henry Lewis (1868-1949)*, BLACKPAST (July 31, 2012), <https://www.blackpast.org/african-american-history/lewis-william-henry-1868-1949/> [<https://perma.cc/E577-N2R7>].

97. Roithmayr, *supra* note 95, at 393.

98. Adjoa A. Aiyetoro, *Truth Matters: A Call for the American Bar Association to Acknowledge Its Past and Make Reparations to African Descendants*, 18 GEO. MASON U. CIV. RTS. L.J. 51, 72 (2007).

99. Subotnik, *supra* note 95, at 366.

100. Aiyetoro, *supra* note 98, at 73.

101. *Id.* at 74.

Today, nineteen states and the District of Columbia require graduation from an ABA-accredited law school in order to sit for the bar examination.<sup>102</sup> Graduates of unaccredited schools or those that lose their accreditation status are therefore ineligible for admission to the bar.<sup>103</sup> Through its standards, “the ABA has been able to wield its power to protect the status quo and stifle competition in its industry.”<sup>104</sup> “The 1927–1941 period thus marks the beginning of the general homogenization of legal education in America.”<sup>105</sup>

The Law School Admissions Test (LSAT) (developed in 1947) and “the ABA’s unsuccessful efforts to eliminate night schools and part-time programs, which were serving the needs of racial and ethnic minorities[,]” can be traced to those themes.<sup>106</sup> The bar exam adhered to the theme, serving as a “traditional gatekeeping mechanism.”<sup>107</sup>

### B. *History of the Bar Examination*

Like many other licensing tests, the bar exam has, in many ways, played a protectionist, exclusionary role and created an effective barrier to entry of the legal profession.<sup>108</sup> Described as “culturally biased against minorities,”<sup>109</sup> its entrenched inequities are not a remnant of a distant past.<sup>110</sup>

For years, graduates of many law schools were automatically admitted to the bar of the state in which their law school was located by virtue of a statutory exemption from the bar exam known as “diploma privilege.”<sup>111</sup> In the early years, bar exams were generally conducted orally, “either before a judge of the court to which admission was sought or by one or more lawyers already admitted to the court.”<sup>112</sup> Then, in 1855, Massachusetts instituted a

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102. *Chart 3: Domestic Legal Education, Comprehensive Guide to Bar Admission Requirements*, NAT’L CONF. BAR EXAM’RS, <https://reports.ncbex.org/comp-guide/charts/chart-3/> [https://perma.cc/YZ3A-5VK7].

103. *See Frequently Asked Questions*, A.B.A., [https://www.americanbar.org/groups/legal\\_education/resources/frequently\\_asked\\_questions/](https://www.americanbar.org/groups/legal_education/resources/frequently_asked_questions/) [https://perma.cc/2QGK-YD4L].

104. Vest, *supra* note 31, at 499.

105. *Id.* at 497.

106. Subotnik, *supra* note 95, at 366.

107. Strauss, *supra* note 24.

108. *See, e.g.*, RICHARD ABEL, *AMERICAN LAWYERS* 62–68, 71–73, 229 (1989).

109. Jarvis, *supra* note 12, at 405.

110. *See* Deborah J. Merritt, *Racial Disparities in Bar Exam Results—Causes and Remedies*, BLOOMBERG L.: U.S. L. WK. (July 20, 2021), <https://news.bloomberglaw.com/us-law-week/racial-disparities-in-bar-exam-results-causes-and-remedies> [https://perma.cc/6XU4-2EHS].

111. *See* ALFRED Z. REED, *TRAINING FOR THE PUBLIC PROFESSION OF THE LAW* 248–53 (1921).

112. Jarvis, *supra* note 12, at 374; *see also* CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* § 5.3 198 (1986).

written exam for candidates who could not show three years of legal study.<sup>113</sup> The practice of requiring applicants to pass a written exam was reinstated in 1876 by the Suffolk County Board in Massachusetts.<sup>114</sup> New York State soon followed suit in 1877 by introducing an examination that included both oral and written components.<sup>115</sup> Arguably concerned with low and inconsistent bar exam standards, the ABA sought a structure to unify bar examiners which resulted in the founding of the National Conference of Bar Examiners (NCBE) in 1931.<sup>116</sup> The NCBE (which administers the Multistate Bar Exam (MBE)) remains the “principal national organization concerned with the quality of the bar exam and the standards for admission to the bar.”<sup>117</sup> The modern-day bar exam consists of a two- to three-day exam with several components.<sup>118</sup>

Introduced by the NCBE in 1972, the Multistate Bar Exam (MBE) portion of the exam is usually administered over the course of one day and is comprised of 200 multiple choice questions.<sup>119</sup> Almost every state administers the MBE or the Uniform Bar Exam (UBE).<sup>120</sup> All fifty states and the District of Columbia administer additional individual jurisdiction tests via a set of essay questions.<sup>121</sup> Many jurisdictions also require a third day of testing on professional responsibility administered via the multiple-choice Multistate Professional Responsibility Examination (MPRE).<sup>122</sup> Each state has the autonomy to determine the specific requirements for the licensing of its lawyers.<sup>123</sup> States therefore have discretion to administer the MBE or UBE, determine what minimum passing scores (commonly referred to as “cut scores”) should be, and establish character and fitness standards for bar examinees.<sup>124</sup>

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113. REED, *supra* note 111, at 101 n.3; *see also* WOLFRAM, *supra* note 112, at 198.

114. WOLFRAM, *supra* note 112, at 198 n.3; *see also* Jarvis, *supra* note 12, at 374.

115. *Id.* at 357 n.4.

116. Sabrina DeFabritiis & Kathleen Elliot Vinson, *Under Pressure: How Incorporating Time-Pressured Performance Tests Prepares Students for the Bar Exam and Practice*, 122 W. VA. L. REV. 107, 113 (2019).

117. *Id.*

118. *Bar Admissions Basic Overview*, A.B.A. (June 26, 2018), [https://www.americanbar.org/groups/legal\\_education/resources/bar\\_admissions/basic\\_overview/](https://www.americanbar.org/groups/legal_education/resources/bar_admissions/basic_overview/) [<https://perma.cc/4AZ4-S8GJ>].

119. *The Evolution of the Bar Exam*, ADAPTIBAR: ADAPTIBAR BLOG (Feb. 3, 2015), <https://blog.adaptibar.com/the-evolution-of-the-bar-exam/> [<https://perma.cc/TZ4P-KB6J>].

120. *Bar Exams*, A.B.A. (July 28, 2022), [https://www.americanbar.org/groups/legal\\_education/resources/bar-admissions/bar-exams/](https://www.americanbar.org/groups/legal_education/resources/bar-admissions/bar-exams/) [<https://perma.cc/R87M-7X4W>].

121. *Jurisdictions Administering the MEE*, NAT'L CONF. BAR EXAM'RS, <https://www.ncbex.org/exams/mee/> [<https://perma.cc/Q5A6-4VLP>].

122. John Gardiner Pieper et al., *Multistate Prof. Responsibility Exam.*, PIEPER BAR REV., at Preface (2017), <https://www.pieperbar.com/wp-content/uploads/2017/10/MPRE-2017-combined.pdf> [<https://perma.cc/F2Y6-L2R9>].

123. *See Bar Admissions Basic Overview*, *supra* note 118.

124. *Jurisdictions Administering the MEE*, *supra* note 121.

This discretionary ability of states to determine the rules and subsequently dictate the impact of the bar exam illustrates the use of the bar exam to perpetuate an exclusionary practice. For example, the Florida Supreme Court used empirical data to inform its decision to increase the MBE cut scores from 131 to 133 in July 2003 and then to 136 in July 2004.<sup>125</sup> The studies used to make this decision indicated that “by raising the cut score from 131 to 136 minority passage rates would decline by up to 14% compared to a decline of 11% by White examinees.”<sup>126</sup> The cut scores were changed nevertheless. The changes, informed by the disparate impact the increase would have on the bar passage of minority applicants, coincided with the reestablishment of Florida A&M University’s College of Law, an access and opportunity school with a historic mission of educating African-Americans.<sup>127</sup> Although the case has been made for uniform cut scores across the country, the discretionary scores continue to be used despite their lack of uniformity and insidious use.<sup>128</sup>

In addition to the disparate outcome measures of the bar exam, the validity of the exam itself has been criticized by many scholars.<sup>129</sup> The stated

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125. See Amendments to Rules of the Supreme Court Relating to Admissions to the Bar, 843 So.2d 245, 249–51 (2003).

126. Patton, *supra* note 35, at 25; see also William Wesley Patton, *A Blueprint for a Fairer ABA Standard for Judging Law Graduates’ Competence: How a Standard Based on Students’ Scores in Relation to the National Mean MBE Score Properly Balances Consumer Safety with Increased Diversity in the Bar*, 24 WASH. & LEE J. CIV. RTS. & SOC. JUST. 3, 25 (2017).

127. *About Us*, FLA. AGRIC. & MECH. UNIV., <https://law.famu.edu/about-us/> [<https://perma.cc/W84W-BAJ5>] (detailing the school’s history of educating African-Americans).

128. See Joan W. Howarth, *The Case for a Uniform Cut Score*, 42 J. LEGAL PROF. 69, 70–71 (2017) (“[C]ut score disparities undermine simple logic, psychometric validity, and optimal protection of the public. They constitute bad logic because every state is attempting to use the same test to predict exactly the same thing: minimum competence to practice law. They are bad science because setting a cut score is a ‘critical step’ in assuring the validity of the use of the exam. MBE cut score disparities are also bad policy, which explains why professions other than law have moved to uniform multiple-choice test cut scores in their licensing tests.”).

129. See, e.g., Deborah Jones Merritt, *Validity, Competence, and the Bar Exam*, AALS NEWS, Spring 2017, at 11, [https://www.aals.org/wp-content/uploads/2017/05/AALSnews\\_spring17-v9.pdf](https://www.aals.org/wp-content/uploads/2017/05/AALSnews_spring17-v9.pdf) [<https://perma.cc/SCU2-SJSA>] (critiquing the validity of bar exams); Joan Howarth, *Teaching in the Shadow of the Bar*, 31 U.S.F. L. REV. 927, 930 (1997) (summarizing earlier criticisms of bar examinations); Andrea A. Curcio, *Society of American Law Teachers Statement on the Bar Exam*, 52 J. LEGAL EDUC. 446–49 (2002) (critiquing traditional bar examinations on three principal grounds: failure to adequately “measure professional competence to practice law,” negative effects “on law school curricular development and the law school admission process,” and creation of significant barriers to achieving “a more diverse bench and bar”); Hansen, *supra* note 95, at 1206–10; Jarvis, *supra* note 12, at 382; William C. Kidder, *The Bar Examination and the Dream Deferred: A Critical Analysis of the MBE, Social Closure, and Ethnic Stratification*, 29 L. & SOC’Y INQUIRY 547, 581–82 (2004); Deborah L. Rhode, *Institutionalizing Ethics*, 44 CASE W. RESV. L. REV. 665, 690 (1994) (“No showing has ever been made that performance either on bar exams or in

purpose of the bar exam is to ensure that new lawyers are minimally competent to practice law<sup>130</sup> and to “protect[] the public.”<sup>131</sup> Yet, critics of the bar exam articulate the inability of the bar exam to actually test skills that measure competence or any skill relevant to the successful practice of law.<sup>132</sup> As Professor Joan Howarth noted: “Our rituals of bar exams are well-settled, but the appropriate foundations to show the validity of the tests have been absent.”<sup>133</sup> A test is valid if it tests what it purports to test.<sup>134</sup> Therefore, “[a] test that bears a weak relationship to actual competence is not valid.”<sup>135</sup>

The bar exam has survived post-Civil Rights challenges regarding its constitutionality on due process and equal protection grounds.<sup>136</sup> However,

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law school correlates with performance in practice.”); W. Sherman Rogers, *Title VII Preemption of State Bar Examinations: Applicability of Title VII to State Occupational Licensing Tests*, 32 HOW. L. J. 536, 622 (1989) (arguing that the bar exam is designed to further the interest of the profession, and not, as claimed, that of the public; that “[t]he legal profession can best protect the public from incompetent lawyers by vigorous enforcement of the Code of Professional Responsibility and by assisting attorneys in obtaining malpractice insurance at reasonable rates;” that the bar exam discriminates against minorities through its disparate passage rates; that what is at stake is “equality of opportunity”; and that the bar exam should be subjected to a Title VII review); Curcio, *supra*, at 446–48 (arguing that the bar exam “inaccurately measures professional competence to practice law” by failing to show “in any meaningful way” whether those who pass the exam will be “minimally competent to practice law”); Kristin Booth Glen, *Thinking Out of the Bar Exam Box: A Proposal to “MacCrate” Entry to the Profession*, 23 PACE L. REV. 343, 478–79 (2003); *see also* Hansen, *supra* note 95, at 1204–22; Edward F. Bell, *Do Bar Examinations Serve a Useful Purpose*, 57 A.B.A. J. 1215, 1216–18 (1971).

130. *E.g.*, Kane, *supra* note 71, at 27.

131. Carla D. Pratt, *Radical Reformation: Diverse Pathways to Attorney Licensure Will Yield a More Diverse Profession*, 23 RUTGERS RACE & L. REV. 177, 196 (2021) (“Proponents of the bar exam regard it as a necessary screen that excludes incompetent people from the bar and protects the public from the harm that is caused by ineffective assistance of counsel.”).

132. *See, e.g.*, Lorenzo A. Trujillo, *The Relationship Between Law School and the Bar Exam: A Look at Assessment and Student Success*, 78 COLO. L. REV. 69, 77–78 (2007) (noting that the bar exam ignores skills essential for a career in the legal field); *see also* AM. BAR ASS’N, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 5 (1992) (explaining that the skills taught at law school, skills essential to passing the bar exam, are irrelevant to actual practice); Andrea A. Curcio, *A Better Bar: Why and How the Existing Bar Exam Should Change*, 81 NEB. L. REV. 363, 364–65, 369, 393–15 (2022) (noting several deficiencies in the existing bar exam process and suggesting potentially viable testing enhancements as well as alternatives to the traditional admissions system).

133. Joan W. Howarth, *The Professional Responsibility Case for Valid and Nondiscriminatory Bar Exams*, 33 GEO. J. LEGAL ETHICS 931, 962 (2020).

134. *See* AM. EDUC. RSCH. ASS’N, AM. PSYCH. ASS’N & NAT’L COUNCIL ON MEASUREMENT IN EDUC., STANDARDS FOR EDUCATIONAL AND PSYCHOLOGICAL TESTING 11 (2014).

135. Howarth, *supra* note 133, at 949.

136. *See, e.g.*, Tyler v. Vickery, 517 F.2d 1089, 1095, 1103, 1105 (5th Cir. 1975) (affirming the lower court’s holding that the bar examination was not intentionally or inherently discriminatory and that the “failure to provide any procedure for review of a failing grade at the

debate continues as to whether or not the bar exam is fulfilling its stated purpose.<sup>137</sup> Some states have moved towards eliminating portions of the historical two- to three-day exam.<sup>138</sup> In its order eliminating the MBE portion of the exam from its July 2022 state bar exam, the Nevada Supreme Court noted that “[t]he results of [the] Board’s [of bar examiners for the state of Nevada] recent study of the MBE showed very little correlation between an exam with the MBE and factors to be considered for minimum competency to practice law.”<sup>139</sup>

Heeding the criticisms of the bar exam, in 2022 the NCBE announced plans to develop a “next-generation bar exam” (NextGen) which purportedly will use “an integrated exam structure to assess both legal knowledge and skills holistically in a single, practice-related examination.”<sup>140</sup> The task force for the NextGen took into account comments meant to highlight the importance of considering any “racist or classist” impact and any impact on first-generation law graduates.<sup>141</sup>

This Article does not specifically address the validity of the bar exam. However, it bears note that the ongoing debate regarding such validity supports the assertion that the purpose and the practice of the bar exam may be different from its stated purpose and is instead supporting entrenched systemic discrimination in the entry to and practice of law.

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behest of the examinee [did not constitute] a denial of due process of law”); *Parrish v. Bd. of Comm’rs of the Ala. State Bar*, 533 F.2d 942, 949 (5th Cir. 1976) (holding that it did not deprive Black test takers of their constitutional rights “for them to be required to pass [a bar examination] without its having been validated . . . under VII of the Equal Employment Opportunity Act”); *Richardson v. McFadden*, 540 F.2d 744, 752 (4th Cir. 1976), *modified on reh’g*, 563 F.2d 1130 (4th Cir. 1977) (holding that two Black applicants were not entitled to individual relief in action challenging the constitutionality of the South Carolina bar exam); *Pettit v. Ginerich*, 582 F.2d 869, 869 (4th Cir. 1978) (holding that the Maryland State Bar Examination did not discriminate against Black plaintiffs based on race and was rationally related to the State’s interest); *Woodard v. Va. Bd. of B. Exam’rs*, 598 F.2d 1345, 1346 (4th Cir. 1979).

137. See Valerie Strauss, *Why This Pandemic is a Good Time to Stop Forcing Prospective Lawyers to Take Bar Exams*, WASH. POST (July 13, 2020), <https://www.washingtonpost.com/education/2020/07/13/why-this-pandemic-is-good-time-stop-forcing-prospective-lawyers-take-bar-exams/> [<https://perma.cc/44KA-LSMK>].

138. Order Regarding Modified July 2022 Nev. Bar Examination at 3 (Apr. 21, 2022) (suspending the use of the MBE for the July 2022 State Bar Exam).

139. *Id.*

140. NAT’L CONF. OF BAR EXAM’RS, FINAL REPORT OF THE TESTING TASK FORCE 20 (2021), <https://nextgenbarexam.ncbex.org/reports/final-report-of-the-ttf/#ftoc-heading-1> [<https://perma.cc/8FJU-TVU2>].

141. *Id.* at 22.

C. *The ABA and the Standards Impacting Diversity, Equity, and Inclusion*

In 2008, the American Bar Association stated that “one of its four goals [was] to ‘[e]liminate Bias and Enhance Diversity, which includes two ‘objectives’: ‘1. [p]romote full and equal participation in the association, our profession, and the justice system by all persons’ and ‘2. [e]liminate bias in the legal profession and the justice system.’”<sup>142</sup> Where the bar exam serves as the sole licensing test for entry into the legal profession, its disproportionate prevention of potential attorneys of color undermines the very objectives of the ABA.<sup>143</sup>

The ABA is aware of the disparate results on bar exams but argues that bar passage differences reflect prior differences (such as law school grades and LSAT scores).<sup>144</sup> As such, the assertion is that bar examiners cannot be expected to eliminate those preexisting differences at the licensing stage.<sup>145</sup> However, on review of bar examination data, it is difficult to divorce the bar exam from the history of other standardized tests used as a means of exclusion based in discrimination and prejudice.<sup>146</sup> These perhaps unintended consequences of the bar exam structure nevertheless reveal striking disparities in bar passage rates and suggest that the bar exam may be nothing short of a fabricated barrier created to reduce the numbers of minorities entering the practice of law.

During the early months of the COVID-19 pandemic, bar examiners made it increasingly difficult for non-White future lawyers to be admitted into the Bar.<sup>147</sup> Even with some states like Oregon and Utah changing their requirements to practice, examiners have been unwilling to make overall changes.<sup>148</sup> This was true even though the pandemic brought to light many of

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142. Howarth, *supra* note 128, at 950 (quoting *ABA Mission and Goals*, A.B.A., [https://www.americanbar.org/about\\_the\\_aba/aba-mission-goals/](https://www.americanbar.org/about_the_aba/aba-mission-goals/) [https://perma.cc/64NG-4VN4]); See Stephen Gillers, *A Rule to Forbid Bias and Harassment in Law Practice: A Guide for State Courts Considering Model Rule 8.4(g)*, 30 GEO. J. LEGAL ETHICS 195, 201–02 (2017).

143. See *ABA Mission and Goals*, *supra* note 142; see also *supra* pp. 193–95.

144. See Douglas R. Ripkey & Susan M. Case, *A National Look at MBE Performance Differences Among Ethnic Groups*, BAR EXAM’R, Aug. 2007, at 21, 26.

145. Howarth, *supra* note 133, at 959 (arguing that, although bar examiners cannot eliminate preexisting differences during the final step on the path to the profession, professional responsibility dictates that bar examiners should nevertheless be expected to eliminate unnecessary disparities in their test results).

146. Phoebe A. Haddon & Deborah W. Post, *Misuse and Abuse of the LSAT: Making the Case for Alternative Evaluative Efforts and a Redefinition of Merit*, 80 ST. JOHN’S L. REV. 41, 78 (2006).

147. Hutton-Work & Guyse, *supra* note 22.

148. *Id.*

the underlying reasons leading to disparate bar passage outcomes.<sup>149</sup> While attempting to study for the Bar, students sought to remain safe and healthy, some caring for young children and older family members and struggling to pay rent.<sup>150</sup> In addition, in light of the pandemic's health disparities and breath-stealing events such as the police killings of unarmed Black people including George Floyd and Breonna Taylor, minority bar-takers endured extreme personal stress greater than their non-minority counterparts due to the nation's reckoning on race relations.<sup>151</sup>

Despite these historic events, bar examiners downplayed the realities of the virus and refused to make any changes to the administration and standards of the bar exam.<sup>152</sup> The current status of the bar exam's administration highlights the privileges enjoyed by the elite and tends to perpetuate racist practices governing entry into the legal profession. It illustrates how the use of the ABA's bar passage standards directly causes disproportionate harms to racial minorities and appears to be a direct contradiction to the ABA's claim that it wants to foster increased diversity in the legal profession.

#### IV. SUGGESTIONS TO COMBAT SYSTEMIC DISPARITIES SURROUNDING THE BAR EXAM

The equality touted and sought in this country has yet to be fully realized. Samuel Selkow noted, "Not until Howard University began in the 1930s graduating numbers of Negro lawyers, trained in civil rights, did the race relations begin to change."<sup>153</sup> It has long been recognized that minority lawyers are critical to the advancement of minority rights and legal change in America.<sup>154</sup> Yet, the bar exam remains a lofty barrier to the practice of law for people of color (POC) with the direct consequence of hampering the ability of POC to realize true equality in our country. Scholars have noted that the bar exam is not a good predictor of success as a lawyer and may simply be serving as an unreasonable obstacle.<sup>155</sup> The bar exam is arguably an obstacle that reinforces an elevated societal status for non-Whites and perpetuates the current social and economic status and racial composition of the profession. These systemic disparities must be addressed.

The suggestions to either abolish the exam or have an alternative exam may be the answer. Abolishing the bar exam outright and instead focusing on

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149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. Samuel Selkow, *Hawkins, The United States Supreme Court and Justice*, 31 J. NEGRO EDUC. 97, 97 (1962).

154. *Id.*

155. *See supra* note 12.

practice/lawyering skills seems reasonable. However, entities and organizations (e.g., bar review companies or state boards of bar examiners) who have the resources and stand to feel economic or societal ramifications will surely object. Chances for imminent abolition are therefore slight.

There is hope that the NextGen Bar Exam's format will remove some of the barriers to bar passage often experienced disproportionately by minority and first-generation law graduates, such as costs for preparation and lodging usually incurred for multi-day tests. However, there is no indication that it will alleviate all bias and disparities, as it will remain a standardized test with the inherent biases associated with such tests.<sup>156</sup>

Rather than focusing on the bar exam as the sole route for licensure, alternative options should be investigated and researched. Such multifaceted licensing systems have been recommended,<sup>157</sup> with some states already allowing this path. Although law office study still remained a viable alternative option to practice law through the late 1950s in at least thirty-five states,<sup>158</sup> currently only California, Vermont, Virginia, Washington and Wyoming permit law office study as a means of practicing law.<sup>159</sup> In Maine and New York, law office study can substitute for one or two years of law school.<sup>160</sup> In January 2022, the Oregon Supreme Court unanimously voted to

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156. See NAT'L CONF. OF BAR EXAM'RS, *supra* note 140, at 2–3 (providing that the exam will remain a standardized exam just as the current bar exam is).

157. See, e.g., Joan W. Howarth & Judith Welch Wegner, *Ringling Changes: Systems Thinking About Legal Licensing*, 13 FIU L. REV. 383, 397 (2019) (noting that only a multifaceted licensing system can do what is needed in assuring minimal competence, and that not all forms of competence are best measured by traditional licensing examinations); see also Judith Welch Wegner, *Rethinking Law Licensing*, N.Y. ST. B.J. 24, 24–25 (2018) (proposing a “multifaceted licensing system [that reflects] best practices in professional licensing and foster[s] incentives for practitioners to achieve the highest possible level of competence in the public interest. Dean Wegner proposes the following component might be adopted: (1) an initial post-1L test on foundational skills involving critical thinking, legal writing and research; (2) a “residency” requirement that facilitates training and assessment of students’ performance in practice-based settings such as clinics, externships and jobs; (3) a possible limited license system that allows qualified students to gain skills in specific practice areas and be credentialed based on performance in those areas before returning to seek a general license; and (4) an advanced bar examination system that allows applicants who have passed the initial post-1L year exam to demonstrate more in-depth expertise in substantive areas and additional skills”).

158. 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, 112 (2003) (noting that, until 1950, more than one half of practicing lawyers had not attended college at all).

159. Corey Adwar, *How to Become a Lawyer Without a Law Degree*, SLATE (Aug. 2, 2014), <https://slate.com/business/2014/08/states-that-allow-bar-exams-without-law-degrees-require-apprenticeships-instead-of-law-school.html> [<https://perma.cc/LC37-63RJ>].

160. John Keller, *Do You Have to go to Law School to Take the Bar?*, BAR PREP HERO (Apr. 21, 2021), <https://barprephero.com/learn/take-the-bar-exam-without-law-school/#:~:text=California%2C%20Vermont%2C%20Virginia%2C%20and,law%20school%20with%20an%20apprenticeship> [<https://perma.cc/HD4R-9XQ9>].

support, in concept, alternative pathways to licensure.<sup>161</sup> The ABA should also consider the impact of law schools' curricula, which frequently includes extensive experiential courses providing a greater chance for law students to graduate practice-ready.<sup>162</sup> In addition, widespread use of diploma privilege should also be considered.<sup>163</sup>

The overarching goal should be creation of avenues of entry and successful access to the legal profession instead of entrenching/retranching a system fraught with inequalities.

This Article is not intended to, as the idiom says, reopen old wounds. However the effects of any wound will resurface if the root cause is not resolved.<sup>164</sup> There are currently more than fifty enunciated standards that law schools must comply with in order to maintain accreditation.<sup>165</sup> To have the viability of schools across the country threatened by a standard which may be unintentionally perpetuating underlying systemic racism is troubling, particularly in light of the effects of the COVID-19 pandemic and the yet unknown impact of the NextGen Bar. To address these real and potential impacts, further discussion is needed on the efficacy of Standard 316, and additional consideration should be given to revising it as an act of remedying a long-standing history of exclusion from the practice of law.

As the ABA's Section of Legal Education and Admissions to the Bar undertakes its multi-year "big-picture strategic review" of the Standards "that may need refinement and improvement,"<sup>166</sup> close attention should be given to standards that impact the diversity, equity and inclusion of the legal profession. This necessarily includes further scrutiny of Standard 316 during the review process.

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161. Zane Sparling, *Oregon Supreme Court Supports Alternative to Bar Exam Requirement, Adding Options for New Lawyers*, OREGONIAN/OREGONLIVE (Jan. 12, 2022), <https://www.oregonlive.com/news/2022/01/oregon-supreme-court-approves-dropping-bar-exam-requirement-adding-options-for-new-lawYERS.html> [<https://perma.cc/8QZF-V9XR>].

162. *See, e.g., Curriculum Calendar*, ELON LAW, <https://www.elon.edu/u/law/academics/progression-of-learning/curriculum/> [<https://perma.cc/J8NY-CPZ4>].

163. *See, e.g., Beverly Moran, The Wisconsin Diploma Privilege: Try It, You'll Like It*, 2000 WIS. L. REV. 645, 653 (arguing that legislatures can adopt a diploma privilege in order to avoid discriminatory impacts of the bar exam).

164. For example, a scab is the body's way of protecting a wound against invading organisms, dirt, and debris. Because the scab itself is made of dead cells, it cannot become infected. However, the underlying wound itself can become infected and lead to potentially life-threatening conditions. *See, e.g., Rachel Nall, Is This Scab Infected?*, MED. NEWS TODAY (July 16, 2019), <https://www.medicalnewstoday.com/articles/325761> [<https://perma.cc/8SPG-59KV>].

165. *See 2021–2022 ABA STANDARDS*, *supra* note 13, at 1–47; *see also Law School Accreditation*, US LEGAL, <https://lawschool.uslegal.com/law-school-accreditaion/> [<https://perma.cc/3K52-LP3W>].

166. Memorandum from Leo Martinez, *supra* note 27, at 1.

## V. CONCLUSION

Amid all the dismay, hardship, and loss caused by the pandemic and the social reckoning in this country, the legal profession is uniquely poised to address the disparate impact caused by the bar exam and its encapsulation in Standard 316. In light of a new forthcoming bar exam format, as a start, the ABA should consider implementing the previous version of Standard 316 which utilized multiple methods of compliance, took into account the variations in law schools, and gave strong consideration to schools' missions, particularly those schools of access and opportunity. The current unbending, one-size-fits-all standard does not equitably account for the diversity and inclusion that the legal profession claims to so desperately seek in its ranks. It is the responsibility of all of us who have reached any level of success in the legal profession to do the difficult work to disrupt the systemic inequities generated by a system that purports to value diversity, equity and inclusion.