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For More Equitable Licensure, Washington State Needs Diploma Privilege, Not the Bar Exam

Carsen Nies*

I. INTRODUCTION

Historically, the bar examination has disproportionately impacted applicants of color. Since its inception, the bar examination has acted as an inequitable gatekeeping tool in the legal profession. In 1914, the American Bar Association (ABA) unwittingly admitted three Black lawyers and asked its membership to vote to expel them, emphasizing the importance of “keeping pure the Anglo-Saxon race.”¹ The ABA then doubled down, stating that “the settled practice of the Association has been to elect only white men to membership.”² The ABA continued this practice—formal exclusion of and discrimination against Black applicants—until 1943.³

Although no longer facially discriminatory, these racially exclusionary practices and their effects persist today. A six-year study commissioned by the Law School Admission Council in 1998 found that first-time bar examination pass rates were 92 percent for white applicants,⁴ while pass rates for Black applicants were only 61 percent.⁵ Although this disparity narrowed when applicants retook the examination, the Council’s study revealed that 28 percent of Black applicants who failed the first time did not retake the

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¹ Dan Subotnik, *Does Testing = Race Discrimination?: Ricci, the Bar Exam, the LSAT, and the Challenge to Learning*, 8 U. MASS. L. REV. 332, 365–66 (2013); see also George B. Shepherd, *No African-American Lawyers Allowed: The Inefficient Racism of the ABA’s Accreditation of Law Schools*, 53 J. LEGAL EDUC. 103, 109 (2003).

² Shepherd, *supra* note 1, at 109.

³ *Id.*

⁴ Andrea Curcio et al., *Society of American Law Teachers Statement on the Bar Exam*, 52 J. LEGAL EDUC. 446, 450 (2002).

⁵ Curcio et al., *supra* note 4, at 450.

exam⁶—and those who did retake the exam found the psychological and financial cost to be extremely high.⁷

On top of the racial inequities presented by the bar exam, the cumulative cost of the examination and bar preparation courses can be as high as \$4,500 to \$5,000.⁸ Further, most students who pass the bar have to treat bar study and preparation as a full-time job for at least ten weeks,⁹ causing many students to take out private loans to stay afloat.¹⁰ Thus, to pass the bar, students often have to forego working for nearly three months to study and are forced to take on higher amounts of debt.¹¹ These additional costs exacerbate privilege gaps between students and negatively impact students from lower socioeconomic backgrounds.¹² The COVID-19 pandemic has negatively affected the ability for states to equitably offer the bar exam, and has only exacerbated the racial and socioeconomic barriers to practicing law. Twenty states were forced to postpone exams in 2020 until late September and October,¹³ which delayed the licensure of thousands of graduates. Some states opted to try online exams,¹⁴ but online exams presented significant

⁶ *Id.* at 450 n.8.

⁷ *Id.* at 450.

⁸ Shirlene Brown, *Breaking Down the Cost of the Bar*, BAR EXAM TOOLBOX (May 1, 2019), <https://barexamtoolbox.com/breaking-down-the-cost-of-the-bar-the-fees-no-one-tells-you-about/> [<https://perma.cc/4KA6-U52G>].

⁹ Jessica Williams, *Abolish the Bar Exam*, CAL. L. REV.: BLOG (Oct. 2020), <https://www.californialawreview.org/abolish-the-bar-exam/> [<https://perma.cc/NX44-F9A9>]; see also Denise Riebe, *A Bar Review for Law Schools: Getting Students on Board to Pass Their Bar Exams*, 45 BRANDEIS L. J. 269, 307 (2007).

¹⁰ Williams, *supra* note 9.

¹¹ *Id.*

¹² Lauren Hutton-Work & Rae Guyse, *Requiring a Bar Exam in 2020 Perpetuates Systemic Inequities in the Legal System*, APPEAL (July 06, 2020), <https://theappeal.org/2020-bar-exam-coronavirus-inequities-legal-system/> [<https://perma.cc/UU3C-D2ZD>].

¹³ 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/K33E-BN6V>].

¹⁴ *Id.*

problems for those who do not have easy or stable access to Wi-Fi.¹⁵ Online examinations also sparked privacy and facial recognition concerns, especially for students of color, of whom facial recognition technology has a well-documented history of misidentifying.¹⁶ These problems and complications in administering the bar examination have highlighted just how inequitable the bar exam is.

Like most states, Washington requires that applicants pass a bar examination that has racially discriminatory roots and results in racially disparate outcomes.¹⁷ The exam has not been—and cannot be—administered equitably, and there is no indication that future versions of the bar exam will have more equitable outcomes.¹⁸ The Washington Supreme Court should therefore amend Admission and Practice Rule 3 (APR 3) to replace the requirement that graduates “pass an examination” with a provision that grants graduates of ABA accredited law schools a form of diploma privilege to practice law in Washington. By doing so, the Washington Supreme Court would make licensure more equitable by removing an unnecessary barrier to licensure that most negatively affects applicants of color.

II. ROADMAP

In Section III, this comment will examine the background history of the bar examination. That section will also examine the racially disparate impact of the bar examination and the negative outcomes that the bar examination has imposed on applicants of color. Additionally, that section will introduce an overview of the history of diploma privilege.

¹⁵ Khari Johnson, *ExamSoft's Remote Bar Exam Sparks Privacy and Facial Recognition Concerns*, VENTUREBEAT (Sept. 29, 2020, 9:07 AM), <https://venturebeat.com/2020/09/29/examsofts-remote-bar-exam-sparks-privacy-and-facial-recognition-concerns/> [https://perma.cc/T8ZD-ABBG].

¹⁶ *Id.*

¹⁷ See Curcio et al., *supra* note 4, at 450; WASH. ADMISSION & PRAC. RULE 3.

¹⁸ *NCBE Board of Trustees Votes to Approve Testing Task Force Recommendations*, NAT'L CONF. BAR EXAM'RS (Jan. 28, 2021), <https://www.ncbex.org/news/ncbe-bot-vote-approves-ttf-recommendations/> [https://perma.cc/8NWR-DZHQ].

Section IV of this comment will review the inequities associated with remote administration of the bar exam in 2020 and 2021. It will also examine the decisions made by a handful of states to offer emergency diploma privilege to 2020 graduates. Finally, that section will provide an overview of the National Conference of Bar Examiners' recommendations for the next generation of the bar examination.

Next, Section V will give a preliminary overview of an alternative to the bar examination and will explore how this alternative would make admission to the Washington Bar more equitable.

Section VI of this comment will dive more deeply into the logistics of implementing the alternative to the bar examination and will assess its viability. That section will use Wisconsin as an example to argue for the adoption of the diploma privilege in Washington State, and it will also assess Oregon's and New York's recent considerations of bar exam alternatives. That section will conclude with an overall recommendation for the Washington Supreme Court to consider.

Finally, Section VII will address and defend against the criticisms to diploma privilege and the alternative to the bar examination that is offered.

III. HISTORY OF THE BAR EXAMINATION AND DIPLOMA PRIVILEGE

The bar examination has been used as a tool for licensing new attorneys since the mid-1800s.¹⁹ Massachusetts became the first state to have a written bar examination in 1855.²⁰ By the 1920s, there was a written bar exam in most states.²¹ As the bar examination became more widespread in the 1920s, the ABA unequivocally rejected diploma privilege—automatic licensure upon graduation—as the preferred means to gain admission to law practice.²² The ABA has since reaffirmed its position on the need for a bar examination

¹⁹ Riebe, *supra* note 9, at 273.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

for licensure.²³ The ABA claims that bar examinations encourage law graduates to study subjects not taken in law school, require the applicant to review all that they learned in law school, and view the subjects they studied in school as a related whole.²⁴ Moreover, the ABA claims that bar examinations provide the opportunity for applicants to be examined by persons other than those who taught them so as to better prepare applicants to appear in front of an unfamiliar judge.²⁵ Today, most states require law students to pass the bar exam to obtain their law license.²⁶ Wisconsin is the sole exception,²⁷ as it offers diploma privilege to graduates of its two in-state law schools.²⁸

A. *The Creation of the Bar Examination*

Before the bar examination, local courts determined admission to the bar.²⁹ After the American Revolution, most states developed their own requirements for bar admission, which typically included a period of legal study under a practitioner or judge. These periods of study varied greatly in length, depending on the state in which one sought licensure.³⁰ During the Jacksonian era and continuing through the Civil War, however, Americans grew increasingly distrustful of lawyers and started to view bar admissions

²³ Riebe, *supra* note 9, at 273; Daniel R. Hansen, Note, *Do We Need the Bar Examination? A Critical Evaluation of the Justifications for the Bar Examination and Proposed Alternatives*, 45 CASE W. RES. L. REV. 1191, 1201 (1995).

²⁴ Riebe, *supra* note 9, at 273; Hansen, *supra* note 23, at 1201.

²⁵ Riebe, *supra* note 9, at 273; Hansen, *supra* note 23, at 1201.

²⁶ Riebe, *supra* note 9, at 273; *see also* Beverly Moran, *The Wisconsin Diploma Privilege: Try It, You'll Like It*, 2000 WIS. L. REV. 645, 648 (2000).

²⁷ Riebe, *supra* note 9, at 273; Moran, *supra* note 26, at 648; *see also* Daniel Webster Scholar Honors Program, UNIV. N.H. FRANKLIN PIERCE SCH. L., <https://law.unh.edu/academics/daniel-webster-scholar-honors-program> [<https://perma.cc/E8JY-7898>] (description of a competence-based program that only admits up to 24 students to the bar each year without having to pass the state's bar exam).

²⁸ Riebe, *supra* note 9, at 273; Moran, *supra* note 26, at 648.

²⁹ Hansen, *supra* note 23, at 1193.

³⁰ *Id.* at 1194.

practices as elitist.³¹ As a result, most admissions standards were either eliminated or greatly reduced to allow nearly any white man the opportunity to practice law.³² By 1921, the ABA started to regulate law schools through accreditation to ensure compliance with the ABA's recommended standards of quality.³³

The use of law schools to prepare new lawyers grew after 1870.³⁴ So, too, did the concept of diploma privilege, which developed out of necessity to entice students to attend law school instead of entering the legal profession through clerkships or apprenticeships.³⁵ However, diploma privilege never enjoyed full support by the ABA, which formally denounced the privilege in 1921: "[t]he American Bar Association is of the opinion that graduation from a law school should not confer the right of admission to the bar, and that every candidate should be subject to an examination by public authority to determine his fitness."³⁶ The ABA purports that bar examination administration over diploma privilege is for consumer protection, and the exam has historically been used to ensure that new lawyers are minimally competent to practice law.³⁷ The ABA and the National Conference of Bar Examiners (NCBE) reaffirmed this position in 1971 out of fear that law school education lacked uniform standards for the purpose of licensure.³⁸

³¹ Hansen, *supra* note 23, at 1195; Shepherd, *supra* note 1, at 108.

³² Shepherd, *supra* note 1, at 109; Hansen, *supra* note 23, at 1195.

³³ Hansen, *supra* note 23, at 1199.

³⁴ *Id.* at 1198.

³⁵ *Id.* at 1201.

³⁶ Hansen, *supra* note 23, at 1201; see Thomas W. Goldman, *Use of the Diploma Privilege in the United States*, 10 TULSA L. J. 36, 41 (1974).

³⁷ Riebe, *supra* note 9, at 273; see also Linda Jellum & Emmeline Paulette Reeves, *Cool Data on a Hot Issue: Empirical Evidence that a Law School Bar Support Program Enhances Bar Performance*, 5 NEV. L. J. 646, 650 (2005) (for example, one justification for the bar exam is that legal consumers need to be protected from incompetent lawyers).

³⁸ Hansen, *supra* note 23, at 1201; Moran, *supra* note 26, at 647.

Ironically, the NCBE President, Judith Gundersen, graduated from University of Wisconsin and never sat for the bar exam.³⁹

Now, bar applicants must complete certain requirements for graduation from an ABA-approved law school to satisfy the legal education requirement for bar admission.⁴⁰ Following graduation, applicants must pass a state-administered bar examination.⁴¹ Schools that are ABA-approved or accredited must comply with the ABA's Standards and Rules of Procedure for Approval of Law Schools, which establish requirements for providing a sound program of legal education.⁴² In other words, ABA accreditation is meant to ensure a level of national uniformity in legal education and practice.⁴³ But if schools are already meeting rigorous standards to maintain uniformity and provide students with a sound legal education, then why is the bar examination necessary at all? In fact, many lawyers nationwide considered the exam to be superfluous for graduates of ABA-accredited schools in the mid-1900s.⁴⁴ This indicates that the bar exam is just an excessive barrier to licensure.

³⁹ See Henry Greenstein, *The Bar Exam and its Impact on the Legal Business*, NAT'L CTR. FOR BUS. JOURNALISM (Feb. 17, 2021), <https://businessjournalism.org/2021/02/the-bar-exam-and-its-impact-on-the-legal-business/> [<https://perma.cc/WA5Y-Q2DR>].

⁴⁰ Hansen, *supra* note 23, at 1202–03.

⁴¹ *Id.*

⁴² *Schools Seeking ABA Approval*, ABA, https://www.americanbar.org/groups/legal_education/accreditation/schools-seeking-aba-approval/ [<https://perma.cc/27XY-3N9V>].

⁴³ See *ABA-Accredited Law School*, PRINCETON REV., <https://www.princetonreview.com/law-school-advice/law-school-accreditation#:~:text=ABA%20accreditation%20is%20a%20rigorous,bar%20exam%20in%20any%20state> [<https://perma.cc/H6G4-UVTQ>].

⁴⁴ Milan Markovic, *Protecting the Guild or Protecting the Public? Bar Exams and the Diploma Privilege*, TEX. A&M UNIV. SCH. L. 9 (Aug. 7, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3789235 [<https://perma.cc/9LR4-327L>].

B. A History of the Racially Disparate Impact of the Bar Examination

Although the ABA and other proponents of the bar examination have successfully defended the need for the exam for over a century, it has not escaped valid criticisms. The most frequent and poignant criticism is that the exam leads to racially disparate outcomes.⁴⁵ In fact, Black professionals were completely excluded when the legal profession was first widely opened to more white applicants in the early 1900s.⁴⁶

In 1910, Black people represented up to 11.1 percent of the country's population, but constituted only 0.7 percent of the legal profession.⁴⁷ In total, the country had only 795 Black lawyers.⁴⁸ As the number of Black lawyers began to grow throughout the mid-1900s, the ABA acted to stop the influx of new minority lawyers by decreasing bar exam pass rates on state bar exams and tightening law school accreditation.⁴⁹ These measures negatively affected and ultimately caused the closure of law schools that primarily served Black students.⁵⁰ The ABA asserted that difficult bar exams and accreditation were necessary to protect the public from incompetent lawyers and to provide for an effective and ethical legal profession.⁵¹ However, these calls for consumer protection conveniently came only as new minority lawyers were becoming more competitive in the legal market.⁵² State bar officials stated that the purpose of decreased pass rates was to eliminate

⁴⁵ Riebe, *supra* note 9, at 275.

⁴⁶ Shepherd, *supra* note 1, at 109.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 110.

⁵⁰ *Id.* at 113 (these schools included Frelinghuysen in Washington, D.C., Virginia Union, and Simmons in Kentucky. Even Howard University almost failed).

⁵¹ See AM. BAR ASS'N, ABA STANDARD AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS, 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/NN9G-NEYA>]; Shepherd, *supra* note 1, at 110.

⁵² Shepherd, *supra* note 1, at 110.

“overcrowding” in the profession,⁵³ but this contention is wholly hypocritical. Eliminating “overcrowding” ultimately reduced competition for existing white lawyers⁵⁴ and directly cut against the ABA’s argument that the bar examination’s purpose was to bolster consumer protection.⁵⁵

Historical evidence shows that the exam has negatively affected efforts to diversify the legal profession; lower pass rates of minority examinees as compared to white examinees is a prime example.⁵⁶ The most dramatic gap in performance is the difference in pass rates of Black and white bar candidates, raising concerns about the bar examination’s supposed “impartiality.”⁵⁷ In California between 1977 and 1988, for example, 73 percent of white first-time test-takers passed the bar, compared to only 30 percent of Black examinees.⁵⁸ This gap—which has not significantly changed since the mid-1990s—has raised concerns about whether the bar examination is an impartial gatekeeper to the legal profession.⁵⁹

While few states publish recent bar passage rates for specific racial groups, the data from those states that do show a clear disparity.⁶⁰ For example, a report from the Texas Board of Law Examiners analyzed the July 2004 Texas

⁵³ *Id.*

⁵⁴ *Id.*; see also George B. Shepherd and William G. Shepherd, *Scholarly Restraints? ABA Accreditation and Legal Education*, 19 CARDOZO L. REV. 2091, 2123–24 (1998).

⁵⁵ Shepherd, *supra* note 1, at 110.

⁵⁶ Jane E. Cross, *The Bar Examination in Black and White: The Black-White Bar Passage Gap and the Implications for Minority Admissions to the Legal Profession*, 18 NAT’L BLACK L. J. 63, 63 (2004); see also LINDA F. WIGHTMAN, L. SCH. ADMISSION COUNCIL, LSAC NATIONAL LONGITUDINAL BAR PASSAGE STUDY 27 (1998), <https://www.lawschooltransparency.com/reform/projects/investigations/2015/documents/NLBPS.pdf> [<https://perma.cc/5JZC-J4ZJ>].

⁵⁷ Cross, *supra* note 56, at 64; see generally Cecil J. Hunt, II, *Guests in Another’s House: An Analysis of Racially Disparate Bar Performance*, 23 FLA. ST. U. L. REV. 721 (1996).

⁵⁸ Shepherd, *supra* note 1, at 120–21.

⁵⁹ Cross, *supra* note 56, at 64; see generally Hunt, *supra* note 57.

⁶⁰ Floyd Weatherspoon, *The Status of African American Males in the Legal Profession: A Pipeline of Institutional Roadblocks and Barriers*, 80 MISS. L. J. 259, 292 (2010).

Bar Exam results by racial and ethnic groups.⁶¹ The report showed that only 53 percent of first-time Black bar takers passed the exam compared to 85 percent of first-time white takers.⁶² Despite this overwhelming evidence to the contrary, the report concluded that there was “no reason to make any changes in the nature of the exam itself,” as it had appeared to be “well balanced and fair to all takers.”⁶³ The pass rate results tell a different story.

Additionally, there is more recent evidence that shows the discriminatory, gatekeeping effects the bar examination maintains today. For example, California’s February 2020 bar exam had a historically low pass rate.⁶⁴ Only approximately 27% of exam-takers passed.⁶⁵ Of that 27%, only 5% of Black first-time takers passed this exam, compared to 52% of white takers, 42% of Asian takers, and 31% of Hispanic takers.⁶⁶ Moreover, America’s most diverse law school, Arizona Summit Law School, earned the nation’s worst bar-passage rate overall in 2017.⁶⁷ That year, less than 30% of the school’s graduates passed the bar exam on their first try.⁶⁸

Further, in July of 2016, first-time pass rates for Black graduates of ABA accredited law schools from outside of California were 22.2%.⁶⁹ By

⁶¹ Weatherspoon, *supra* note 60, at 292 n.170; Stephen P. Klein & Roger Bolus, *Analysis of July 2004 Texas Bar Exam Results by Gender and Racial/Ethnic Group*, TEX. BD. L. EXAM’RS (Dec. 15, 2004), <https://ble.texas.gov/statistics> [<https://perma.cc/LS25-Z3DX>].

⁶² Weatherspoon, *supra* note 60, at 292 n.170; Klein & Bolus, *supra* note 61.

⁶³ *Id.*

⁶⁴ 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/VFB7-7QXZ>].

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Erin Thompson, *Law Schools are Failing Students of Color*, NATION (June 5, 2018), <https://www.thenation.com/article/archive/law-schools-failing-students-color/> [<https://perma.cc/2B5K-TJ88>].

⁶⁸ *Id.*

⁶⁹ Joan W. Howarth, *The Professional Responsibility Case for Valid and Nondiscriminatory Bar Exams*, 33 GEO. J. LEGAL ETHICS 931, 953 (2020).

comparison, rates for white graduates were 67.9%.⁷⁰ This disparity in pass rates stayed consistent in 2017 and 2018, and statistics for graduates of California ABA accredited law schools for the same years showed a similar pattern.⁷¹ Of the white first-time test-takers of the October 2020 California bar exam, 83.7% passed; comparatively, only 56% of Black first-time test-takers passed.⁷²

In 2001, Florida's Board of Bar Examiners released racial data on the February 2000 and July 2000 Florida bar exams at the request of the Florida Supreme Court.⁷³ The results revealed that 68.5% of white test-takers passed compared to 53.2% of test-takers of color.⁷⁴ Additionally, a 2017 study on bar exam pass rates in New York found that a white test-taker was 39% more likely to pass the bar exam than a Latinx exam-taker and was 64% more likely to pass the exam than a Black test-taker.⁷⁵ In 2019, the ABA reported that 85% of attorneys nationwide are white, while only 5% are Black, 5% are Hispanic, 2% are Asian, and 1% are Native American.⁷⁶ These statistics reflect the dark reality that there are several structural barriers to entry into the legal profession. The bar examination is one of these barriers.

The bar exam's racially disparate outcomes that negatively affect applicants of color exist for a few reasons. For one, Black law students and

⁷⁰ *Id.* at 953.

⁷¹ *Id.*

⁷² STATE BAR OF CALIFORNIA, GENERAL STATISTICS REPORT OCTOBER 2020 CALIFORNIA BAR EXAMINATION (2020), <http://www.calbar.ca.gov/Portals/0/documents/OCT2020-CBX-Statistics.pdf> [<https://perma.cc/VFC3-JK4N>].

⁷³ Christina Shu Jien Chong, *Battling Biases: How Can Diverse Students Overcome Test Bias on the Multistate Bar Examination*, 18 U. MD. L. J. 31, 38 (2018).

⁷⁴ *Id.* at 38.

⁷⁵ See Kelsey J. Griffin, *Harvard Law Students Call for Automatic Bar Admission, Citing Racial and Economic Disparity*, HARVARD CRIMSON (July 15, 2020), <https://www.thecrimson.com/article/2020/7/15/law-students-diploma-privilege/> [<https://perma.cc/55A3-ATH4>].

⁷⁶ ABA, ABA NATIONAL LAWYER POPULATION SURVEY (2019), https://www.americanbar.org/content/dam/aba/administrative/market_research/national-lawyer-population-demographics-2009-2019.pdf [<https://perma.cc/G5KK-C8QD>].

other students of color are more often burdened by higher student loan debt, primary caregiver responsibilities, a need to work while they study for the bar examination, and other unique cultural and social challenges that are less pervasive among white students.⁷⁷ Additionally, bar examiners incorrectly assume that all applicants possess similar cultural experiences and that all applicants have learned the same information throughout their academic careers.⁷⁸ Applicants of color may have very different cultural experiences than white applicants, and applicants from more diverse schools may have different in-school experiences or exposure to certain curricula than applicants from less diverse schools.⁷⁹

These outcomes, coupled with the bar examination's anti-Black origins, indicate a need for a legal licensure that is not racially discriminatory.

C. An Overview of the Diploma Privilege

Thirty-two states and the District of Columbia granted diploma privilege starting in 1842.⁸⁰ By 1977, only five states had kept the privilege.⁸¹ When diploma privilege was still widely used, each state with diploma privilege in place created its own admission practices.⁸² These practices fell into three general categories: (1) universal diploma privilege, where the state admitted anyone who had a diploma from any U.S. law school; (2) statewide diploma privilege, where a graduate of any school within the state was admitted to practice only in that state; and (3) state university diploma privilege, where only graduates of the state's public law school were permitted to practice.⁸³

⁷⁷ Sybil Rosado, *When Will Black Lives Matter to the Florida Board of Bar Examiners?*, JURIST (June 30, 2020, 5:00 PM), <https://www.jurist.org/commentary/2020/06/sybil-rosado-black-lives-matter-florida-bar-exam/> [<https://perma.cc/QF9X-JA7K>].

⁷⁸ Chong, *supra* note 73, at 31.

⁷⁹ *Id.* at 62.

⁸⁰ Moran, *supra* note 26, at 646.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

Most states granted statewide diploma privilege until the twentieth century, when the use of diploma privilege began to decline nationally.⁸⁴

In the 1970s, the ABA and the NCBE offered several reasons for the decline in the use of diploma privilege among states.⁸⁵ They primarily noted the following reasons: (1) a lack of uniform standards among schools, which would affect the practicality of universal diploma privilege;⁸⁶ (2) the impracticality of having the privilege for state schools but not private schools, which would affect the feasibility of state university diploma privilege;⁸⁷ (3) a belief that diploma privilege discriminated against state residents who studied at out-of-state institutions, which would affect the practicality of statewide diploma privilege;⁸⁸ (4) a belief that the bar examination produced a higher standard of practice than did mere diploma privilege, which would affect the viability of all forms of diploma privilege;⁸⁹ and (5) a public desire to raise admissions standards, which the ABA and NCBE believed would be better accomplished through a bar examination than through a diploma privilege.⁹⁰

Today, many legal scholars recognize that there are three main types of diploma privilege:⁹¹ First, a pure diploma privilege, which makes graduation from an ABA-accredited law school sufficient evidence of competence to practice law and does not require the graduate to take a bar examination—though character and fitness review would remain unchanged;⁹² second, a more restricted diploma privilege, which adds a requirement that the graduate had studied a specified set of core subject areas or had completed a clinical

⁸⁴ *Id.* at 647.

⁸⁵ Hansen, *supra* note 23, at 1201.

⁸⁶ *Id.* at 1202.

⁸⁷ *Id.*

⁸⁸ Moran, *supra* note 26, at 647.

⁸⁹ *Id.*

⁹⁰ Hansen, *supra* note 23, at 1202.

⁹¹ See Claudia Angelos et al., *Diploma Privilege and the Constitution*, 73 SMU L. REV. F. 168, 170 (2020).

⁹² Angelos et al., *supra* note 91, at 170 n.5.

or experiential learning program;⁹³ and third, a “diploma-plus privilege,” which consists of post-graduation requirements such as a specified number of hours of supervised practice or completion of a state-specific set of tutorials.⁹⁴

IV. BAR EXAMINATION ADMINISTRATION FROM 2020 ONWARD

The COVID-19 pandemic brought several challenges to the administration of the bar exam nationally, including public health concerns for in-person exams and technological issues with remote exams. Accordingly, a handful of states opted to grant emergency diploma privilege to 2020 graduates, while others forced bar candidates to endure these challenges for licensure.

A. Inequities in Remote Examination

Due to the COVID-19 pandemic, twenty-one states opted to move the exam to an online format in the summer of 2020,⁹⁵ twenty-four states made their February 2021 exams remote,⁹⁶ and thirty jurisdictions offered remote exams in July of 2021.⁹⁷ The use of remote examination has only deepened the racial disparities of the bar exam. A survey—completed primarily by candidates to the New Jersey Bar—found that a white bar candidate is about 54% more likely to have a quiet place to take the remote bar exam compared to a Black candidate.⁹⁸ Additionally, a white test-taker is about 71% more

⁹³ *Id.* at 170.

⁹⁴ *Id.*

⁹⁵ See *Bar Exam Modifications During COVID-19: 50-State Resources*, JUSTIA (2020), <https://www.justia.com/covid-19/50-state-covid-19-resources/bar-exam-modifications-during-covid-19-50-state-resources/#california> [<https://perma.cc/MHQ5-LG2B>].

⁹⁶ *Id.*

⁹⁷ See *July 2021 Bar Exam: Jurisdiction Information*, NAT’L CONF. BAR EXAM’RS (May 18, 2021, 2:40 PM), <https://www.ncbex.org/ncbe-covid-19-updates/july-2021-bar-exam-jurisdiction-information/> [<https://perma.cc/2BCH-FYV8>].

⁹⁸ Claire Newsome & Catherine Perrone, *The Inequity and Technology Behind an Online Bar Exam*, JURIST (July 18, 2020, 2:41 PM), <https://www.jurist.org/commentary/2020/07/newsome-perrone-online-bar-exams/> [<https://perma.cc/QH49-C5T5>].

likely to have reliable internet as compared to a Black candidate.⁹⁹ Even without the presence of a global pandemic, this disparity in overall access to technology and reliable internet negatively affects test-takers of color.

The online bar examination has also sparked bias concerns. Facial recognition tools used by bar exam software have had problems “with faces of color and female faces.”¹⁰⁰ Such tools have demonstrably been less accurate in identifying Black people, people of Asian descent, and women.¹⁰¹ According to a letter from the American Civil Liberties Union (ACLU) to the California Supreme Court, the biases built into the software “all but guarantee test takers from marginalized groups will be disproportionately impacted by erroneous identifications during the exam.”¹⁰² The ACLU further noted that for undocumented applicants and applicants of color, the risks of having their biometric data stored in a large database increase the possibility of future surveillance and possible criminalization.¹⁰³ This is especially concerning given that ExamSoft’s privacy policy states that it may share data with law enforcement, effectively transforming the bar exam into an invasive search and wiretap of test-takers’ homes.¹⁰⁴

Not only is bias a real concern, but the technology of the exam itself has also had its issues across the country. In Michigan, for example, test-takers

⁹⁹ *Id.*

¹⁰⁰ Allie Reed, *Online Bar Exams Come with Face Scans, Bias Concerns (1)*, BLOOMBERG L. (July 28, 2020, 2:01 AM), <https://news.bloomberglaw.com/business-and-practice/online-bar-exams-come-with-face-scans-discrimination-concerns> [<https://perma.cc/P2LC-MH9Z>].

¹⁰¹ *ACLU Civil Rights Concerns with Potential Use of Facial Recognition in Proctoring the California Bar Examination*, ACLU (July 16, 2020), https://www.aclunc.org/sites/default/files/ACLU_Advocacy_Letter_re_Online_Bar_Exam.pdf [<https://perma.cc/QP9Q-SPK4>].

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Privacy Policy*, EXAMSOFT (June 21, 2021), <https://examsoft.com/privacy-policy> [<https://perma.cc/YE7L-4ZTH>]; see also Albert Fox Cahn & Alice Beck, *Surveillance and the City: Online Bar Exam, Remote Learning Fuel In-Home Surveillance*, GOTHAM GAZETTE (Oct. 20, 2020), <https://www.gothamgazette.com/opinion/9834-online-bar-exam-remote-learning-home-surveillance-privacy> [<https://perma.cc/PHH5-EQA5>].

experienced login issues an hour into the bar exam after ExamSoft was hacked.¹⁰⁵ Other test-takers across the country described issues with the software repeatedly crashing.¹⁰⁶ One test-taker's laptop crashed while they were working on the exam's first essay question.¹⁰⁷ When the test-taker contacted ExamSoft support, ExamSoft told them to “withdraw or get another laptop.”¹⁰⁸ The response from the online bar exam's software company itself exemplifies how harmful an online exam is to test-takers who do not have access to reliable technology and quiet spaces. And, despite ExamSoft having nearly a year to fix these technical issues ahead of the July 2021 exam, several graduates who took the July 2021 exam nevertheless saw their computers crash or freeze.¹⁰⁹ The varying problems associated with administering the bar exam remotely are further indications that the bar exam can never be administered equitably, with or without the presence of COVID-19.

B. Emergency Diploma Privilege in 2020

While many states chose to offer in-person and online examinations in 2020, a handful of states, including Washington,¹¹⁰ opted to grant 2020 graduates emergency diploma privilege in lieu of requiring the exam for

¹⁰⁵ Johnson, *supra* note 15.

¹⁰⁶ Stephanie Francis Ward, *Amid Claims that Online Bar Exam Went Well, Some Test-Takers Have a Different View*, ABA J. (Oct. 20, 2020, 4:18 PM), <https://www.abajournal.com/web/article/amid-claims-that-online-bar-exam-went-well-some-test-takers-have-a-different-view> [https://perma.cc/D4W9-5E5N].

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ Sam Skolnik, *'Devastating' Anxiety as Remote Bar Exam Tech Crashes Again*, BLOOMBERG L. (July 30, 2021, 2:32 AM), <https://news.bloomberglaw.com/business-and-practice/devastating-anxiety-as-remote-bar-exam-tech-crashes-again> [https://perma.cc/N48X-KYEK].

¹¹⁰ See Joe Patrice, *Washington Grants Diploma Privilege to Graduates of ABA Accredited Schools*, ABOVE THE LAW (June 15, 2020, 11:18 AM), <https://abovethelaw.com/2020/06/washington-grants-diploma-privilege-to-graduates-of-aba-accredited-schools/> [https://perma.cc/VW5M-PZBS].

licensure.¹¹¹ Although the Washington Supreme Court initially rejected a diploma privilege proposal in early 2020,¹¹² the court issued an order for diploma privilege and temporarily modified the Admission & Practice Rules.¹¹³ The court cited “extraordinary barriers facing applicants” registered to take the July or September 2020 bar examinations,¹¹⁴ including the COVID-19 pandemic and the political unrest following the murder of George Floyd.¹¹⁵

Washington was only the second state to grant diploma privilege in the summer of 2020.¹¹⁶ Despite the state pioneering the move to grant temporary diploma privilege in 2020, the Washington Supreme Court opted not to extend the privilege to winter of 2021 test-takers.¹¹⁷ In response to questions about the efficacy of the bar exam, the Washington Supreme Court decided

¹¹¹ Karen Sloan, *Diploma Privilege Leader: ‘This is a Good Moment to Try Something New,’* LAW.COM (Aug. 19, 2020, 1:39 PM), <https://www.law.com/2020/08/19/diploma-privilege-leader-this-is-a-good-moment-to-try-something-new/> [<https://perma.cc/Z6M8-E559>].

¹¹² Debra Cassens Weiss, *Many Would-Be Lawyers are Allowed to Practice Law Without Exam in Washington State*, ABA J. (June 16, 2020, 12:04 PM), <https://www.abajournal.com/news/article/many-would-be-lawyers-allowed-to-practice-law-without-exam-in-washington-state> [<https://perma.cc/QQ9D-TV77>].

¹¹³ In the Matter of Statewide Response by Wash. State Courts to the COVID-19 Pub. Health Emergency, No. 25700-B-630, at 1 (Sup. Ct. of Wash. June 12, 2020) (Order Granting Diploma Privilege and Temporarily Modifying Admission & Practice Rules).

¹¹⁴ *Id.*

¹¹⁵ Hugh Spitzer, Opinion, *Washington’s Supreme Court Should Do All of its Business in the Sunshine*, SEATTLE TIMES (June 26, 2020, 4:07 PM), <https://www.seattletimes.com/opinion/washingtons-supreme-court-should-do-all-its-business-in-the-sunshine/> [<https://perma.cc/M2B2-VPHR>].

¹¹⁶ Caroline Spiezio, *Washington State to Let Law School Grads Skip the Bar*, REUTERS (June 16, 2020, 4:33 AM), <https://www.reuters.com/article/lawyer-coronavirus-bar/washington-state-to-let-law-school-grads-skip-the-bar-idUSL1N2DT0L2> [<https://perma.cc/7DMA-FFT9>].

¹¹⁷ Order Authorizing Remote Licensing Examinations and Amending APR 4 to Reduce Passing Score for Uniform Bar Examination in February 2021, No. 25700-B-651 (Dec. 3, 2020), <https://www.knkn.org/sites/kplu/files/202102/25700B651.pdf> [<https://perma.cc/K9XG-F6FJ>]; Order Authorizing Remote Examinations for the July 2021 Legal Licensing Examinations, No. 25700-B-661 (Mar. 5, 2021), <https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Orders/25700-B-661.pdf> [<https://perma.cc/XQF4-7CPQ>].

to implement a strategic initiative to evaluate the exam requirement for licensure and to consider alternatives to current license requirements.¹¹⁸ The Washington Bar Licensure Task Force met for the first time in March of 2021 and again in April of 2021.¹¹⁹ However, the Task Force has not met since and did not make changes to the July 2021 exam, so it is unlikely that it will make changes to the exam before the February and July 2022 exam dates.

Along with Washington, only four other jurisdictions granted emergency diploma privilege in response to the COVID-19 crisis in 2020.¹²⁰ None offered diploma privilege to 2021 graduates, opting instead to offer the exam remotely.¹²¹ However, even the NCBE has admitted to the inadequacies of remote testing.¹²² It admitted that it cannot ensure that candidates do not encounter accessibility issues.¹²³ Further, the NCBE admitted that it offered the bar exam remotely only as an emergency option during the pandemic.¹²⁴

¹¹⁸ In the Matter of the Establishment of the Washington Bar Licensure Task Force, Order No. 25700-B-649 (Nov. 20, 2020), https://www.abajournal.com/files/Washington_state_task_force.pdf [<https://perma.cc/9WPF-VGPV>].

¹¹⁹ Washington Bar Licensure Task Force, *First Meeting*, TVW (Mar. 17, 2021, 2:00 PM), <https://www.tvw.org/watch/?clientID=9375922947&eventID=2021031232> [<https://perma.cc/CSA3-HAGM>]; *Washington Bar Licensure Task Force*, WASH. COURTS, https://www.courts.wa.gov/appellate_trial_courts/SupremeCourt/?fa=supremecourt.LicensureTaskForce [<https://perma.cc/H5QX-LRYH>].

¹²⁰ Sam Sklonik, *D.C. Allows Law School grads to Skip Exam During Pandemic (1)*, BLOOMBERG L. (Sept. 24, 2020, 11:51 PM), <https://news.bloomberglaw.com/business-and-practice/d-c-allows-law-school-grads-to-skip-bar-exam-during-pandemic> [<https://perma.cc/PHT9-NLTU>].

¹²¹ See *July 2021 Bar Exam: Jurisdiction Information*, NAT'L CONF. BAR EXAM'RS (May 18, 2021, 2:40 PM), <https://www.ncbex.org/ncbe-covid-19-updates/july-2021-bar-exam-jurisdiction-information/> [<https://perma.cc/ME5P-B222>]; *NCBE COVID-19 Updates*, NAT'L CONF. BAR EXAM'RS (June 14, 2021), <https://www.ncbex.org/ncbe-covid-19-updates/> [<https://perma.cc/P8CV-MHLR>].

¹²² See Testing Task Force, *FAQs about Recommendations*, NAT'L CONF. BAR EXAM'RS: NEXT GEN, BAR EXAM OF THE FUTURE, <https://nextgenbarexam.ncbex.org/faqs/> [<https://perma.cc/B7H7-NXDK>].

¹²³ *Id.*

¹²⁴ *Id.*

C. The NCBE's Preliminary Recommendations for the Next Generation of the Bar Examination

The NCBE created a Testing Task Force in 2018 that was charged with undergoing a three-year study of the bar examination.¹²⁵ More specifically, the Task Force was charged with ensuring that the exam continues to test the knowledge and abilities for competent entry-level legal practice.¹²⁶ In January of 2021, the NCBE Board of Trustees voted to approve various recommendations for the next generation of the bar exam made by the Task Force.¹²⁷ These recommendations were the final product of the Task Force's three-year study of the bar examination.¹²⁸ According to its preliminary report, the Task Force's ultimate decisions were founded on the principle that the bar exam's purpose is "to protect the public by helping to ensure that those who are newly licensed possess the minimum knowledge and skills to perform activities typically required of an entry-level lawyer."¹²⁹

The Task Force offered several recommendations. For example, it recommended that the NCBE create and use an integrated examination that assesses both knowledge and skills holistically.¹³⁰ This integrated examination would permit use of scenarios that are representative of real-world legal problems.¹³¹ The Task Force also recommended the bar examination test fewer subjects and test less broadly, with a greater emphasis

¹²⁵ *Next Generation of the Bar Exam*, NAT'L CONF. BAR EXAM'RS, <https://www.ncbex.org/statistics-and-research/testingtaskforce/> [https://perma.cc/X99N-Y8Y9].

¹²⁶ *Id.*

¹²⁷ *NCBE Board of Trustees Votes to Approve Testing Task Force Recommendations*, NAT'L CONF. BAR EXAM'RS (Jan. 28, 2021), <https://www.ncbex.org/news/ncbe-bot-vote-approves-ttf-recommendations/> [https://perma.cc/R6ZJ-8LCV].

¹²⁸ *Id.*

¹²⁹ TESTING TASK FORCE, NAT'L CONF. BAR EXAM'RS: NEXT GEN: BAR EXAM OF THE FUTURE, OVERVIEW OF RECOMMENDATIONS FOR THE NEXT GENERATION OF THE BAR EXAMINATION 2 (Dec. 2020), <https://nextgenbarexam.ncbex.org/wp-content/uploads/TTF-Next-Gen-Bar-Exam-Recommendations.pdf> [https://perma.cc/4QPU-79WB].

¹³⁰ *Id.*

¹³¹ *Id.* at 2–4.

on foundational and performance skills, such as client interviewing and negotiation.¹³² Additionally, the Task Force suggested the next generation of the exam be a computer-based test administered either on candidates' laptops or at computer testing centers given as a single event, as opposed to the current multi-day event.¹³³ The major steps of the implementation of the new bar exam will include a number of things, including ensuring accessibility for candidates with disabilities, establishing scoring processes and psychometric methods for equating and scaling scores, and conducting analyses and reviews to ensure fairness for diverse populations of candidates.¹³⁴

With regard to issues of accessibility and fairness, the NCBE has not provided specific information about its plans to ensure equitable outcomes from this new bar. Rather, the organization has stated that it “has always been committed, and will remain committed, to producing a bar exam that fairly assesses all candidates regardless of race, gender, or ethnicity . . . [and it] will continue to perform test item review processes and psychometric analyses to ensure fairness.”¹³⁵ However, these processes and analyses are not described in further detail, so it remains unclear how the NCBE will provide a new bar examination that does not lead to the same racially disparate outcomes of the current exam. Even if the new bar were to be more equitable than the current bar is, the process of implementing the Task Force's recommendations is expected to take four to five years to complete.¹³⁶ This means that the new bar exam will not likely be available to test takers until 2025 or 2026. Thus,

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *NCBE Board of Trustees Votes to Approve Testing Task Force Recommendations*, NAT'L CONF. BAR EXAM'RS (Jan. 28, 2021), <https://www.ncbex.org/news/ncbe-bot-vote-approves-ttf-recommendations/> [<https://perma.cc/R6ZJ-8LCV>].

¹³⁵ Testing Task Force, *FAQs about Recommendations*, *supra* note 122.

¹³⁶ *NCBE Board of Trustees Votes to Approve Testing Task Force Recommendations*, *supra* note 134.

graduates who take the bar before then will still have to face an exam that has historically led to racially disparate outcomes.¹³⁷

V. PRELIMINARY OVERVIEW OF A PROPOSED ALTERNATIVE TO THE BAR EXAMINATION

The Washington Supreme Court should amend Admission and Practice Rule 3 by removing the requirement of an examination for admission to the bar.¹³⁸ The bar examination has proven to yield racially disparate outcomes and administering the examination during COVID-19 has shed more light on this disparity.¹³⁹ Additionally, the NCBE's proposed recommendations for the next generation of the bar exam do not provide sufficient details for how the new bar will be equitable to everyone.¹⁴⁰ Assuming, *arguendo*, that the new bar exam is racially equitable, it will still take four to five years to implement;¹⁴¹ that is too much time considering the documented racially disparate outcomes the bar exam creates.¹⁴² The court must consider an alternative to the exam—diploma privilege.

Specifically, the court should admit ABA accredited Washington State law school graduates who have completed specific educational requirements. Law students should be required to take and pass courses like trial advocacy, lawyering skills, and other clinical courses. Additionally, diploma privilege should not be limited to in-state graduates. Rather, the court should admit

¹³⁷ *Id.*

¹³⁸ WASH. ADMISSION & PRAC. RULE 3.

¹³⁹ See Abigail Johnson Hess, 'Literal Hell' – How the Pandemic Has Made the Bar Exam Even More Excruciating for Future Lawyers, CNBC (Aug. 19, 2020, 11:26 AM), <https://www.cnbc.com/2020/08/19/literal-hellthe-pandemic-has-made-the-bar-exam-more-excruciating.html> [<https://perma.cc/F98U-5G9J>].

¹⁴⁰ See NCBE Board of Trustees Votes to Approve Testing Task Force Recommendations, *supra* note 134.

¹⁴¹ *Id.*

¹⁴² See Oday Yousif Jr., Commentary, *The Bar Exam is Stained with Inequality and Racism. It Needs to be Abolished*, THE SAN DIEGO UNION-TRIB. (Dec. 7, 2020, 5:45 PM), <https://www.sandiegouniontribune.com/opinion/commentary/story/2020-12-07/abolishing-the-bar-exam-bias> [<https://perma.cc/7Q55-N2CR>].

out-of-state graduates to the bar upon completion of at least ten weeks of supervised practice with an experienced attorney, or upon documentation that the graduate had taken one or more courses about Washington law. Out-of-state graduates would need to complete the additional requirement of supervised practice or of taking Washington law courses to become familiar with Washington State-specific laws and procedures prior to licensure.¹⁴³

It is likely that the ABA would counter this proposal by arguing that diploma privilege would affect the calculation of bar passage rate for Washington law schools under Standard 316.¹⁴⁴ For law schools to maintain accreditation under standard 316, 75 percent of each year's graduates who sit for the bar examination must pass within two years of their graduation.¹⁴⁵ A simple solution exists: the ABA could base bar passage data for Washington law schools on the number of graduates who completed the proposed requirements to qualify for admission to the Washington State bar through the diploma privilege. The ABA already calculates bar passage data this way in Wisconsin.¹⁴⁶

With the above-mentioned alternative, it is important to note that the bar examination will not be eliminated altogether in Washington State. Graduates for whom the alternative may not apply or who want to take the exam for another reason will still be able to do so under this proposal. However, the bar exam would no longer be a requirement to licensure for graduates of ABA accredited schools.

¹⁴³ Markovic, *supra* note 44, at 26.

¹⁴⁴ AMERICAN BAR ASS'N, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2020-2021, at 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-chapter3.pdf [<https://perma.cc/2H2D-MY9E>].

¹⁴⁵ *Id.*

¹⁴⁶ See *Consumer Information (ABA Required Disclosures)*, UNIV. OF WI-MADISON L. SCH., <https://law.wisc.edu/prospective/stats.html> [<https://perma.cc/4J76-8U6F>].

VI. THE VIABILITY AND LOGISTICS OF IMPLEMENTING THIS ALTERNATIVE

This section will elaborate on the alternative to the bar examination introduced in the previous section. It will look to Wisconsin's diploma privilege as an example to assess the proposed alternative's possible implementation, as well as to Oregon's and New York's recent considerations of bar exam alternatives.

A. The Wisconsin Example of Diploma Privilege

In the mid-1800s, Wisconsin opened practice to all citizens with "good moral character," but this open admission was short-lived.¹⁴⁷ The state soon premised bar admission on a minimal oral examination by a Circuit Court Judge;¹⁴⁸ however, this was an ineffective barrier to bar admission because candidates who failed oral examinations simply found more sympathetic judges.¹⁴⁹ When the University of Wisconsin School of Law was established, the state legislature quickly moved to a diploma privilege structure.¹⁵⁰ Diploma privilege was meant to increase the standards of practice¹⁵¹ and promote formal legal education.¹⁵² By 1870, Wisconsin offered diploma privilege to University of Wisconsin Law School graduates.¹⁵³ It is likely that Wisconsin has retained the diploma privilege because it helps Wisconsin law schools recruit students and keeps high-achieving graduates in the state for practice.¹⁵⁴

¹⁴⁷ Moran, *supra* note 26, at 645.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 646.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² Daniel B. Nora, Note, *On Wisconsin: The Viability of Diploma Privilege Regulations Under Dormant Commerce Clause Review*, 37 J. COLL. & UNIV. L. 447, 473 (2011).

¹⁵³ Nora, *supra* note 152, at 474.

¹⁵⁴ See Moran, *supra* note 26, at 651; Deborah Ziff, *State's Longtime 'Diploma Privilege' Challenged*, WIS. STATE J. (Sept. 13, 2009), <https://madison.com/wsj/news/local/education/university/states-longtime-diploma->

Since 1870, Wisconsin's diploma privilege has undergone two significant changes to achieve its current form.¹⁵⁵ It first expanded the privilege to graduates of any law school within Wisconsin, rather than only offering the privilege to University of Wisconsin law graduates.¹⁵⁶ This change followed opposition from Marquette University graduates who faced a disadvantage until the diploma privilege was expanded.¹⁵⁷ The expansion of diploma privilege effectively validated Marquette's equal status with the University of Wisconsin within the state.¹⁵⁸

The second major change was made in 1971, when Wisconsin amended the diploma privilege to include the thirty-credit rule.¹⁵⁹ This rule requires students seeking bar admission through diploma privilege to take ten specific classes, including in constitutional law; contracts; criminal law and procedure; evidence; jurisdiction of courts; ethics and legal responsibilities of the legal profession; pleading and practice; real property; torts; and wills and estates.¹⁶⁰ Similarly, the state requires a sixty-credit rule for diploma privilege.¹⁶¹ This rule compels students to take at least sixty of their law school credits in thirty subject areas, including subjects like administrative law, pleading and practice, and trusts.¹⁶²

In 2009, Wisconsin's diploma privilege came under fire when the Seventh Circuit revived a lawsuit challenging the state's practice of granting the

privilege-challenged/article_e45f22e3-7cb0-5c2e-8b92-8b81bbdd8061.html
[<https://perma.cc/3QH2-NMHM>].

¹⁵⁵ Nora, *supra* note 152, at 474.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 474–75.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 475.

¹⁶⁰ Nora, *supra* note 152, at 475; Stephanie Francis Ward, *Bar Exam Does Little to Ensure Attorney Competence, Say Lawyers in Diploma Privilege State*, ABA J. (April 21, 2020, 9:08 AM), <https://www.abajournal.com/web/article/bar-exam-does-little-to-ensure-attorney-competence-say-lawyers-in-diploma-privilege-state> [<https://perma.cc/4GS5-FB4W>].

¹⁶¹ Lorenzo A. Trujillo, *The Relationship Between Law School and the Bar Exam: A Look at Assessment and Student Success*, 78 U. COLO. L. REV. 69, 95 (2007).

¹⁶² Trujillo, *supra* note 161, at 95; WIS. SUP. CT. RULE 40.03.

privilege only to graduates from the University of Wisconsin and Marquette University.¹⁶³ The lawsuit was a constitutional challenge brought by a then-law student in Oklahoma who had charged that the Wisconsin court rule impermissibly discriminated against out-of-state law school graduates.¹⁶⁴ Specifically, the plaintiffs argued that Wisconsin's diploma privilege violated the commerce clause,¹⁶⁵ which prohibits a state from discriminating against similarly-situated articles of commerce simply because they come from outside the state.¹⁶⁶ However, the Wisconsin Attorney General successfully argued that there was no discrimination within the meaning of the commerce clause because non-Wisconsin law schools do not teach Wisconsin law, and as such the education in question was not similar.¹⁶⁷ Other related constitutional challenges to Wisconsin's diploma privilege have not been readdressed since. And, while the ABA has expressed its preference for the bar examination over diploma privilege, there otherwise has not been documented criticism of Wisconsin's method of licensure.

Overall, the diploma privilege works in Wisconsin for a few different reasons. Namely, it is a small state with a fairly small practicing bar—there is a close relationship between the bar, the judiciary, the legislature, and the two law schools within the state. Additionally, there is a sense of trust between the public and the bar.¹⁶⁸

¹⁶³ Annie Youderian, *Challenge to 'Diploma Privilege' Reinstated*, COURTHOUSE NEWS SERV. (Jul. 10, 2009), <https://www.courthousenews.com/challenge-to-diploma-privilege-reinstated/> [<https://perma.cc/4CRD-H987>].

¹⁶⁴ *Settlement Retains Diploma Privilege*, STATE BAR OF WIS. (Mar. 25, 2010), <https://www.wisbar.org/NewsPublications/InsideTrack/Pages/Article.aspx?Volume=0&Issue=0&ArticleID=5824> [<https://perma.cc/ZBU2-LUMS>].

¹⁶⁵ See *The Dormant Commerce Clause*, L. SHELF, <https://lawshelf.com/coursewarecontentview/the-dormant-commerce-clause/> [<https://perma.cc/9GH9-GWLF>].

¹⁶⁶ *Id.*

¹⁶⁷ *Settlement Retains Diploma Privilege*, STATE BAR OF WIS. (Mar. 25, 2010), <https://www.wisbar.org/NewsPublications/InsideTrack/Pages/Article.aspx?Volume=0&Issue=0&ArticleID=5824> [<https://perma.cc/ZBU2-LUMS>].

¹⁶⁸ Moran, *supra* note 26, at 655.

According to Professor Beverly Moran, a small state and a small practicing bar are required for developing “the trust and participation that the diploma privilege represents.”¹⁶⁹ In a large state, fewer people know one another; therefore, it is challenging to maintain a close relationship between the bar, the judiciary, the legislature, and the law schools within the state.¹⁷⁰ This close relationship is important so that law school programs can work with the state court and bar to develop programs that truly represent what lawyers need to know in practice. Finally, there must be trust between the public, the bar, and law schools to make the diploma privilege work.¹⁷¹ Professor Moran has acknowledged that a state like Washington might do well to consider re-establishing the diploma privilege, as it exhibits similar characteristics to Wisconsin.¹⁷²

B. Oregon’s and New York’s Recent Considerations of Bar Exam Alternatives

Although Wisconsin is the only state that offers a broad form of diploma privilege to its graduates, task forces in Oregon and New York have begun considering alternatives to the bar exam.¹⁷³ In Oregon, the state Supreme Court held a public hearing in July of 2021, during which it heard the Alternatives to the Exam Task Force’s recommendations to overhaul the licensing system.¹⁷⁴ One of the two proposed alternatives to the bar

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ See Elizabeth Olson, *Oregon High Court to Consider Dropping Bar Exam for New Lawyers*, BLOOMBERG L. (Jul. 6, 2021, 10:47 AM), <https://news.bloomberglaw.com/business-and-practice/oregon-high-court-to-consider-dropping-bar-exam-for-new-lawyers> [<https://perma.cc/V6ZA-7PB7>]; N.Y. STATE BAR ASSOC., THIRD REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON THE NEW YORK BAR EXAMINATION (June 2021), <https://nysba.org/app/uploads/2021/06/9.-Task-Force-on-the-New-York-Bar-Examination-with-staff-memo.pdf> [<https://perma.cc/G32X-CKVU>].

¹⁷⁴ Elizabeth Olson, *Oregon High Court to Consider Dropping Bar Exam for New Lawyers*, BLOOMBERG L. (Jul. 6, 2021, 10:47 AM),

examination is an experienced-based learning pathway. This would be a curriculum-based model with a focus on experiential coursework which culminates in a capstone portfolio submitted to the Oregon State Bar Board of Bar Examiners.¹⁷⁵ The other is a supervised practice pathway, which would be a post-graduation model where applicants work directly under a licensed attorney for at least 1,000 hours of practice.¹⁷⁶

A New York State Bar Association task force released a similar report in June of 2021 that included several recommendations for overhauling the bar exam.¹⁷⁷ One of the task force's recommendations was to provide applicants with two alternative means to admission: a pathway through concentrated, experiential study of New York law while in law school; and a pathway through supervised practice of law in New York.¹⁷⁸ According to the task force, the two alternative pathways will better protect the public from incompetent lawyers gaining admission to the New York bar since those who successfully studied or practiced New York law would surely have the minimum competency to be licensed.¹⁷⁹

C. An In-Depth Look at the Proposed Alternative to the Bar Exam

Looking to Wisconsin's positive experience using the diploma privilege, Professor Moran's recommendation for Washington State to consider re-establishing a similar form of licensure, and Oregon's and New York's movement towards bar exam alternatives, it is feasible for Washington to

<https://news.bloomberglaw.com/business-and-practice/oregon-high-court-to-consider-dropping-bar-exam-for-new-lawyers> [<https://perma.cc/V6ZA-7PB7>].

¹⁷⁵ *Recommendations of the Alternatives to the Bar Exam*, OR. STATE BD. OF BAR EXAM'RS (June 18, 2021), <https://aboutblaw.com/YsW> [<https://perma.cc/QQ95-2KPK>].

¹⁷⁶ *Id.*

¹⁷⁷ *See generally* N.Y. STATE BAR ASSOC., THIRD REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON THE NEW YORK BAR EXAMINATION (June 2021), <https://nysba.org/app/uploads/2021/06/9.-Task-Force-on-the-New-York-Bar-Examination-with-staff-memo.pdf> [<https://perma.cc/G32X-CKVU>].

¹⁷⁸ *Id.* at 13.

¹⁷⁹ *Id.* at 16.

replace the bar examination requirement with diploma privilege. Therefore, the Washington Supreme Court should amend APR 3 by removing the requirement of an examination for bar admission.¹⁸⁰ Instead, the court should consider a universal diploma privilege alternative.

This proposed universal diploma privilege alternative would take aspects of both a restricted diploma privilege and a “diploma-plus privilege.” This alternative would admit graduates of ABA accredited Washington State law schools to the state bar who have completed certain education requirements during law school, like trial advocacy, lawyering skills, and clinical or experiential courses. Further, graduates of ABA accredited law schools from outside of Washington State may be admitted to practice within the state upon completion of at least ten weeks of supervised practice with an attorney located in Washington, or upon documentation that they took one or more courses focused on Washington State law.

Like diploma privilege in Wisconsin,¹⁸¹ this alternative would require Washington law school students to take a set number of credits in specific subject areas. The number of credits and required courses should be decided upon by the state bar, the judiciary, and the three Washington law schools. Given Wisconsin’s success with requiring students to take certain courses in order to earn diploma privilege, it is reasonable and possible to require Washington bar applicants from Washington law schools to do the same. This is especially true since the mandatory and elective courses set out in the Wisconsin Court Rule for diploma privilege are already staples in law school curricula.¹⁸²

Unlike Wisconsin, however, this alternative would allow for graduates from any state to practice in Washington.¹⁸³ To allow this, the Washington Supreme Court should require the study of Washington’s laws and

¹⁸⁰ WASH. ADMISSION & PRAC. RULE 3.

¹⁸¹ Markovic, *supra* note 44, at 25.

¹⁸² *Id.*

¹⁸³ *Id.* at 26.

procedures before receiving diploma privilege.¹⁸⁴ Such a requirement would be important for out-of-state graduates because understanding state law is essential to practicing in a particular state.¹⁸⁵ Requiring proof that out-of-state graduates took courses focused on Washington State law or that they worked under the supervision of a Washington attorney for at least ten weeks will ensure the necessary familiarity with state and local laws.¹⁸⁶

Finally, this alternative will avoid the constitutional issues that Wisconsin previously faced, as the alternative opens diploma privilege to any student in the country and not just to graduates from Washington law schools. Because this alternative follows both an already-in-place form of diploma privilege and adds an additional restriction that is not too complicated to impose, it is simple to implement.

D. Overall Recommendation to the Washington Supreme Court

Based on the assessment of the proposed alternative discussed in the preceding subsection, the Washington Supreme Court should amend court rule APR 3, subsection (a) by removing the prerequisite that a bar examination is necessary for admission to the state bar. Instead, APR 3 should state something similar to Wisconsin Supreme Court rule 40.03, which provides the legal competence requirement for diploma privilege.¹⁸⁷ The Washington Supreme Court should make this amendment as soon as possible to keep graduates from further exposure to an exam with racially

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 26 n.185 (quoting *Shenfield v. Prather*, 387 F. Supp. 676, 687 (“[I]t is quite improbable that courses offered at law schools outside the state provide the close correlation to Mississippi law and practice and the state bar examination which the University of Mississippi’s curriculum possesses.”)).

¹⁸⁶ *Id.* (for example, students interested in moving to Washington to practice could consider taking several CLEs in Washington that focus on Washington law to meet this requirement).

¹⁸⁷ WIS. SUP. CT. RULE 40.03.

inequitable outcomes.¹⁸⁸ If the court is unable to make such a change immediately, then it should at least make this amendment before the July 2022 examination. Further, Washington law schools should begin considering the required curricula for diploma privilege as soon as the Washington Supreme Court decides to amend APR 3.

In the amended APR 3, the Washington Supreme Court should provide a diploma privilege legal competence requirement. This requirement should state that graduates of Washington law schools must complete a minimum number of credits in mandatory and elective subject matter areas decided upon by the law schools, the state bar, and the judiciary. These curricula should follow similar requirements to Wisconsin's required curricula¹⁸⁹ and should emphasize clinic and experiential learning credits. A well-developed curriculum will ensure that graduates gain practical skills as well as the required knowledge to successfully practice in Washington. Further, the amended court rule should state that graduates of out-of-state law schools may satisfy the legal competence requirement for diploma privilege if they complete at least ten weeks of supervised practice in Washington before licensure, or upon documentation that they took one or more courses focused on Washington State law.

While this comment does not address the Multistate Professional Responsibility Examination (MPRE) or the Character and Fitness portion of licensure, the need for these components to bar admission should similarly be reassessed. The Character and Fitness portion, in particular, has proven to be a challenging hurdle to overcome for people with criminal records.¹⁹⁰ For example, the Washington State Bar Association Character and Fitness Board

¹⁸⁸ See Kelsey J. Griffin, *Harvard Law Students Call for Automatic Bar Admission, Citing Racial and Economic Disparity*, THE HARVARD CRIMSON (July 15, 2020), <https://www.thecrimson.com/article/2020/7/15/law-students-diploma-privilege/> [<https://perma.cc/W53S-C636>].

¹⁸⁹ WIS. SUP. CT. RULE 40.03.

¹⁹⁰ See, e.g., Tarra Simmons, *Transcending the Stigma of a Criminal Record: A Proposal to Reform State Bar Character and Fitness Evaluations*, 128 YALE L. J. F. 759 (2019).

recommended denial of an application to sit for the Washington bar examination from Tarra Simmons, a formerly incarcerated now-attorney.¹⁹¹ Ultimately, the Washington Supreme Court found that Simmons has the requisite moral character and fitness to practice law in the state after Simmons requested review.¹⁹² Following her licensure, Ms. Simmons co-founded the Civil Survival Project¹⁹³ and later became the first person formerly convicted of a felony elected to Washington State's legislature.¹⁹⁴ Ms. Simmons's great successes following licensure demonstrate how arbitrary and ineffective restrictions like the Character and Fitness review can be. Thus, future research may consider the disproportionate impacts of the MPRE and the Character and Fitness portion of the admissions process.

VII. DEFENSES TO THE CRITICISMS OF THE DIPLOMA PRIVILEGE

Concerns and criticisms regarding the diploma privilege have existed for decades and have been brought to light more recently as states implemented emergency diploma privilege.¹⁹⁵ Some of these concerns have come from the NCBE itself, which said in mid-2020 that it “believes strongly in the value of the bar exam to protect the public interest.”¹⁹⁶ Additionally, the NCBE stated the following:

¹⁹¹ In Re: Tarra Denelle Simmons, Bar Applicant, No. 201,671-5 (Wash. Sup. Ct. Nov. 16, 2017) (order unanimously granting Tarra Simmons's application to sit for the bar exam).

¹⁹² *Id.*

¹⁹³ See generally Civil Survival Project, <https://civilsurvival.org/> [<https://perma.cc/YC94-WR42>].

¹⁹⁴ Eoin Higgins, *Tarra Simmons Becomes First Person Formerly Convicted of a Felony Elected to Washington State Legislature*, THE APPEAL (Nov. 4, 2020), <https://theappeal.org/tarra-simmons-washington-state-legislature/> [<https://perma.cc/3VDM-VKWF>].

¹⁹⁵ See, e.g., Mark W. Gifford, *Why Diploma Privilege for Law School Graduates is a Bad Idea: A Regulator's Perspective*, WYO. STATE BAR (Apr. 17, 2020), <https://www.wyomingbar.org/diploma-privilege-law-school-graduates-bad-idea-regulators-perspective/> [<https://perma.cc/9XD8-25W4>].

¹⁹⁶ Dan Kittay, *States Mull Diploma Privilege as Option for Pandemic-Affected Bar Exams*, AM. BAR ASS'N: VOL. 46, No. 1 (Sept.–Oct. 2020), https://www.americanbar.org/groups/bar_services/publications/bar_leader/2020_21/septe

Like every other high-stakes profession, including engineering, medicine, aviation, and others, the legal profession relies on licensure to ensure that practitioners meet minimum standards of fundamental competency . . . NCBE remains dedicated to its role, which is to ensure that the bar exam is an objective measure of the legal knowledge and skills needed for entry-level practice.¹⁹⁷

This criticism of the diploma privilege stems from the desire to uniformly measure the abilities of every new attorney, which allegedly becomes more challenging without a bar examination.¹⁹⁸

Proponents of the bar examination have stated that the bar exam provides an essential tool for courts and bar admission officials to independently and objectively ensure that practitioners are proficient to provide legal services to the public.¹⁹⁹ Moreover, diploma privilege critics have claimed that replacing the bar exam with a diploma privilege would abdicate the duty of courts and bar admissions officials to ensure public protection.²⁰⁰ Instead, law schools and practicing attorneys would have to take on the role of ensuring that new graduates have minimum competence.²⁰¹ But the bar examination creates an altogether “false sense of security for consumers.”²⁰² Bar examiners rely on the widely held belief among the public that the bar exam is a rigorous test that weeds out those who are capable of practicing law from

mber-october/states-mull-diploma-privilege-as-option-for-pandemic-affected-bar-exams/ [https://perma.cc/BG6V-NRV8].

¹⁹⁷ *Id.*

¹⁹⁸ See Chad Sokol, *Hundreds Become Lawyers in Washington State Without Taking Bar Exam Due to COVID-19 Exemption*, THE SPOKESMAN-REV. (Jul. 30, 2020), <https://www.spokesman.com/stories/2020/jul/30/hundreds-become-lawyers-in-washington-state-without/> [https://perma.cc/HL49-XMUS].

¹⁹⁹ Mark W. Gifford, *Why Diploma Privilege for Law School Graduates is a Bad Idea: A Regulator’s Perspective*, WYO. STATE BAR (Apr. 17, 2020), <https://www.wyomingbar.org/diploma-privilege-law-school-graduates-bad-idea-regulators-perspective/> [https://perma.cc/MU7M-9964].

²⁰⁰ *Id.*

²⁰¹ Sokol, *supra* note 198; Gifford, *supra* note 195.

²⁰² Kristin Booth Glen, *Thinking Out of the Bar Exam Box: A Proposal to “MacCrate” Entry to the Profession*, 23 PACE L. REV. 343, 361 (2003).

those who are not.²⁰³ However, this belief is untrue and the evidence suggests a contrary conclusion.²⁰⁴ A recent study that followed 1000 attorneys found no evidence that higher bar exam scores produce fewer complaints, charges, or disciplinary actions.²⁰⁵ In fact, the study's evidence pointed in the opposite direction: higher bar exam scores tended to correlate with more complaints and charges.²⁰⁶ This indicates that the bar exam does not provide the public protection that the ABA and NCBE claim it does.

Further, there is little evidence that shows that the bar examination does anything to ensure attorney competence and prevent malpractice.²⁰⁷ In fact, between 2015 and 2017, Wisconsin's complaint rate was nearly identical to the jurisdictional average and was lower than Washington's, despite Wisconsin's diploma privilege practice.²⁰⁸ Additionally, Wisconsin's charge rate per 100 attorneys between 2015 and 2017 was only 0.16%, compared to a national average of 0.31%.²⁰⁹ Variables may exist among states, including how disciplinary authorities choose to investigate complaints and pursue charges.²¹⁰ Still, one would expect to see more complaints and charges against Wisconsin attorneys than attorneys elsewhere if the bar exam truly protects the public by screening out attorneys likely to commit misconduct.²¹¹

Another critique about the diploma privilege is that the tradeoff for automatic admission to the bar is substantially more state bar association control over the curriculum of law schools in states with diploma privilege.²¹² However, even though a law school's faculty ultimately determines the

²⁰³ *Id.* at 361.

²⁰⁴ *Id.*

²⁰⁵ Frisby et al., *Safeguard or Barrier: An Empirical Examination of Bar Exam Cut Scores* 30 (Feb. 25, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3793272 [<https://perma.cc/VK9L-N2X3>].

²⁰⁶ *Id.* at 40.

²⁰⁷ See Ward, *supra* note 160.

²⁰⁸ Markovic, *supra* note 44, at 17–18, T.1.

²⁰⁹ *Id.* at 20, T.2.

²¹⁰ *Id.* at 17.

²¹¹ *Id.*

²¹² Glen, *supra* note 202, at 359.

curriculum, they are forced to offer a curriculum that matches what the bar examiners decide to test.²¹³ For example, in the early 2000s, New York’s bar examiners decreased the number of subjects tested on the state’s bar.²¹⁴ Administrative law was among the subjects the examiners removed.²¹⁵ Following its removal, fewer schools in New York continued requiring administrative law, fewer students chose to take the course, and fewer law graduates have entered practice with an understanding of this important subject.²¹⁶ This is an example of the bar exam’s influence on the classes offered by law schools and the classes students choose to take. While having diploma privilege may mean more state curriculum control, as is the case in Wisconsin,²¹⁷ it is not likely that curriculums will drastically change.²¹⁸

Nevertheless, these criticisms of diploma privilege are understandable, particularly because the written bar examination has existed in most states since the 1920s²¹⁹ and is notorious for being incredibly challenging.²²⁰ Despite concerns that diploma privilege “would be a serious dereliction of [a bar association’s] duty to ensure that . . . lawyers meet minimum standards of competency,”²²¹ there is little data to support such a concern. To the contrary, a Wisconsin attorney who defends legal malpractice actions has stated that it is unusual, if not unheard of, for new Wisconsin attorneys to get

²¹³ *Id.* at 360.

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.* at 361.

²¹⁷ See *Admission to the Practice of Law in Wisconsin*, WIS. CT. SYS. (Nov. 18, 2020), <https://www.wicourts.gov/services/attorney/bar.htm> [<https://perma.cc/ZSG9-K7A2>].

²¹⁸ Some students may opt to take more classes that simply interest them as opposed to classes they would have otherwise taken had they needed to for bar preparation, which may have a small impact on the overall curriculum offered.

²¹⁹ Riebe, *supra* note 9, at 273.

²²⁰ Lee Burgess, *The Bar Exam Culture of Fear*, BAR EXAM TOOLBOX (Nov. 5, 2013), <https://barexamtoolbox.com/the-bar-exam-culture-of-fear/> [<https://perma.cc/4KAL-E287>].

²²¹ Michael Miller, *Diploma Privilege Proposal is ‘Deeply Flawed’*, N.Y. L. J. (July 21, 2020), <https://www.law.com/newyorklawjournal/2020/07/21/diploma-privilege-proposal-is-deeply-flawed/> [<https://perma.cc/D8LD-V4FH>].

sued for malpractice, despite their licensure from diploma privilege.²²² Further, the bar exam rejects people who would be fine lawyers, and conversely admits many people who turn out to be ill-suited to practice law.²²³ Lawyers who are disciplined by the bar for fraud, incompetence, or stealing from clients all passed a bar exam; the bar exam cannot protect consumers or the public from attorneys who do bad things.²²⁴

Moreover, the State Bar of California stated in a 2017 report to the California Supreme Court that “public protection [from the bar] has never been clearly defined.”²²⁵ Rather than focus on proving competency through staged licensing, apprenticeships, or the continuation of legal education, the legal profession has opted to stick to a process that has been described as “an excellent barrier to entry, and [a] superb hazing ritual.”²²⁶ This process began as a way to control the number of lawyers in the legal profession. This control, of course, was and still is rooted in racism²²⁷—from the moment the ABA unwittingly admitted three Black lawyers and then sought to remove them to “[keep] pure the Anglo-Saxon race,” to the present, where approximately 82% of United States lawyers are white while only 4% are Black, and 4% are Latinx.²²⁸

Other critics of the bar examination have argued that competence to practice law is developed through education and training, not through memorizing legal rules for the purpose of answering multiple-choice

²²² Ward, *supra* note 160; Markovic, *supra* note 44, at 17–18, T.1.

²²³ Shepherd, *supra* note 1, at 127.

²²⁴ *Id.*

²²⁵ 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/U2AE-BP8V>].

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ Claire Newsome & Catherine Perrone, *The Inequity and Technology Behind an Online Bar Exam*, JURIST (July 18, 2020, 2:41 PM), <https://www.jurist.org/commentary/2020/07/newsome-perrone-online-bar-exams/> [<https://perma.cc/2YN7-U3RT>].

questions.²²⁹ Further, scholars have noted that the existing bar examination does not purport to test skills like counseling, negotiation, factual investigation, or other problem-solving skills essential to lawyering.²³⁰ The bar examination not only fails to test these skills, but it also discourages law schools from offering courses or preparing students in the actual skills required for the practice of law.²³¹ Rather, the examination influences law schools to overemphasize courses in the substantive areas covered by the examination at the expense of courses in the area of lawyering skills.²³² Ann Murphy, Professor of Law at Gonzaga University, has noted that bar examinations have varied greatly by state until the 1970s, when the ABA developed a more uniform system.²³³ Even so, the scores required to obtain a law license still vary by state.²³⁴ This does not ensure the uniformity that bar examination proponents claim it does.

Further, racial disparities in licensure would likely decrease with the implementation of the diploma privilege.²³⁵ The bar examination requires limited resources, such as time, money, and, for test-takers who fail the first time and plan to retake the exam, hard-to-find hope.²³⁶ As stated by DeShun Harris, Professor of Law, “[t]he defenses of an exam with a clear disparity reinforces the racist idea that [Black people] (and other minorities) are intellectually inferior to Whites.”²³⁷ It is not enough to identify a system that is racist; rather, action must be taken to eliminate the disparities of licensing

²²⁹ Andrea A. Curcio, *A Better Bar: Why and How the Existing Bar Exam Should Change*, 81 NEB. L. REV. 363, 370 (2002).

²³⁰ Glen, *supra* note 202, at 377–78.

²³¹ *Id.* at 378.

²³² *Id.* at 380.

²³³ Sokol, *supra* note 198.

²³⁴ *Id.*

²³⁵ See Glen, *supra* note 202, at 391–92.

²³⁶ DESHUN HARRIS, RAISING THE BAR: ANTIRACIST STRATEGIES TO INCREASE LICENSURE FOR MINORITIES, in RAISING THE BAR Vol. 3 Issue 4, at 5 (2020), https://issuu.com/accessgroup10/docs/raising_the_bar_oct_2020 [<https://perma.cc/H3SD-4XCW>].

²³⁷ *Id.*

between white students and students of color.²³⁸ For Washington State, this action should be the implementation of diploma privilege in place of a required bar examination for licensure.

VIII. CONCLUSION

The bar examination has a racially disparate outcome in pass rate data and a racist history that cannot be ignored. From the early 1900s, when the examination was used to keep non-white and non-male people out of the legal profession,²³⁹ to now, when pass rates for applicants of color remain significantly lower than those of their white counterparts,²⁴⁰ it is evident that the bar examination is inequitable. Because of this disturbing racist history of the bar exam and the current inequities that stem from the exam, it is more important than ever to replace the exam with diploma privilege for licensure.

The Washington State bar currently requires, in part, that applicants pass a bar examination to become licensed.²⁴¹ However, Washington and four other jurisdictions offered emergency diploma privilege during the summer of 2020 due to COVID-19.²⁴² States that did not offer emergency diploma privilege have run into a variety of issues, including offering an online exam amidst artificial intelligence bias concerns, widespread technological issues, and having to delay the 2020 exam so much that some graduates were unable to work and make an income for months.²⁴³ Despite an ongoing pandemic, states did not offer emergency diploma privilege in 2021, and applicants

²³⁸ *Id.*

²³⁹ Subotnik, *supra* note 1, at 365.

²⁴⁰ Claire Newsome & Catherine Perrone, *The Inequity and Technology Behind an Online Bar Exam*, JURIST (July 18, 2020, 2:41 PM), <https://www.jurist.org/commentary/2020/07/newsome-perrone-online-bar-exams/> [<https://perma.cc/4H5C-MTLF>].

²⁴¹ WASH. ADMISSION & PRAC. RULE 3.

²⁴² Skolnik, *supra* note 109.

²⁴³ Karen Sloan, *Amid COVID-19, the Bar Exam Faces a Reckoning and a Revamp*, LAW.COM (Dec. 2, 2020, 11:26 AM), <https://www.law.com/2020/12/02/amid-covid-19-the-bar-exam-faces-a-reckoning-and-a-revamp/> [<https://perma.cc/SQ6G-RZSH>].

continued to experience similar issues with remote exams that they experienced during the administration of the 2020 exam.²⁴⁴

Besides the states that offered emergency diploma privilege for the July 2020 examination, Wisconsin is the only state in the country that offers diploma privilege every year to all in-state graduates.²⁴⁵ For Wisconsin, diploma privilege has worked.²⁴⁶ Wisconsin's success with diploma privilege is indicative of Washington's possibility for success in using diploma privilege instead of the bar examination.

Because the bar examination has racially disparate outcomes and a racist history, and because it currently imposes a great pressure primarily on applicants of color, the Washington Supreme Court should amend court rule APR 3.²⁴⁷ The court should make this amendment by replacing the requirement that graduates pass an examination with a provision that grants graduates of ABA accredited law schools a form of diploma privilege to practice law in Washington. Specifically, this diploma privilege would be granted to in-state graduates who take a series of required courses. Diploma privilege would also be granted to out-of-state applicants who either complete a ten-week supervised internship in Washington following graduation and prior to licensure, or who complete one or more courses that focus on Washington State-specific laws and procedures.

Adopting this amendment would remove a barrier to licensure that disproportionately negatively affects applicants of color and would consequently make licensure more equitable. It is imperative to have the diverse voices of people of color, people with criminal records, people with

²⁴⁴ See *July 2021 Bar Exam: Jurisdiction Information*, NAT'L CONF. BAR EXAM'RS (May 18, 2021, 2:40 PM), <https://www.ncbex.org/ncbe-covid-19-updates/july-2021-bar-exam-jurisdiction-information/> [<https://perma.cc/YL59-VMSZ>]; *NCBE COVID-19 Updates*, NAT'L CONF. BAR EXAM'RS (June 14, 2021), <https://www.ncbex.org/ncbe-covid-19-updates/> [<https://perma.cc/TZP5-PPT4>].

²⁴⁵ WIS. SUP. CT. RULE 40.03; Ward, *supra* note 160.

²⁴⁶ See *generally* Markovic, *supra* note 44.

²⁴⁷ WASH. ADMISSION & PRAC. RULE 3.

disabilities, and people with different backgrounds and experiences in the legal profession so that the profession is apt to best serve all clients. Accordingly, while nationwide diploma privilege would be something to consider one day, diploma privilege in Washington State is necessary and feasible to implement now.

